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

Case number: 2019/8534
REPORTABLE: **NO**
OF INTEREST TO OTHER JUDGES: **NO**
30 JUNE 2022

In the matter between:

SANLAM LIFE INSURANCE LIMITED Applicant

and

FUTURE ENERGY ELECTRICAL (PTY) LIMITED First Respondent
(Registration number: 2014/076964/07)

MANESHREE PILLAY Second Respondent
(Identity number: [....])

JUDGMENT

[1] This is an opposed application in which the Applicant ("Sanlam") seeks an order that a settlement agreement ("the agreement") be made an order of court. The agreement was signed after Sanlam had instituted an action ("the action") under the above case number against the Respondents. In the action, Sanlam's case against the First Respondent ("Future Energy") was based on the latter's alleged breach of a written

commercial lease it had concluded with Sanlam. As against the Second Respondent ("Ms Pillay"), Sanlam's case in the action was that she had allegedly bound herself as surety and co-principal debtor with Future Energy in favour of Sanlam for Future Energy's obligations under the said written commercial lease.

[2] The agreement was signed on Sanlam's behalf by a duly authorised representative. Ms Pillay is the sole member of Future Energy. She signed the agreement in her personal capacity and on behalf of Future Energy. The agreement provides as follows in relevant part:

"IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 8534/2019

In the matter between:

SANLAM LIFE INSURANCE LIMITED Plaintiff

and

FUTURE ENERGY ELECTRICAL (PTY) LIMITED First Defendant

(REGISTRATION NUMBER: 2014/076964/07)

MANESHREE PILLAY Second Defendant

(IDENTITY NUMBER: [....])

SETTLEMENT AGREEMENT

WHEREAS the Plaintiff has instituted action against the First and Second Defendants, jointly and severally, the one paying the other to be absolved for recovery of arrear rental, charges, ejectment and legal costs in respect of the commercial leased premises described as Unit 26, Randburg Graphite Park, Strijdompark, Randburg.

AND WHEREAS the Plaintiff and First and Second Defendants (hereinafter referred to as 'the parties'), are desirous of concluding settlement of their respective rights and obligations in relation to the action and the underlying tenancy, on the terms and conditions herein contained:

NOW THEREFORE the parties record and agree as follows:

1. The First and Second Defendants acknowledge themselves to be truly and lawfully indebted and firmly bound, jointly and severally, the one paying the other to be absolved, to the Plaintiff in the amount of:

1.1. R68 022.47 …, being the total arrears in respect of rentals and other charges including, interest and legal fees incidental to the Plaintiff's claim, up until and including April 2019;

1.2 Three months' rental in the amount of R34 303.23 (including VAT), as an agreed early termination penalty;

1.3 Utility and ancillary charges up to and including April 2019 (provided that the First Defendant vacate the commercial leased premises on or before 30 April 2019, as agreed to herein below);

1.4 Reinstatement costs incurred by the Plaintiff who shall attend to such reinstatement of the commercial leased premises on the First Defendant's behalf and the costs of which will be the liability of the First and Second Defendants. In this regard, the Plaintiff will

furnish the First and Second Defendants with invoices pertaining to the costs of the reinstatement upon completion thereof; and

1.5 All legal costs incurred by the Plaintiff on the attorney and own client scale.

(herein after referred to as 'the settlement indebtedness').

2. The First and Second Defendants will pay the settlement indebtedness to the Plaintiff, without deduction or set off, and free of commissions and bank costs as follows:

2.1 By way of monthly installments in the amount of R10 000.00 … commencing on 1 April 2019 and thereafter on or before the first day of each month until the settlement indebtedness is paid in full;

…

8. This agreement constitutes the entire agreement between the parties and here *(sic)* are no other understandings or agreements, written or oral, among them on the subject.

9. The parties specifically record that the parties are desirous that this agreement be made an order of the above Court, subject to the approval of the Court."

[3] Although the Respondents raised a number of grounds of opposition to the relief sought in the answering affidavit deposed to by Ms Pillay, they persisted with only one ground in their heads of argument and at the hearing of this application. They contend as follows at paragraph 6.1 of their heads of argument:

"[T]he respondents were unaware of certain material terms contained in the settlement agreement. The conclusion of the settlement agreement on these terms was done in error as a result of the applicant's *mala fide* conduct and misrepresentation. This is centred on the defence of *iustus error*".

[4] The Respondents contend at paragraph 32 of their heads of argument that they –

"cannot be bound to the re-instatement charges and legal costs clauses on the basis of *iustus error*."

[5] The liability of the Respondents for reinstatement costs is provided for at clause 1.4 of the agreement, while their liability for Sanlam's legal costs is provided for at clauses 1.1 and 1.5. In support of their contention that they cannot be bound by the provisions of clauses 1.1, 1.4 and 1.5, the Respondents make the following submissions in their heads of argument:

"10. The issue of legal costs (especially on an attorney and own client scale) was never negotiated with the respondents. The only reference made to any legal costs by the applicant were those referred to in an email dated 11 March 2019. Paragraph 5 of that email reads:

'5. You will continue making payment of R10 000.00 per month until the full amount owed by you as at 30 April 2019, plus the 3 (three) month early termination penalty, interest and legal costs are settled in full and final settlement of this matter.'

11. The above was then catered for in the settlement agreement:

'1.1 R68 022.47 …, being the total arrears in respect of rentals and other charges including, interest and legal fees incidental to the Plaintiff's claim, up until and including April 2019.'

12. In any event, it is clear from the papers that on 11 March 2019 the applicant proposed terms of settlement to the respondents, after which the first respondent countered with terms of its own (i.e. the removal of the re-instatement costs). This evinces that the respondents did not accept all the terms proposed by the applicant.

…

15. In the email under cover of which the settlement agreement was sent to the respondents, the applicant's attorney states that the settlement agreement is *'as discussed last month'*.

16. The respondents were entitled to assume that the settlement agreement contained those terms as counter-proposed to the applicant and nothing more.

17. The respondents certainly did not expect the settlement agreement to contain terms which were not discussed or agreed upon, especially those terms which had been rejected or disputed outright by the respondents, such as the re-instatement costs.

18. The respondents signed the settlement agreement on the assumption that it did not contain clauses which were rejected or not discussed. The respondents could not reasonably have expected the settlement agreement to contain these clauses.

19. By signing the settlement agreement, the respondents committed a justifiable error as a result of the applicant not bringing these clauses to the respondent's attention.

…

21. Had the applicant intended to bind the respondents to the clause relating to the re-instatement charges and legal costs, it should have specifically drawn the respondents' attention to these clauses in the settlement agreement as it was imposing an unusual obligation on the respondents. Only the applicant can be at fault for failing to alert the respondents accordingly."

[6] The submissions at paragraph 12 of the Respondents' heads of argument are not borne out by the facts. Future Energy did not make a counterproposal on 11 March 2019. Ms Pillay conveyed at paragraph 4 of her email at 17:41 on 11 March 2019 that there would be no reinstatement costs because the premises was in the same condition as when Future Energy took occupation. She accepted that there was a liability in respect of reinstatement costs, but made the point that it would not be necessary to incur any such costs. In any event, Ms Pillay does not state in the answering affidavit that she and/or Future Energy made the counterproposal contended for in their heads of argument.

[7] As to the submissions contained at paragraph 16 of the Respondents' heads of argument, Ms Pillay does not state in the answering affidavit that she assumed that the agreement contained the terms of a so-called "counter-proposal" and nothing more. There is no mention of a counterproposal in the answering affidavit.

[8] The main thrust of Ms Pillay's evidence as to how the error contended for by the Respondents came about, is found in these two paragraphs of the answering affidavit:

"6.16 At the time of signing the Settlement Agreement I did not appreciate and understand all the clauses contained therein, save for the clause that stated that the arrear rental was R68 923.68 … and that the Respondents would be paying monthly instalments in the amount of R10 000, commencing on 01 April 2019;

…

13.1 … I re-iterate that I printed and signed the settlement agreement as I implicitly relied on the representations of the Applicant, via Liad Hadar, in that all the settlement agreement encompassed was that the respondents were going to pay the applicant R62 923.68, in monthly instalments of R10 000.00."

[9] The Respondents contend that they agreed to the provisions of clauses 1.1, 1.4 and 1.5 of the agreement in error as a result of Sanlam's *mala fide* conduct and misrepresentation. According to the Respondents, Sanlam made itself guilty of misrepresentation by omission when it failed to bring clauses 1.1, 1.4 and 1.5 of the agreement to their attention. The Respondents further contend that they cannot be bound by the provisions of clauses 1.1, 1.4 and 1.5 of the agreement on the basis of *iustus error*. This is similar to what was contended for by Compusource in the Supreme Court of Appeal in *Constantia Insurance Co Ltd v Compusource (Pty) Ltd 2005 (4) SA 345 (SCA)*:

"[15] … Compusource's answer to Constantia's claim was … that it was not bound by the provisions of clause 3.5. As the basis for this answer, it relied upon the contention that [Compusource's representative] was unaware of the clause when he entered into the agreement and that [Constantia's representatives] had failed in their duty, imposed upon them by law, to alert [Compusource's representative] to its existence.

[16] Compusource's approach to the case was that its defence was one of misrepresentation by the representatives of Constantia in the form of an omission: the non-disclosure of clause 3.5."

[10] In dealing with this contention, the Supreme Court of Appeal held at paragraph [16] of *Constantia*:

"… The true issue in this case is not one of misrepresentation by omission. It is one of *dissensus*. Constantia's representatives thought that [Compusource's representative] had agreed to clause 3.5 read with clause 3.3.2 whereas in fact

he had not. The reason for the misapprehension on the part of the former was that [Compusource's representative] created the impression that he did agree to clause 3.5 by accepting the quotations that were made subject to the provisions of a standard policy, including that clause. Under these circumstances our law is that [Compusource's representative's] principal would, despite this lack of actual consensus, be bound to the provisions of the clause if Constantia's representatives were reasonable in their reliance on the impression created by [Compusource's representative]. If a reasonable person in their position would have realised that [Compusource's representative], despite his apparent expression of agreement, did not actually consent to be bound by the clause, this clause could not be said to be part of their agreement."

[11] Having regard to this authority from *Constantia*, it seems to me that this case is also not one of misrepresentation by omission, but rather one of *dissensus*. I am fortified in my view by the Supreme Court of Appeal's reference in *Constantia* to the principles laid down by the Appellate Division in *SONAP Petroleum (SA) (Pty) Ltd (formerly known as SONAREP (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (AD) and the Supreme Court of Appeal's application of those principles in deciding *Constantia*. The Appellate Division held in *SONAP* at 238G–240B:

"The mistake relied upon by the appellant was one committed during the expression of its intention ('erklärungsirrtum' in German: Fevrier-Breedt *A Critical Analysis of Mistake in SA Law of Contract*, LLD dissertation, UP (1991) at 142): it mistakenly believed that its declared intention conformed to its actual intention. The respondent's declared intention, on the other hand, did not differ from his actual intention. The *dissensus* is, therefore, in a sense the result of the appellant's so-called unilateral mistake. Compare Asser *Verbinternissenrecht* part II (1985) at 144–5. I use the term 'mistake' and not 'error' because, although they may be used interchangeably, 'mistake' rather 'implies misunderstanding, misinterpretation, and resultant poor judgment, and is

usually weaker than *error* in imputing blame or censure'. (*American Heritage Dictionary sv* 'error'.)

The law, as a general rule, concerns itself with the external manifestations, and not the workings, of the minds of parties to a contract. *South African Railways & Harbours v National Bank of South Africa Ltd* 1924 AD 704 at 715–6. However, in the case of an alleged *dissensus* the law does have regard to other considerations: it is said that, in order to determine whether a contract has come into being, resort must be had to the reliance theory. Compare *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) at 995–6 and *Reinecke and Van der Merwe* 1984 TSAR 290. This Court has, in two judgments delivered on the same day by differently constituted Benches, dealt authoritatively with the question of *iustus error* in the context of a so-called unilateral mistake. The first is *Georqe v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 471B–D where Fagan CJ said the following:

> '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 fraudulent, by the other party, then, of course, it is the second party who is to blame, and the first party is not bound.'

The second is Schreiner JA's statement in *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) at 479G–H:

> '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.'

These *dicta* gave respondent's counsel the cue to argue that, in the absence of a misrepresentation by the respondent, the appellant could not succeed in its alternative claim. That is in my view an over-simplification. If regard is had to the authorities referred to by the learned Judges (see *Logan v Beit* 7 SC 197 at 251; *I Pieters and Company v Salomon* 1911 AD 121 at 137; *Hodgson Bros v South African Railways* 1928 CPD 257 at 261; *Van Ryn Wine and Spirit Co v Chandos Bar* 1928 TPD 417 at 422–4; *Irvin & Johnston (SA) Ltd v Kaplan* 1940 CPD 647 and, one could add, *Collen v Rietfontein Enqineerinq Works* 1948 (1) SA 413 (A) at 430–1), I venture to suggest that what they did was to adapt, for the purposes of the facts in their respective cases, the well-known *dictum* of Blackburn J in *Smith v Huqhes* (1871) LR 6 QB 597 at 607, namely:

> 'If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.'

In my view, therefore, the decisive question in a case like the present is this: 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? Compare Corbin on *Contracts* (one volume edition) (1952) at 157. To answer this question, a three-fold enquiry is usually necessary, namely, first, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly,

was the other party misled thereby? See also *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A) at 906C–G; *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A) at 316I–317B. The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled? *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 (1) SA 978 (A) at 984D–H, 985G–H."

[12] The approach set out in *SONAP* was also referred to and applied by the Supreme Court of Appeal in *Pillay and Another v Shaik and Others* 2009 (4) SA 74 (SCA) at paragraphs [55] to [60].

[13] In this case it is clear, in my view, that Sanlam laboured under the genuine misapprehension that Ms Pillay had in fact agreed, on behalf of herself and Future Energy, to be bound by the provisions of clauses 1.1, 1.4 and 1.5 of the agreement and that that misapprehension was caused by the conduct of Ms Pillay in signing the agreement. The first two questions formulated in *SONAP* must therefore be answered in favour of Sanlam. The outcome of this case is therefore dependent on the third question: would a reasonable person in the position of Sanlam have laboured under the same misapprehension?

[14] There are a number of considerations that would, in my view, have influenced the reasonable person. First, Ms Pillay is a businesswoman. She is, in the words of Willis J (as he then was) in *Langeveld v Union Finance Holdings (Pty) Ltd* 2007 (4) SA 572 (W) at paragraph [12], *"no 'babe-in-the-wood', never mind an illiterate."* Second, there was nothing that stopped Ms Pillay from reading and considering the agreement before signing it. Third, Ms Pillay was not prevented from first obtaining legal advice on the agreement before signing it. It is clear from Ms Pillay's email to which she attached the signed version of the agreement, that she took the liberty of asking Sanlam's attorneys advice. There is no evidence that she could not have sought their advice regarding issues she did not understand or agree with prior to signing the agreement. Fourth, Ms Pillay in no way indicated that she did not read or understand the agreement before

signing it. Fifth, there is no general obligation on an offeror to enquire whether or not the other party to the agreement has read and understood the agreement. Sixth, having regard to the fact that the agreement was concluded to settle the parties' respective rights and obligations in relation to the action and the underlying tenancy, clauses 1.1, 1.4 and 1.5 of the agreement cannot be described as so unusual or unduly onerous as to be unexpected. Seventh, the wording of clauses 1.1, 1.4 and 1.5 of the agreement is clear enough that it could be understood by a businesswoman like Ms Pillay. In this regard, it must be remembered that Ms Pillay is the sole member of Future Energy and concluded the commercial lease which contains clauses that are much more complex. She also executed a suretyship that contains words and phrases that would have been much more difficult to understand. Eighth, the signing of a settlement agreement is not something novel in this country like the case was with post litigation insurance in *Constantia*. Provisions like those contained in clauses 1.1, 1.4 and 1.5 of the agreement are not unusual in settlement agreements.

[15] In all the circumstances, I am therefore satisfied that, as a matter of probabilities, the reasonable person in the position of Sanlam would have inferred, from the fact that Ms Pillay signed the agreement, that her true intention was to bind herself and Future Energy to the provisions of clauses 1.1, 1.4 and 1.5 of the agreement. I believe that the reasonable person would not have enquired from Ms Pillay at the time whether she appreciated the meaning of those clauses. The legal consequence of this finding is that Future Energy and Ms Pillay are held bound by the provisions of clauses 1.1, 1.4 and 1.5 of the agreement. It follows that the application must succeed.

[16] As to the question of costs, Sanlam seeks an order that Future Energy and Ms Pillay pay its of the application on the attorney and client scale. In light of my finding that Future Energy and Ms Pillay are bound by the provisions of clause 1.5 of the agreement, I see no reason why such an order should not be made.

[17] In the result, the following order is made:

1. The settlement agreement concluded between the parties, a copy of which agreement is attached to the founding affidavit as “FA1”, is made an order of Court.

2. The Respondents shall pay the Applicant’s costs of this application on the attorney and client scale.

This judgment is handed down electronically by uploading it on CaseLines.

L.J. du Bruyn
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Date heard:	25 April 2022
Judgment delivered:	30 June 2022
For the Applicant:	Ms C.J. Bekker Briefed by Hadar Incorporated
For the First and Second Respondents:	Mr K. Naidoo Briefed by Nishlan Moodley Attorneys