

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
LOCAL SEAT, JOHANNESBURG**

CASE NO: 55947 /2022

DATE: 14 December 2023

DELETE WHICHEVER IS NOT APPLICABLE

1. Reportable: Yes / No
2. Of Interest to Other Judges: Yes / No
3. Revised

DATE:

SIGNATURE:

In the matter between:

Solum Civils (Pty) Ltd

Plaintiff

and

Tiger Business Enterprises CC:

First Defendant

Simphiwe MacGyver Mbetse

Second Defendant

JUDGMENT

Johann Gautschi AJ

1. This is a provisional sentence application for payment of the amount of R7,702,368.28 (inclusive of VAT).
2. The provisional sentence summons claims from first defendant in terms of an acknowledgement of debt (annexure A to the provisional sentence summons and hereinafter referred to as the AOD) in favour of the plaintiff signed on or about 7 November 2022 by the second defendant on behalf of the first defendant, the second defendant having been authorised to do so in terms of a resolution of the members of the first defendant, annexure B to the provisional sentence summons. The summons further alleges that:
 - 2.1. the AOD acknowledges that the first defendant is truly and lawfully indebted to the plaintiff in the aforementioned amount of R7,702,368.28 (inclusive of VAT) (the "capital sum") "in respect of works executed and services rendered by the plaintiff and the two separate written agreement entered into between the plaintiff and the first defendant;
 - 2.2. in terms of the AOD the first defendant undertook to make payment of the capital sum in instalments, but, as the first defendant failed to make payment of the first two instalments, the first defendant immediately became liable in terms of clause 3 of the AOD to pay "*the full balance outstanding of the capital sum plus interest calculated daily and compounded monthly at the maximum rate permissible in law from the date of default until the date of payment, costs on an attorney and client scale, collection commission tracing fees*" and is further entitled "*without prejudice to any other remedy rights it may have against the first defendant, to proceed immediately with the recovery of the outstanding balance, and may issue provisional sentence summons therefore without further notice or demand*";

2.3. the existence of the first defendant's indebtedness to the plaintiff of the aforementioned capital amount is confirmed by a certificate of indebtedness, duly signed by director of the plaintiff as provided by clause 4 of the AOD in terms of which such certificate would be prima facie proof for the purpose of provisional sentence summons of the existence and amount of indebtedness of the first defendant to the plaintiff.

3. As against the second defendant, the provisional sentence summons claims on the basis of a deed of suretyship, annexure D to the provisional sentence summons, alleged to have been signed by the second defendant on about 20 October 2021 in terms of which the second defendant is alleged to have bound himself, jointly and severally, in favour of the plaintiff as surety and solid and as joint and several co-principal debtor with the first defendant for payment of all debts and other monies due of whatsoever nature and howsoever arising.
4. The affidavit opposing provisional sentence was signed by the second defendant, also acting on behalf of the first defendant in his capacity as a member of the first defendant and authorised to do so by a resolution attached to the opposing affidavit marked annexure A. In the opposing affidavit the second defendant admits the signatures on the AOD, but denies that "*the document attached as Annexure "B", being the deed of surety was properly executed and signed by me (or by any other person)*". I shall assume that the reference to Annexure B is an obvious topographical error as the suretyship is annexure D to the provisional sentence summons.
5. The defence raised in respect of the AOD was formulated as follows in the defendants' opposing affidavit:

"3.2. Capital must be expressly stipulated that on 7 November 2022 when I on behalf of the First Defendant signed the acknowledgement of debt in favour of the Plaintiff I was under the bona fide, but mistaken belief and impression, that the amount claimed being R7,702,368.28 was due, owing payable.

.3. *The aforesaid impression was created as result of incorrect figures relating to various amounts allegedly due and payments claimed which I was able to identify through the necessary cheques (sic) and balances with the accounting division of the First Defendant.*

3.4. *Subsequent to the signing of the document I was however advised that the calculation is not correct at all and in the circumstances the claimed amount is disputed.”*

6. The second defendant’s opposing affidavit alleged that the amount claimed is disputed on the following grounds and thereafter provided some amplification:

6.1. *“No contractual basis for standing time claim”;*

6.2. *“No contractual basis for retention claims”;*

6.3. *“Various bulk services payments made on behalf the Plaintiff by the First Defendant which must be credited”;*

6.4. *“Exceptio errore calculi”.*

7. For reasons explained more fully below, the opposing affidavit does not, in my view, disclose a valid defence in law.

8. In the Plaintiff’s heads of argument reliance was placed, *inter alia*, on the applicable legal principles conveniently set out in the following passages from George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A):

“– – when the document was put in evidence and the appellant's signature to it was admitted, the onus resting on the respondent was discharged unless the evidence also disclosed some fact which in law entitled the appellant to repudiate the document. If the action had been brought in the Supreme Court, where the Rules would have required the filing of a replication, an admission of the signing of the document in the replication would have necessitated the pleading of some further fact by reason of which the appellant was not bound by it, and the onus of proving that further fact would clearly have rested on the appellant.

In Burger v Central South African Railways, 1903 T.S. 571, INNES, C.J., said at p. 578:

*'It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature. There are, of course, grounds upon which he may repudiate a document to which he had put his hand. But no such grounds have been shown to exist in the present case. Consider the circumstances under which this note was signed. Neither fraud nor misrepresentation has been alleged; nothing was said by any railway official which misled the signatory; the language of the document was one which the consignor understood; no pressure of any kind was exercised. All that can be said is that the consignor did not choose to read what he was signing, and after he had signed did not know the particulars of the regulations by which he had agreed to abide. For the Court to hold upon these facts that the appellant is legally justified in repudiating his signature would be a decision involving far-reaching consequences, and it would be a principle unsupported by any principle of our law. The mistake or error of the signatory in the present case was not such justus error as would entitle him to claim a restitution in integrum, or as could be successfully pleaded as a defence to an action founded upon the written contract, and therefore it cannot be used for the purpose of attacking that contract when the railway seeks to rely upon it.'*¹

*"When can an error be said to be justus for the purpose of entitling a man to repudiate his apparent assent to a contractual term? As I read the decisions, our Courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: 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? (vide Logan v Beit, 7 S.C. 197; I. Pieters & Company v Salomon, 1911 AD 121 esp. at pp. 130, 137; van Ryn Wine and Spirit Company v Chandos Bar. 1928 T.P.D. 417, esp. at pp. 422, 423, 424; Hodgson Bros v South African Railways, 1928 CPD 257 at p. 261). 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."*²

"When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by doing so, his assent to whatever words appear above his signature. In

¹ At p 470

² At p 471 C-D

cases of the type of which the three I have mentioned are examples, the party who seeks relief must convince the Court that he was misled as to the purport of the words to which he was thus signifying his assent. That must, in each case, be a question of fact, to be decided on all the evidence led in that particular case.”³

9. In the present case the second defendant, having admitted the signature on the AOD, failed to set out any facts which would amount to *justus error* as required by the authorities as conveniently set out in the above-mentioned passages from George v Fairmead (Pty) Ltd (supra). He merely relies upon his own alleged mistaken belief.

10. Besides and in any event, even the underlying contractual basis relied upon as providing the basis for the second defendant’s alleged erroneous calculation is without substance:

10.1. firstly, with regard to standing time, he states that no basis exists in any of the underlying service level agreements entitling the plaintiff to claim standing time and that *“clause 5.2 expressly indemnify (sic) parties to claims of this nature”*. But that is not correct. Clause 2.5 does not deal with standing time at all. It reads: *“Unless otherwise provided in any further written Agreement, neither Party shall be liable to the other for any indirect, consequential, special, incidental or punitive damages, including without limitation, loss of use or loss of business, revenue, profits, anticipated savings, reputation and goodwill arising connection with the Scope of Works or Services.”*

10.2. secondly, with regard to retention, he states: *“The claim amount was calculated to include retention payments, which basis can only be found in the GCC (Clause 6.10.5). When considering these provisions, it is clear that these retention amounts only becomes (sic) due when a Final Approval Certificate is issued in terms of Clause 6.10.5.3. This Final Approval Certificate has not been issued in the circumstances claims for these retention amounts are premature and not yet due owing and payable.”* But this is also not correct. The second defendant’s version is contradicted by retention certificate 15 attached as annexure **RA 4** to the plaintiff’s replying affidavit, which contains the second

³ At p 472 A-B

defendant's signature acknowledging that the retention invoice is correct and payable and on which the amounts and due dates were inserted in manuscript by second defendant;

10.3. thirdly, with regard to bulk services he states that "*The claim amount calculated fails to take into account bulk services that was paid for by the First Defendant on the Plaintiff's behalf which in the circumstances ought to be deducted from the calculation*". This explanation is contradicted by contents of the second defendant's own calculation included in its replying affidavit which reflects two instances in which credit was given for bulk services;

10.4. fourthly and finally, the defence of *exceptio errore calculi* is misplaced. The second defendant does not contend for a calculation error, but instead alleges that the account should be revised in various respects. But, as I have already found above, each of those is incorrect.

11. In the result, the second defendant has, in my view, not shown that the first defendant has a *bona fide* defence to the plaintiff's claim.

12. It follows that the claim for provisional sentence against the first defendant must succeed in the amount of R7,702,368.28 (including VAT) claimed together with interest on the aforementioned amount *a tempore morae* at the rate of 9% per annum (there having been no dispute as to the applicable rate of interest).

13. I turn now to the claim for provisional sentence against the second defendant based on the deed of suretyship.

14. Both parties addressed argument on the defence raised in the opposing affidavit, namely, whether there was compliance with the formalities for contracts of suretyship as required by section 6 of Act 50 of 1956 by reason of the absence of the second defendant's signature on the last page of the document. After the hearing and pursuant to my request, counsel for both parties filed supplementary heads of argument thereon.

15. However, when in the course of preparing this judgment I checked legal requirements for provisional sentence, I realised that following the Full Bench

judgment in Harrowsmith v Ceres Flats (Pty) Ltd 1979 (2) SA 722 (T) and further endorsed by the Appellant Division in Wollach v Barclays National Bank Ltd 1983 (2) SA 543 (A), a deed of suretyship is not a liquid document in respect of which provisional sentence can be granted. This is because, as in the present case, it does not unequivocally acknowledge any indebtedness for a certain and determinate sum. Instead, the deed of suretyship, which was signed about a year prior to the AOD, merely acknowledges an indebtedness for an unspecified sum, namely, such sum or sums of money as might at any time in the future become owing or claimable from the debtor to the creditor. In such circumstances extrinsic evidence would be necessary to show the amount owing and the subsequent provision of a certificate of indebtedness (as provided for in clause 7 of the deed of suretyship) cannot serve to make the deed of suretyship a liquid document.

16. In the result provisional sentence cannot be granted against the second defendant.
17. Given that neither party drew my attention to this line of authorities, I am of the view that I should in such circumstances make no order as to costs with regard to the plaintiff's claim against the second defendant.
18. Accordingly, I make the following order

ORDER:

1. Provisional sentence is granted against the first defendant in the amount of R7,702,368.28 (inclusive of VAT) and interest on the aforementioned amount *tempore morae* at the rate of 9% per annum.
2. The first defendant is ordered to pay the plaintiff's costs of provisional sentence application but only insofar as it relates to the claim for provisional sentence against the first defendant.
3. The claim for provisional sentence against the second defendant is dismissed.
4. No order for costs is made with regard to the claim for provisional sentence against the second defendant.

Johann Gautschi AJ

14 December 2023

Date of judgment: 14 December 2023

Date of hearing: 26 October 2023

Counsel for Plaintiff: Adv M Jacobs

Attorneys for Plaintiff: MDA Attorneys

Counsel for Respondents: Adv J van den Bergh

Attorneys for Respondents: Neethling and Vosloo Inc