REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2017/41419

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

26/7/19.
DATE

RT SUTHERLAND

In the matter between

MUSTEK LIMITED **PLAINTIFF**

and

MUTUAL AND FEDERAL RISK FINANCING (PTY) LTD **DEFENDANT**

JUDGMENT

SUTHERLAND J:

Introduction

[1] This matter is about whether or not the plaintiff has proven a case to justify a rectification of a credit guarantee issued to it, by excising a suspensive condition put into the guarantee by the guarantor.

[2] The circumstances giving rise to the controversy are hardly in dispute.

[3] The plaintiff is a distributor of computer products. The plaintiff sells goods on credit to its customers, who, in the main, are retailers. The defendant is an insurer, specialising, as its name suggests, in risk financing. It operates through agents. One such agent was One Insurance Underwriting Managers (Pty) Ltd. Oosthuizen represented this entity, and in turn interacted with Du Plessis and Loureiro, the defendant's authorised representatives who signed the guarantee.

[4] This case also concerns a customer of the plaintiff, the ironically and inappropriately called Fantastic 1 Mobile (Pty) Ltd, (Fantastic) whose fortunes were piloted by its managing director, Nissaar Ally. In short, Ally represented to the plaintiff that he wanted a huge volume of goods to launch various retail outlets. The value of the goods he requested far exceeded the prudent credit limits hitherto afforded to Fantastic. The plaintiff wished to sell the goods but required additional security.

[5] Ultimately, the agent of the defendant, One Insurance Underwriting (Pty) Ltd, was approached to procure from the defendant a credit guarantee to the plaintiff in respect of the debt that Fantastic would incur. Discussions ensued. In short, the text

of an unconditional guarantee was discussed between Oosthuizen on behalf, ultimately, of the defendant and Emslie, on behalf of the Plaintiff, resulting in a text proposed by the defendant being agreed to by the plaintiff on 28 February 2017.

[6] However, on 3 March 2017, the defendant offered to the plaintiff a conditional guarantee, requiring payment of a premium and provision of collateral before a given date, and failing compliance being timeously made the guarantee would automatically lapse.[1] Self-evidently, the terms of the guarantee offered differed from the text earlier discussed between Emslie and Oosthuizen. Ally acted as the *nuntius* to deliver the document to Emslie, who without inspecting the text, accepted it, assuming the text was as earlier discussed.

[7] After accepting the guarantee, the huge volume of goods were delivered at a time before the time for payment of the premium and provision of the collateral fell due. Fantastic defaulted on payment to the plaintiff when payment for the goods subsequently fell due. When the plaintiff presented the guarantee for payment, it was repudiated because the premium and collateral had not been provided timeously and, *ergo,* the guarantee which had been offered had lapsed.

[8] The action instituted by the plaintiff seeks to rectify the document given on 3 March 2017 so as to conform to the terms of the document earlier discussed between Emslie and Oosthuizen on 28 February 2017; ie to excise clause 15 and reference thereto.

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[1] The text, clause 15 read: "This guarantee is conditional upon the payment of the agreed premium and receipt by the insurer of the agreed collateral by close of business on 10th March 2017."

The nature of a credit guarantee

[9] In our law a credit guarantee is a contract between the guarantor and the creditor / beneficiary. The debtor is not a party to this contract.[2] A contract of guarantee consists of a unilateral offer in writing addressed to a creditor who accepts the offer upon delivery of the document without the need to also sign it, or signify acceptance in any manner other than receipt thereof.[3] Credit Guarantees are frequently likened to letters of Credit.[4] The guarantor demands, at least, a premium to be paid to it as consideration for making the offer of guarantee as set out in the document. As a rule, the debtor pays this premium, though for the purposes of the guarantee itself it is irrelevant who actually pays the guarantor. The procurement of the premium and the collateral is the subject matter of another contract between the guarantor and, usually, the debtor. When the creditor presents the guarantee for payment, the only fact to be demonstrated to trigger an obligation to honour it is the event against which guarantee was designed to operate; ie the default of the debtor.

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[2] See *Compass Insurance Co Ltd v Hospitality Hotel Developments (Pty) Ltd* 2012 (2) SA 537 at [14]: " The very purpose of a performance bond is that the guarantor has an independent autonomous contract with the beneficiary and that the contractual arrangements with the beneficiary and the other parties are of no consequence to the guarantor." The dictum was approved again *in Schoeman v Lombard Insurance Ltd* ZASCA 66 (29/05/2019) at [24].

[3] See: *Hazis v Transvaal and Delagoa Bay Investment Company Ltd* 1939 AD 372 at 39; *Netherlands Bank of SA v Stem NO* 1955(1) SA 667 (W) at 672F-G..

[4] Eg, see: *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd* 2010 (2) SA 688 (SCA) at [20]

The requirements for rectification of a written contract

[10] There are two essential elements to the remedy of rectification; (1) A mistake of some sort that resulted in the written document being an inaccurate memorial of the parties' (2) common and a continuing intention to be bound on given terms.

[11] A mistake is a *sine qua non* for rectification. In *Brits v Van Heerden* 2001 (3) SA 257 (C) at 282C it was held that :

> ".... the mistake does not have to relate to the writing itself, but might relate to the consequences thereof. The mistake may be that of only one party; the mistake may be induced by misrepresentation or fraud. But there must be a mistake. In my view, the crux of the matter is that the mistake, be it a misunderstanding of fact or law or be it an incorrect drafting of the document, must have the effect of the written memorial not correctly reflecting the parties' true agreement."

[12] A common intention, as distinct from an antecedent agreement, is sufficient. In *Meyer v Merchants' Trust Ltd* 1942 AD 244 at 253 it was held:

> "It is therefore open to a court to consider the question whether in the absence of proof of an antecedent agreement, it is competent to order the rectification of a written contract in those cases in which it is proved that both parties had a common intention which they intended to express in the written contract but which through a mistake they failed to express. It is difficult to understand why this question should not be answered in the affirmative. Proof of an antecedent agreement may be the best proof of the common intention which the parties intended to express in their written contract, and in many cases would be the only proof available, but there is no reason in principle why that common intention should not be proved in some other manner, provided such proof is clear and convincing."

[13] As to the moment in time that is relevant, In *Propfokus 40 (Pty) Ltd v Wenhandel 4 (Pty) Ltd* [2007] 3 All SA 18 (SCA) at 22a, it was held that what must be proven is that:

> " ....the written document does not reflect the true intention of the parties – this requires that the common continuing intention of the parties, as it existed at the time when the agreement was reduced to writing be established"
> (Emphasis supplied)

The Plaintiff's thesis for rectification

[14] The differences between the text of the document discussed up to 28 February 2017, being an unconditional guarantee, and the document delivered on 3 March 2017, is simply the addition of the condition referred to, in clause 15.

[15] The case pleaded by the plaintiff alleges that the defendant's agent:

> "....on its behalf, made a mistake in drafting the guarantee by including clause 15 and a reference to clause 15 in clause 1....[therefore] the guarantee must be rectified by the deletion of the clause 15 and reference thereto in clause 1 [and accordingly] The guarantee does not reflect the common continuing intention of the parties as it existed when the guarantee was signed on behalf of the defendant."

The plaintiff also pleaded that:

> "Having regard to the exchange of emails and on a proper construction thereof, the plaintiff and the defendant agreed that the draft guarantee contained the terms and conditions of the final guarantee to be issued by the defendant in favour of the plaintiff."

[16] It seems to me that there is some ambivalence in the pleaded case about whether reliance is placed on an antecedent agreement or reliance is placed on simply a common continuing intention. Even in argument the thrust of the contentions tended to straddle both propositions. Ultimately, it is sufficient for the plaintiff to contend a deviation from the common continuing intention.

[17] What has not been part of the plaintiff's case is any allegation of fraud or deceit. Such examples of deviation from a common intention are treated differently.[5] The decision in this case need not explore such considerations.

The Defendant's Thesis on Rectification

[18] The defendant tackles the issues on the facts. It disputes any mistake was made, and advances the argument that the evidence shows a deliberate addition of the clause containing the suspensive condition. Thus, it is said no mistake occurred. Secondly, the defendant contends that whatever common intention might have existed during the time that the draft reflecting an unconditional guarantee is concerned, no such common intention *continued* on 3 March 2017, when the guarantee including a suspensive condition was signed and dispatched to the plaintiff.

[19] On that premise, it is argued that the plaintiff case fails.

Evaluation

[20] A dominant feature of Emslie's evidence, she being the sole witness, was the exchanges she conducted with Oosthuizen. It is unnecessary to regurgitate the minutiae. This body of evidence demonstrates unequivocally that the text of an unconditional guarantee was exhibited by Oosthuizen to Emslie and the approval of the plaintiff of that text was solicited. The requested approval was expressly given.

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[5] See, eg: *Benjamin Gurewitz* [1973] 1 All SA 401 (AD); *Offit Enterprises (Pty) Ltd v Knysna Development Company (Pty) Ltd* 1987 (4) SA 24 (C)

What then remained to take place before the issue of the guarantee no longer involved the plaintiff.

[21] What was contemporaneously made known to the plaintiff about those happenings in the interim came from communications from the defendant. These communications were the form of allusions in correspondence to explain why the issue of the guarantee had to await further dealings with Ally on behalf of Fantastic and with the defendant's reinsurers. In communications discovered by the defendant, it is plain that Ally had difficulty in coming up with the premium and collateral and discussions were ongoing about that difficulty in the face of Ally's anxiety about getting the goods delivered from the plaintiff in time for the grand launch of the retail outlets. Among these exchanges is an email by Oosthuizen explaining that it was not normal practice to issue a guarantee until the premium and the collateral had been provided to the defendant. The value of this body of evidence is limited to providing a background explanation for the decision made eventually on 3 March 2017 to issue a conditional guarantee and not issue the unconditional guarantee, as evidenced by the original document under discussion up to 28 February 2017.

[22] No explanation is given in any of the evidence adduced why the plaintiff was not alerted to the changes to the draft document discussed and approved by the plaintiff as communicated by Emslie. It is defendant's case that the plaintiff was, constructively, notified thereof upon the delivery of the conditional guarantee.

[23] Considerable debate ensued in the hearing about the nature or characterisation of the act of including clause 15 in the document. Whether or not it was "deliberate"

was contested. On behalf of the defendant it is contended that it is manifest on the facts that such an act could never be anything other than deliberate; a contention founded on logic and common sense. On behalf of the plaintiff, the contention was not that it could not or was not deliberate, but that there was no evidence to show why it happened and thus the court was left in the dark on the question of whether it was deliberate or inadvertent.

[24] Because the defendant called no witnesses and closed its case after the close of the plaintiff's case, it was argued that the failure to call Oosthuizen and the two authorised signatories of the defendant to the guarantee, Du Plessis and Louriero, warranted an adverse inference. Precisely what omission of information, or failure to rebut evidence that had been adduced, that would warrant the inference, is unclear. It was suggested that an explanation was owing from the defendant for the change to the text and it might be that the two signatories would own up to inadvertently including the suspensive condition because of circumstances yet to be disclosed. In my view there is no basis for the contention that an adverse inference be drawn. Neither the credibility nor the account given by Emslie was challenged: the point of contestation was the significance or lack of significance of the facts in her account, which it is the case of the defendant, did not contribute to proving a case for rectification.

[25] In my view, this was a sterile battleground. The omission of a clause can be inadvertent. The addition of a clause is unlikely to be so, for reasons of logic and

probability.[6] Plainly, in my view, the addition of clause 15 was deliberate in that it could only have been inserted by a conscious act to achieve an obvious objective.

[26] The identification of the mistake was also somewhat murky. The case of the plaintiff was that the signatories did not intend to contradict the common continuing intention to give an unconditional guarantee to the plaintiff. This unavoidably means that the defendant was always desirous of giving an unconditional guarantee, *regardless of whether the premium was paid or not.* Moreover, it must mean that when the defendant wished to issue the guarantee, whilst fully aware the premium was unpaid prior to issue, the defendant's representatives mistakenly added in the suspensive condition that the guarantee was ineffective unless the premium and collateral was provided within the specified period.

[27] In my view this scenario is palpably at odds with the evidence of the exchanges between Ally and the defendant about payment and at odds with the exchanges between Emslie and the defendant. Moreover, it is also at odds with the inherent probabilities. The facts simply do not demonstrate a mistake by the defendant, rather, what the facts demonstrate is a prudent business decision not to expose the defendant to a risk that had not been paid for.

Conclusions

[28] In the result:

1.1. No mistake is proven.

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[6] See the example in *Standard Bank of SA Ltd v Cohen* 1993(2) SA 854 (SE) at 861I – 862A, where a clause intended to be inserted was instead omitted.

1.2. No common continuing intention to provide an unconditional guarantee regardless of payment of the premium and provision of collateral is proven.

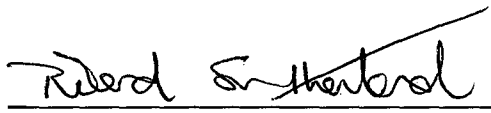
1.3. No case for rectification is made out.

The Costs

[29] The appropriate costs order is that the plaintiff pay the defendant's costs.

The Order

The plaintiff's action is dismissed with costs.



ROLAND SUTHERLAND
Judge of the High Court
Gauteng Local Division, Johannesburg

Date of Hearing: 22-23 May 2019; 26 June 2019.
Date of Judgment: 29 July 2019.

For the Plaintiff:
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