THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1120/2018

In the matter between:

AIRPORTS COMPANY SOUTH AFRICA LTD **APPELLANT**

and

MASIPHUZE TRADING (PTY) LTD **FIRST RESPONDENT**

JOHN RUSSEL GOLDREICH **SECOND RESPONDENT**

NTAVHANYENI ALBERT NEMUKULA **THIRD RESPONDENT**

WILLIAM PATRICK O'DRISCOLL **FOURTH RESPONDENT**

Neutral citation: *Airports Company SA Ltd v Masiphuze Trading (Pty) Ltd and Others* (1120/2018) [2019] ZASCA 150 (22 November 2019)

Coram: Cachalia, Wallis, Nicholls and Dlodlo JJA and Hughes AJA

Heard: 12 November 2019

Delivered: 22 November 2019

Summary: Suretyship – s 6 of General Law Amendment Act 50 of 1956 – compliance therewith – defence of *justus error* – alleged error induced by co-shareholders not lessor – not a basis for defence.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Koen J, sitting as court of first instance)

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

2 Paragraph 1 of the High Court's order is set aside and replaced with the following:

'(a) It is declared that the third defendant is bound by the deed of suretyship Annexure 5 to the agreement of lease concluded between the first defendant and the plaintiff and annexed as Annexure A1 to the particulars of claim.

(b) The third defendant is ordered to pay the plaintiff's costs of suit up until 15 June 2018.'

3 The case is remitted to the trial court for determination of the amounts owing to the plaintiff by the defendants in terms of the lease and the deed of suretyship, including the plaintiff's claim for damages for holding over.

JUDGMENT

Wallis JA (Cachalia, Nicholls and Dlodlo JJA and Hughes AJA concurring)

[1] This is a dispute over the validity and binding effect of a deed of suretyship signed by the third respondent, Mr Nemukula, for the obligations of the first respondent, Masiphuze Trading (Pty) Ltd (Masiphuze), under an agreement of lease. In 2009 Masiphuze leased premises at the King Shaka International Airport from the appellant, the

Airports Company South Africa Limited (ACSA). Its purpose was to operate a Wimpy franchise. The lease was to commence on 1 May 2010 and expire on 30 April 2015. In 2014 ACSA complained that Masiphuze had fallen into arrears with the payment of rental and accordingly gave notice terminating the lease and instituted action to recover arrear rentals, damages for holding over, ejectment and costs. The directors and shareholders of Masiphuze, Messrs Goldreich, Nemukula and O'Driscoll, were joined as the second to fourth defendants respectively on the basis that they had bound themselves as sureties for and co-principal debtors with Masiphuze for the due performance of the latter's obligations under the lease.

[2] When the matter came to trial it proceeded against only Mr Nemukula. Masiphuze had entered business rescue. Messrs Goldreich and O'Driscoll defended the action separately from Mr Nemukula and their attorneys withdrew shortly before the trial. The action was accordingly adjourned *sine die* against them. After a three day trial Koen J dismissed ACSA's claim against Mr Nemukula. The appeal is with his leave.

The facts

[3] Since 1997 Mr Nemukula has been engaged through different companies in leasing premises from which to conduct retail businesses in airports operated by ACSA. Prior to the opening of the King Shaka International Airport he had leased retail premises in the old Durban International Airport from which a franchise business known as House of Coffees was conducted. It was there that he encountered Messrs Goldreich and O'Driscoll, who had experience in the food industry. Mr Nemukula having won the tender to lease premises at King Shaka International Airport for that purpose, the three of them used Masiphuze

as a corporate vehicle for the operation of a Wimpy franchise. The operational side of the business was in the hands of Messrs Goldreich and O'Driscoll, while Mr Nemukula was merely an investor and non-executive director of the company. This was the standard pattern he adopted with all his businesses. After problems arose with the business of Masiphuze, Mr Nemukula resigned as a director in March 2014. However, he remained a shareholder in the company.

[4] The lease concluded with Masiphuze was a standard lease used by ACSA for all leases of retail premises in its airports. It was a lengthy document running to some 67 pages embodying the lease itself and seven annexures. The disputed deed of suretyship was Annexure 5 to the lease at pages 46 to 50 thereof. Clause 9.6 of the lease provided for a deed of suretyship to be executed 'on written request' by ACSA. Although no written request was produced at the trial, Messrs Goldreich and O'Driscoll, who were the persons actively involved in its conclusion, did not suggest in their plea that there was no such request, nor did they suggest that they had executed the deed of suretyship under any misapprehension as to its contents. It can safely be accepted that ACSA required the shareholders of Masiphuze to provide sureties in addition to the other security for which they stipulated.

[5] The deed of suretyship, like the lease itself, is a standard form document. The typed form commences as follows:

'Deed of suretyship

We, the undersigned,

[INSERT NAMES]

("the Sureties")

do jointly and severally hereby bind ourselves to:

AIRPORTS COMPANY SOUTH AFRICA LIMITED

("the Lessor")

and its successors and assigns as surety for and co-principal debtors with

[INSERT DETAILS]

("the Lessee')

for the due and punctual fulfilment and performance by the Lessee of all its obligations to the Lessor in terms of the lease agreement to which this suretyship is attached . . .'

Clause 14 of the deed made provision for selection of a *domicilium citandi et executandi* by inserting the names and addresses of the sureties. The final page of the document made space for the signatures of five sureties.

[6] The names of Masiphuze and Messrs Goldreich, Nemukula and O'Driscoll have been inserted in manuscript at the head of the deed of suretyship after the words 'We the undersigned' and adjacent to the place provided for the insertion of the names of the sureties. In clause 14, and in the same handwriting, the name of the company and the names of the directors have been inserted, together with their addresses. On the final page the first signature is that of Mr Goldreich, the second that of Mr O'Driscoll and the third that of Mr Nemukula. The first two wrote next to their names that they had signed the document at Durban. The similarity in both handwriting and the pen used makes it probable that Mr O'Driscoll was the person responsible for the manuscript insertions elsewhere in the document. All of the pages of the deed of suretyship were initialled, although, unlike the rest of the document, not by Mr Nemukula. In his evidence he sought to suggest that perhaps these pages did not appear in the document at the time he affixed his signature, but that was not pleaded and was inconsistent with his evidence that the manuscript insertions were not in the document when he signed it. He could only have known that if he had seen those pages.

[7] The signatures to the deed of Messrs Goldreich, Nemukula and O'Driscoll were not disputed. There was no direct evidence concerning the circumstances in which the manuscript insertions were added to the document, although as I have said they appear to have been inserted by Mr O'Driscoll. Mr Nemukula testified that they were not on the deed when he affixed his signature to it. Mr Govind, who signed the lease some months later on behalf of ACSA, could not cast any light on the matter because he was not present when the sureties signed, but said that when he received the document for signature on behalf of ACSA it had been completed. That likelihood was reinforced by the fact that the insertions included the residential addresses of the three shareholders. Nonetheless Koen J accepted Mr Nemukula's evidence that the manuscript insertions were not on the document when he signed it and that Mr Nemukula had not authorised whoever inserted them to do so on his behalf.

[8] Mr Nemukula testified that he affixed his signature to the deed of suretyship in the following circumstances. He had gone to Durban for a meeting in 2009, which took place at the Greyville Racecourse, where Mr Goldreich was a member of the Golf Club. The lease documents were substantial and had already been signed by Messrs Goldreich and O'Driscoll. He had no time to peruse the lease and other documents carefully or to consider their terms. He simply signed where it was indicated that he should do so and trusted his partners to inform him of anything unusual. The result was that he signed not knowing what was in the attachments to the lease. He said he believed that he was signing as a shareholder of Masiphuze to indicate his assent to the lease. Nobody pointed out to him that he was signing a deed of suretyship. He claimed

that had he known he would have refused to sign as surety for Masiphuze. This evidence was likewise accepted by the trial court.

[9] Mr Nemukula did not go so far as to suggest that anything said to him by Messrs Goldreich and O'Driscoll had misled him. His complaint was rather that he trusted them to keep him fully informed and that they did not tell him that the documents he was signing included a deed of suretyship. He said that had he been told he would have refused to do so, because as a matter of business principle he did not bind himself as surety for the business obligations of the businesses in which he had an interest. This despite the fact that ACSA produced another lease where he had bound himself as surety for its performance by the lessee.

[10] Given the circumstances in which the deed of suretyship was signed, there was nothing that ACSA could do to rebut this evidence. Mr Nemukula had affixed his signature to the deed on an occasion when no representative of ACSA was present. The suggestion in argument that they should have called either Mr Goldreich or Mr O'Driscoll, whom they were suing on the same deed of suretyship, was wholly impractical. If anything, one of them should have been called by Mr Nemukula to corroborate his version of events, a number of elements of which seemed improbable. It seems clear that the manuscript insertions were made before the documents were returned to ACSA for signature, probably by Mr O'Driscoll, but the precise circumstances are shrouded in mystery. Although a more sceptical view might have been taken of Mr Nemukula's evidence, given its acceptance by the trial judge, the appeal must be determined on the basis that it was correct.

The issues

[11] Mr Nemukula's first defence was based on the provisions of s 6 of the General Law Amendment Act 50 of 1956 (the Act). This provides that:

'No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety . . .'

Mr Nemukula contended that, as the names of the sureties were not inserted at the head of the deed and the name of the principal debtor was omitted, there was non-compliance with this provision and the deed was accordingly invalid and unenforceable.

[12] The second defence was one of *iustus error*. Mr Nemukula contended that he was unaware that one of the documents he was signing was a deed of suretyship and said that he did not intend to bind himself as such. He had been misled, so he said, by Messrs Goldreich and O'Driscoll's failure to inform him that he was signing a deed of suretyship. His signature was affixed in error as to its purpose and function; such error was both bona fide and *iustus*; and he was, accordingly, not bound by it.

[13] If neither of these defences succeeded Mr Nemukula contended that ACSA had not proved the quantum of its claim under the deed of suretyship and on that basis also the judgment dismissing its claim was correct.

The validity of the deed of suretyship

[14] The law in this regard is well established. The deed of suretyship must include all the material terms of the contract including the identity

of the principal debtor, the principal debt and the identity of the sureties.[1] However, these do not have to be set out expressly in the deed of suretyship itself, provided that they are sufficiently incorporated by reference.[2] Extrinsic evidence is admissible to identify matters referred to in the written document including the identity of the creditor, the principal debtor and the surety, as well as the nature and amount of the principal debt, provided such evidence does not seek to add to or supplement the terms of the written contract.[3]

[15] Mr Nemukula's argument was that the failure to insert the names of the sureties at the head of the deed and the name of the principal debtor, Masiphuze, where indicated on the document, amounted to non-compliance with these requirements. This is the basis upon which he succeeded before the high court. It held that in the absence of evidence that the insertion of the names of the sureties at the outset of the document occurred with his authority[4] he was not bound thereby and that in the absence of his name as surety the deed did not comply with the statute.

[16] Unfortunately the high court was not asked to, and did not address, the consequence of holding that the manuscript insertions did not appear in the deed when Mr Nemukula signed it. However, the problem with this was that without the manuscript insertions the document he signed identified the sureties and the principal debtor, as well as the debts for

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[1] *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) at 345.
[2] *Industrial Development Corporation SA (Pty) Ltd v Silver* 2003 (1) SA 365 (SCA) paras 11-13.
[3] *Sapirstein and Others v Anglo-African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A) at 12A-D; *Industrial Development Corporation SA (Pty) Ltd v Silver* supra, paras 9 and 10.
[4] Which was held to comply with the Act in *Jurgens and Others v Volkskas Bank Ltd* 1993 (1) SA 214 (A) at 221.

which the sureties bound themselves as sureties. That is clear from the following analysis.

[17] After the heading 'Deed of suretyship' the document, without the manuscript insertions, read: 'We, the undersigned, [INSERT NAMES]("the Sureties")'. The signatures of Messrs Nemukula, Goldreich and O'Driscoll appear on the signature page. They were 'the undersigned' who bound themselves as sureties. By affixing their signatures to the document the three shareholders identified themselves unequivocally as the sureties. Deeds of suretyship commonly commence with something along the following lines:

'We the undersigned, do hereby bind ourselves as sureties for and co-principal debtors with X for the due performance of the latter's obligations to Y.'

The identity of the sureties then emerges by identifying the signatories to the deed, if need be by way of evidence. It has never, so far as I am aware, been suggested that this does not adequately identify the sureties for the purposes of the Act.

[18] In *Fourlamel v Maddison*[5] Miller JA said that what s 6 requires to be signed is the written document containing the terms of the agreement. Elsewhere in that judgment he said that this included the identity of the parties. But that does not mean that the document is not completed when the signatures of the sureties are affixed identifying themselves as such. Were that the case there could never be a valid agreement of co-suretyship, because at the time the first co-surety signed the absence of the second co-surety's signature would render it non-compliant with s 6.[6] When two or more persons must sign a document it is necessarily the

[5] Fn 1, supra, at 341H.

[6] See *Nelson v Hodgetts Timbers (East London) (Pty) Ltd* 1973 (3) SA 37 (A) where the co-surety did not sign the document and it was sought to hold the surety who had signed liable.

case that one will sign first and the other or others later. That reality cannot affect whether the signed document complies with a statutory provision such as s 6 of the Act.

[19] The document identified ACSA (the Lessor) as the party to whom the sureties bound themselves as such. It said that the sureties bound themselves 'as surety for and co-principal debtor with [INSERT DETAILS]("the Lessee")'. Given that the suretyship document was Annexure 5 to the lease between ACSA and Masiphuze, it was perfectly clear that Masiphuze was the principal debtor as the high court correctly held. This was put beyond any doubt by the following words, in which the principal debt for the performance of which the sureties bound themselves was described as:

'the due and punctual fulfilment and performance by the Lessee of all its obligations to the Lessor in terms of the lease agreement to which this suretyship is attached . . .'

There was only one lease to which the deed of suretyship was attached and that identified Masiphuze as the lessee.

[20] Accordingly, the deed of suretyship identified the sureties, the principal debtor and the principal debt. It therefore complied with the requirements of s 6 of the Act. The first defence must fail.

[21] The second defence of *iustus error* was based upon the fact that Mr Nemukula said that his trusted business associates, Messrs Goldreich and O'Driscoll, did not tell him that ACSA required all the shareholders to bind themselves as sureties and did not warn him that in signing the lease with its annexures, more particularly Annexure 5, the deed of suretyship, he was binding himself as surety for the due performance by Masiphuze of its obligations in terms of the lease.

[22] There are limited circumstances in which a party can set up their unilateral error as a defence to a claim based on contract. They were set out as follows by Schreiner JA in the *Potato Board* case:[7]

'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.'

[23] To similar effect is the following passage from the judgment of Fagan CJ in *George v Fairmead*:[8]

'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? … If his mistake is due to a misrepresentation, whether innocent or fradulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound.'(Citations omitted)

[24] The decisive question to be asked and answered in cases where reliance is placed on *iustus error* is:[9]

'… did the party whose actual intention did not conform to 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

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[7] *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) at 479G-H.
[8] *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 471A-D.
[9] *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) at 239I-240B.

party's intention; secondly, who made that representation; 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?'

[25] In this case Mr Nemukula claimed that he was misled by the failure of his business associates to inform him that he was signing a deed of suretyship. If the approach of Fagan CJ is adopted and we ask whether he, as the party seeking to resile from the agreement, is to blame for the situation in which he found himself, the answer is clear. It was his own failure to check the documents that he was signing – a not particularly onerous task for an experienced businessman – that led to the situation in which he found himself. If one asks the question postulated in *Sonap*, whether Mr Nemukula led ACSA to believe that his declared intention to be bound by the deed of suretyship represented his actual intention, the answer must be in the affirmative. On either basis it was not open to Nemukula to rely upon the defence of *iustus error*.

[26] While disclaiming any suggestion that ACSA had misled Mr Nemukula, there was some endeavour to suggest that the deed of suretyship was insufficiently identified as forming part of the documents constituting the lease and its annexures. A similar argument was considered and rejected by this court in *Slip Knot Investments 777 (Pty) Ltd v Du Toit*.[10] There the trustee of a trust, at the request of his nephew, executed a deed of suretyship as part of a suite of documents relating to a R6 million loan to the trust, but without reading them. Like Mr Nemukula he signed and initialled where the other two trustees had already signed or initialled. He claimed that he was unaware that he was executing a deed of suretyship and that his error was induced by the failure of the other

[10] *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA) paras 11 and 12.

trustees to inform him of this fact, but disavowed any misrepresentation on the part of the lender.

[27] In that case Malan JA dealt with the contention that the deed of suretyship was somehow obscure or hidden away in the overall bundle of documents in the following terms:[11]

'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. … Slip Knot was entitled to rely on the respondent's signature as a surety, just as it was entitled to rely on his signature as a trustee.* The respondent relied entirely on what was conveyed to him by his nephew through Altro Potgieter. Slip Knot made no misrepresentation to him, and there is no suggestion on the respondent's papers that Slip Knot knew or ought, as a reasonable person, to have known of his mistake.' (Emphasis added.)

[28] That passage is entirely apposite to describe Mr Nemukula's situation. There was nothing objectionable in the lease documents.[12] A cursory glance through them would have identified that he was being required to sign a deed of suretyship. ACSA was as entitled to rely on his signature as surety as it was to rely on his signature as shareholder on behalf of Masiphuze. The defence of *iustus error* cannot succeed. The necessary conclusion is that Mr Nemukula was bound by the deed of suretyship as surety for and co-principal debtor with Masiphuze for the latter's indebtedness to ACSA under the lease.

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[11] Ibid para 12.

[12] The defence that it contained terms that were unusual, unduly onerous and contrary to public policy was abandoned.

[29] In the course of argument before us the issue of quantum fell away because it was necessary for the case to be remitted to the trial court to resolve the issue of quantum insofar as it related to damages for holding over. Some evidence had been led on quantum with a view to arriving at an agreement, but no such agreement had been reached. Counsel agreed that the remittal should also deal with the question of quantum in regard to the amounts owing by Masiphuze to ACSA in terms of the lease.

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

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

2 Paragraph 1 of the High Court's order is set aside and replaced with the following:

'(a) It is declared that the third defendant is bound by the deed of suretyship Annexure 5 to the agreement of lease concluded between the first defendant and the plaintiff and annexed as Annexure A1 to the particulars of claim.

(b) The third defendant is ordered to pay the plaintiff's costs of suit up until 15 June 2018.'

3 The case is remitted to the trial court for determination of the amounts owing to the plaintiff by the defendants in terms of the lease and the deed of suretyship, including the plaintiff's claim for damages for holding over.

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant: L B Broster SC (with him J F Nicholson and N Nicolls)(Heads of argument prepared by S M Mullins SC and J F Nicholson)

Instructed by: Garlicke & Bousfield, Durban;
Symington & De Kok, Bloemfontein

For third respondent: Z Ploos van Amstel

Instructed by: Fluxmans Inc, Johannesburg;
Lovius Block, Bloemfontein.