REPUBLIC OF SOUTH AFRICA

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

CASE NO: 01653/13

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

BEAUX LANE (SA) PROPERTIES (PTY) LIMITED Plaintiff

And

ALBERTUS CHRISTIAAN MARAIS Defendant
(IDENTITY NUMBER 4…….)

SUMMARY

Surety – principal and surety – deed of suretyship – contained in separate but high-lighted clause in lease agreement – the defendant signing lease agreement and deed of suretyship as sole member of close corporation under

alleged mistake of not attracting personal liability – defences under sec 6 of General Law Amendment Act 50 of 1965 and the Consumer Protection Act 68 of 2008 not exonerating defendant from liability – alleged mistake not just and reasonable – landlord succeeding in enforcing deed of suretyship.

J U D G M E N T

MOSHIDI, J:

[1] The plaintiff has instituted action against the defendant for payment of the amounts of R244 538,12 (Claim 1), and R44 673,75 (Claim 2) ("*the amounts*"). The amounts represent arrear rentals, rates and taxes, and damages for breach of contract based on a lease agreement.

CAUSE OF ACTION

[2] The cause of action is predicated on a deed of suretyship contained in the lease agreement concluded between the plaintiff and an entity called Ustica 1019 CC ("*the tenant*") in July 2011. The defendant, who was the sole member of the tenant at the time, signed a suretyship in favour of the plaintiff, also in July 2011.

THE ISSUES FOR DETERMINATION

[3] The central issues to be decided in this trial are whether the defendant was aware of the deed of suretyship when he signed the lease agreement; whether he was aware that by signing the deed of suretyship he attracted personal contractual liability towards the plaintiff; whether the defendant was misled into signing the suretyship; and whether the defences raised by the defendant under the Consumer Protection Act,[1] ("*the CPA*") and sec 6 of the General Law Amendment Act,[2] ("*the GLAA*") were valid. There were other peripheral issues to be determined.

THE EVIDENCE

[4] The plaintiff led the evidence of a single witness. He was Mr Bernard Bredenkamp ("*Bredenkamp*"). At the time of the conclusion of the lease and the suretyship agreements, Bredenkamp was the property manager in the employ of a company called Eris Property Group (Pty) ("*Eris*"), and had been in the property industry for some 18 years. His company, Eris, was the managing agent on behalf of the plaintiff. The plaintiff was a landlord that owned immovable property.

[5] Bredenkamp was not involved in the initial negotiations leading to the lease agreement under discussion. However, an unnamed external broker from a company called Galetti Commercial and Industrial ("*Galetti*"), approached Eris looking for space on behalf of a potential tenant, which later turned out to be the tenant in the present action. An offer was made to Eris

[1] 68 of 2008.
[2] 50 of 1965.

on behalf of the tenant, and in respect of the leased property. The leased property comprised of two warehouses for commercial use. In the offer, the tenant opted for a two months' only deposit payable plus a suretyship agreement, which fell in line with the policy of Bredenkamp's company. The plaintiff, as landlord, would also not accept a two months' deposit without the accompanying suretyship.

[6] The above was conveyed to the broker before the lease agreement was signed. The offer, which was in writing, was signed by the tenant on 30 May 2011. The offer also made mention that the tenant, by signing the lease agreement, acknowledged that they may sign personal surety at the landlord's request.

[7] Bredenkamp testified that his legal department proceeded to prepare the lease agreement pursuant to his management policy which included, credit checks and bank cheques, which were all favourable. The lease agreement was then signed by the tenant (the defendant) on 30 May 2011, and later by Bredenkamp on 18 July 2011, at separate venues. The defendant presumably signed the lease agreement in the presence of his broker at Galetti. There was some delay in between, which Bredenkamp explained satisfactorily. In the end, nothing really turned on this aspect, save that the investigations leading to the signing of the lease agreement confirmed that the defendant was the sole member of his close corporation, i.e. the tenant.

[8] The defendant signed the lease agreement, which included a deed of suretyship (clause 54), and initialled each clause thereof. Attached to the lease agreement, was a schedule marked "*B*", (at least on my papers), which dealt with the particulars of the parties, the description of the leased premises, the commencement of the lease i.e. 1 May 2011, the rental and the deposit of R26 000,00 payable. The schedule, consisting of several blocks and one of the blocks was headed, '*Full names and identity numbers of sureties*'. This was the same schedule on which the defendant signed the lease agreement. He printed his full names next to the name of the close corporation as member of the tenant, and signed '*for and on behalf of the tenant who warrants that he/she is duly authorised thereto*'. The block just referred to on the schedule, was left blank.

[9] Bredenkamp testified that the reason why the block was left empty, was simply that there were no additional sureties required since the defendant was the sole member of the tenant. Bredenkamp was contend that the defendant intended to be bound by the suretyship, otherwise he would have said so, and the deposit would have been increased to three months', in which event the suretyship clause would have been deleted.

[10] Bredenkamp was cross-examined. The lease agreement was prepared by the legal department of Eris. This, after consultation with the South African Property Owners' Association ("*SAPOA*"), and in order to comply with the provisions of the CPA. He studied the lease agreement subsequently and noticed that the defendant had initialled twice in the right-hand margin against

clause 54 of the lease agreement which is headed, "*DEED OF SURETYSHIP*". In his view, by this, the defendant signified that he (the defendant), was aware of the deed of suretyship, had read the clause and in fact assented to its terms. Rather strangely, it was put to Bredenkamp in cross-examination that if the landlord had required a personal suretyship, that the broker (from Galetti) would have included a reference to a suretyship in the offer to lease. This suggested clearly that the defendant omitted to instruct his counsel that there was in fact a reference to a suretyship in the offer he made to lease. In response to the proposition that for the purposes of law, clause 54 was '*hidden*', Bredenkamp replied that the clause had a separate heading, and therefore it was not concealed; the bold or highlighted portion of the clause attracted attention, and the boldness was readily seeable, and that the defendant had initialled twice in the margin against this clause.

THE DEFENDANT'S EVIDENCE

[11] Mr A C Marais, the defendant, testified in his own defence. In short, his evidence came to this: he was the only member of the tenant, and was duly authorised to sign the lease agreement on behalf of the tenant. He identified the unknown broker from Galetti as Mr Darryl Frerk ("*Frerk*"), whom he appointed for the purposes of the transaction in question.

[12] The defendant and Frerk went through the agreement but did not discuss the contents thereof. However, during cross-examination, he

conceded that he had read the document in full and was aware of its contents. He further acknowledged that he saw the reference to the suretyship contained in paragraph 9 of the offer he made, which reads as follows:

> "… *By signing this agreement, the tenant acknowledges that they may have to sign personal surety over the lease agreement at the landlord's request* (underlining added)."[3]

[13] In addition, the defendant testified that he was asked by Frerk to fill in his (defendant's) details under the heading, "*Sureties For Company/CC*", in a document of the landlord requesting details for the lease agreement. The defendant conceded during both his evidence-in-chief and cross-examination that, by filling in the details, he would be liable. He knew that the landlord required him in future, and when the lease agreement was to be concluded to execute a deed of suretyship in respect of debts of the tenant. The defendant plainly contradicted himself when he testified, first that Frerk must have brought the lease agreement to him in order to explain it to him, but then testified that Frerk at the same time was in a hurry and instructed him merely to sign in the margin against all the paragraphs. There were other contradictions which emerged from the defendant's evidence.

[14] He admitted in evidence that, as sole member of the tenant, he passed a resolution of the directors/members of the tenant at Alberton, on 20 May 2011. He signed the resolution in his capacity as sole member. In terms of the resolution the defendant was authorised, *inter alia*, "*to sign all such documents and to perform all such acts as may be necessary, to conclude a*

[3] See trial bundle index A, p 9.

valid and enforceable lease agreement and any addendum or addenda thereto …"[4] He testified that he had to do so since he was the tenant.

[15] The crucial contradiction, and indeed unreliability of the defendant's version came in regard to the actual suretyship clause in question, which I deal with immediately below.

THE DEED OF SURETYSHIP

[16] The lease agreement consists of some 59 clauses, each with a separate heading typed in bold letters. The suretyship clause, clause 54, on page 23 of the agreement, is reproduced as follows:

> "***DEED OF SURETYSHIP***
>
> *In the event of the Tenant being a private company, close corporation, trust or other legal entity, the authorised signatories, by their signatures hereto, irrevocably bind themselves jointly and severally as surety and co-principal debtors in solidum to the Landlord as defined herein ('the creditor') for the due fulfilment by the Tenant ('the debtor') of all terms of the Lease or any renewal thereof between the creditor and the debtor in respect of the Leased Premises as defined herein and agree that this surety shall extend to cover any failure to fulfil the terms of the Lease or any renewal or extension thereof whether brought by the action of the debtor or any person or by the liquidation of the debtor.*
> *The surety/sureties waive the benefits of excussion and division and agree that any indulgence or latitude granted by the Landlord to the Tenant in respect of any obligation in terms of this Lease agreement or any amendment of the terms thereof, shall in no way prejudice the Landlord's rights in terms of this suretyship.* ***Benefits of excussion means the Landlord becomes entitled to sue the surety for the full amount for which the surety is liable in terms of the suretyship without first proceeding against the Tenant and division means that the surety is not only responsible for a pro rata share of the debt but for the entire debt (if more than two persons bind themselves as sureties for one obligation).***"

[4] See pleadings bundle p 39, annexure "*G*".

[17] As in the case of all the clauses in the agreement, it was undisputed that the defendant initialled the deed of suretyship clause 54, which appears on p 23 of the 25-page lease agreement. However, in evidence-in-chief, the defendant alleged that Frerk did not point out to him the suretyship deed. He said it was just one of the clauses that he was required to sign. He complained that Frerk had not drawn his attention to the clause. However, in cross-examination the defendant conceded that the clause containing the deed of suretyship is confined within a separate paragraph; that the deed of suretyship clause has a separate heading; part of the clause, as quoted above, is in bold letters; he initialled against the clause in the right-hand margin twice, that is, first against the part of the clause that was not in bold, and then he initialled against the bold portion of the clause, i.e. clause 54; and that by just giving the clause a cursory glance, a reasonable person would have determined that it contained a deed of suretyship. He agreed that he signed as tenant, but however, proceeded to contend that he made a mistake by not realising that by signing, he was liable in his personal capacity. He admitted that by signing it could mean that he was a surety as a member of the tenant and would be a surety in that capacity. He admitted in cross-examination that his alleged mistake was caused by his own recklessness and inattention in not reading the document in part and in part by Frerk. Later, the defendant conceded that the suretyship clause had been properly

highlighted, and that his attention was in fact drawn to it by requesting him to initial against the right hand margin of the paragraph on two occasions.

DISCUSSION OF THE DEFENDANT'S DEFENCES

[18] In the light of the above it was unnecessary to consider fully the defendant's other defences, including the defence based on the Consumer Protection Act ("*CPA*"). In fact, the latter defence was specifically abandoned at the commencement of closing argument. What however, remained to determine were the three other defences advanced. The first is whether the defendant was mistaken about the fact that he signed the lease agreement as tenant, and that the tenant was the surety for its own debts, and whether the mistake alleged by the defendant was *iustus* or reasonable. The final defence related to the provisions of sec 6 of the GLAA.

SOME LEGAL PRINCIPLES APPLICABLE

[19] The matter of *Glen Comeragh (Pty) Ltd v Colibri (Pty) Ltd and Another,*[5] concerned an application for an order against the first and the second respondents jointly, second respondent being a director of first respondent. The order was for payment of the balance of the purchase price owing in respect of certain deeds of sale. The second respondent stated in his affidavit that when he signed the deeds of sale, he was not aware, '*that*

[5] 1979 (3) SA 210 (T).

hidden amongst the detailed small print was a sentence to the effect that I would incur liability as suretyship by my signature to the documents', and that if he had been aware thereof, he would never have agreed to it and would have insisted upon its deletion. At 214D-H, the Court said:

> "*In an action based on a written contract, the defendant cannot escape liability (at any rate in the absence of misrepresentation) merely because he was unaware of the terms of the contract. In George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A) FAGAN CJ said at 472A:*
>
> > *'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.'*
>
> *If he chooses not to read what he is signing, he takes the risk, with his eyes open, of being bound by it and he cannot be heard to say that his ignorance of what was in it was justus error (ibid at 472H-473A).*
>
> *The question is accordingly whether the second respondent has 'put his signature' on the deed of sale. He admittedly signed his name above the word 'koper'. The word 'koper', must, however, be given the same meaning as it is given in the deed of sale, namely 'Colibri (Pty) Ltd, van Lewis Gebou, Paul Krugerstraat 259, Pretoria (hierinlater na verwys die 'koper'). (See Major v Business Corners (Pty) Ltd 1940 WLD 84; Meter Motors (Pty) Ltd v Cohen 1966 (2) SA 735 (T)). His signature is accordingly that of the second respondent in his capacity as agent acting on behalf of the first respondent. It may however also be his signature in his personal capacity. There is no reason in principle why a person should not sign a contract in two capacities, ie in his capacity as agent and in his personal capacity, so that his signature is in effect a double signature. See Phipson on Evidence 11th ed at 714 para 1635:*
>
> > *'Where a party executes a document in several different capacities, it is not necessary that he should sign more than once and extrinsic evidence is admissible to show his intention …'*"

Compare *Brink v Humphreys and Jewell (Pty) Ltd,*[6] where the majority of the Court found that the error was just and the suretyship agreement was void *ab initio*. In *Slip Knot Investments 777 (Pty) Ltd v Du Toit,*[7] the appeal was upheld in the following circumstances. One of the respondents in the court *a*

[6] 2005 (2) SA 419 (SCA).
[7] 2011 (4) SA 72 (SCA).

quo, although admitting that he signed the deed of suretyship, denied that he was liable, and averred that he signed by mistake, and without the intention to incur contractual liability. At para [12] of the judgment, the Court, per Malan JA, said:

> "*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 …*"

[20] In the present matter, there was no question of any misrepresentation made by the landlord's managing agent when the agreement was signed. In fact, the defendant appointed his own broker, Frerk, who assisted him in presenting the offer and executing the lease agreement. They both went through the document. The defendant was informed in advance, i.e. in his own offer to lease that a suretyship was expected. The defendant was a businessman of longstanding. He signed the offer to lease on behalf of the tenant in favour of the plaintiff. He acknowledged that he may have to sign personal surety in respect of the lease agreement at the landlord's request. In addition, the defendant knew what a suretyship was, and he understood the implications thereof. He had previously concluded a suretyship in favour of another bank, i.e. Nedcor Bank for the debts of a tenant. In any event, the version of how he made the mistake, was highly questionable and inherently incredible. He was simply not a good witness, and his evidence, like his several other defences, was not impressive for a number of reasons. It was

also contradictory. He never raised some of the defences in his affidavit resisting summary judgment. The mistake on which he relied was clearly of his own recklessness and inattention. There was no reasonable error or misrepresentation. He failed to discharge the *onus* placed on him that he was unaware of the suretyship provision. See in this regard *Stiff v Q Data Distribution (Pty) Ltd.*[8] See also *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd.*[9]

THE PROVISIONS OF THE GENERAL LAW AMENDMENT ACT

[21] I turn to the defendant's contention that the plaintiff failed to comply with the provisions of sec 6 of the GLAA. The sec 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: provided that nothing in this section contained shall affect the liability of the signer of aval under the laws relating to negotiable instruments.*"

The GLAA came into operation in June 1956. In *Fourlamel (Pty) Ltd v Madison,*[10] the Court said:

> "*In either case, the party concerned is required to manifest his assent to the agreement as recorded in a written document, by appending his signature to such written document. However many objects the Legislature may have had in mind in an acting sec 6 of Act 50 of 1956, one of them was surely to achieve certainty as to the true terms agreed upon and thus avoid or minimise the possibility of perjury or fraud and unnecessary litigation … The Legislature may also have been influenced by other considerations, for example, that suretyship being*

[8] 2003 (2) SA 336 (SCA) at [10].
[9] 2000 (1) SA 167 (W) at 175F-H.
[10] 1977(1) SA 333 (A) at 342-343.

> *an onerous obligation, involving as it does the payment of another's debts, would-be sureties should be protected against themselves to the extent that they should not be bound by any precipitate verbal undertakings to go surety for another but would be bound only after their undertaking had been recorded in a written document and signed by them or on their behalf …*"

In Caney's *The Law of Suretyship:*[11]

> "*Thus, 'signature' means, any mark – whether it be a person's full name and surname, or his initials and surname, or only his initials, or a mere mark-placed on the contract with the intention of identifying the signatory. A signature need not be in ink, nor be written in a specific manner or in a specific place. An agent must indicate that he is signing in a representative capacity in order to escape personal liability on the contract.*" [footnotes omitted]

[22] In the instant matter, the lease agreement incorporating the suretyship was in writing. The defendant initialled each clause and signed it. He signed on the strength of a resolution on behalf of the tenant whilst being the sole member thereof. The representative capacity in which he signed could hardly be divorced from incurring personal liability. This begged the question, who else would be liable, if not the defendant, for the debts of the tenant. The tenant has in any event, since been liquidated. The defendant's assertions that the suretyship contained in the lease agreement was not signed by or on behalf of the surety were truly untenable and plainly without merit. He was admittedly the sole member of the tenant at the time the tenant concluded the lease agreement pursuant to being duly authorised to sign the agreement for and on behalf of the tenant. The deed of suretyship provides that the "*authorised signatories bind themselves to the landlord for the due fulfilment*

[11] 6th ed at 69.

by the tenant of all the terms of the lease agreement". In the end, the conclusion that the written document in which the deed of suretyship is contained, complies with sec 6 of GLAA, became irresistible. The plaintiff has succeeded in proving its case on a balance of probabilities. The various defences raised by the defendant were truly redherrings".

THE DEPOSIT PAID BY THE TENANT

[23] The parties omitted to take into account the deposit paid by the tenant when the lease agreement regarding the quantum of plaintiff's claim was concluded. The amount agreed in respect of Claim A was for payment of the sum of R244 538,12 plus interest thereon at the rate of 11% per annum (being prime of 9% plus 2% from the date of service of summons). In the circumstances, the amount agreed in respect of Claim 1 should correctly and properly be reduced by the amount of the deposit paid i.e. the amount of R26 000,00.

THE COSTS

[24] There was no reason advanced why the costs should not follow the result. Clause 34 of the lease agreement makes provision that in the event of litigation, such as the present action, the tenant shall pay for all the legal costs incurred by the landlord, including attorney and own client charges. At the conclusion of final argument, the parties undertook to provide the Court with a copy of the transcript of the proceedings. There appears to have been some delay in this regard.

ORDER

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

1. The defendant shall pay to the plaintiff the sum of R228 538,12, including interest at the rate of 11% per annum *a tempore morae* to date of final payment.

2. The defendant shall pay to the plaintiff the sum of R44 673,75 at the legal rate of interest from the date of service of summons to the date of payment.

3. Costs on the attorney and client scale (as claimed in the heads of argument).

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D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING	30 SEPTEMBER 2014
DATE OF JUDGMENT	13 MARCH 2015