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IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 27916/2009
APPEAL NO: A99/12

26/2/2014

In the matter between:

THERON ANNA ELIZABETH	First Appellant (Second Respondent in the Court quo)
THERON ANTONIE MARIUS	Second Appellant (Third Respondent in the Court a quo)
And	
INVESTEC BANK LIMITED	Respondent (Applicant in the Court a quo)

JUDGMENT

JORDAAN, J

The respondent has applied for judgment against the appellants for payment of R38 million arising from two identical deeds of suretyship

executed by the appellants in the respondent's favour. The appellants admit executing the deeds of suretship, but rely upon the following two defences:

1. They allege that they are entitled to resile from the deeds of suretyship because they were induced to sign them as a result of certain fraudulent misrepresentations ("*assurances*") made by the respondent; and

2. They allege that they are entitled to rectification of the deeds of suretyship. They assert that the deeds of suretyship once rectified would preclude the respondent from claiming against them.

The court *a quo* (Southwood J) dismissed the appellants' defences and granted judgement in favour of the respondent. Southwood J dismissed an application for leave to appeal but the Supreme Court of Appeal granted the appellants leave to appeal to this court.

On behalf of the respondents it was contended that the following facts are undisputed:

1. The first appellant is a businesswoman who, over a period of forty years, built up a successful business, known as Annique Skin Care Products. She is also an active director of two companies and one close corporation. In addition, she has recently resigned as a director of two other companies.

2. The second appellant is the first appellant's son, and is a businessman. He merely signed a confirmatory affidavit in which he aligned himself with what is stated in the first appellant's answering affidavit.

3. On 27 June 2006 the respondent and Idada Trading 3 (Pty) Limited ("Idada") entered into a written loan agreement in terms of which the respondent lent an amount of R40 560 000.00 to Idada ("the loan agreement"). The agreement was subsequently amended in that the amount of the loan was increased to R43 130 000.00.

4. Idada signed the agreement on 22 June 2006 but the respondent signed it only on 27 June 2006, the day that the deeds of

suretyship giving rise to the claims against the respondents were signed.

5. In terms of the loan agreement:

5.1 the respondent lent the loan amount to Idada for a period of twelve months as from the date the respondent first advanced the capital or any part thereof to Idada;

5.2 the loan agreement was subject to the fulfilment of *inter alia* the following special conditions:

5.2.1 registration of a first covering mortgage by Idada over *"the Property"* (i.e. portions 19, 21, 22, 26, 37, 84, 88 and 92 of the farm Rietspruit 518 IQ, which are situated within the Parys region) for an amount of R43 million;

5.2.2 registration of a first covering mortgage bond by Abrina 128 (Pty) Limited **("Abrina")** over "the Collateral Property" (i.e. portions 10, 65, and 123 of

the farm Roodepoort 467 KR, which was a residential development next to Bela-Bela) for an amount of R38 million;

5.2.3 joint and several continuing suretyships for *inter alia* the appellants, each limited to R38 million for the obligations of Idada in favour of the respondent subject to the respondent's standard terms and conditions;

5.2.4 receipt and approval by the respondent of all the documents contemplated in clause 22.1 of the respondent's standard terms and conditions (i.e. all the documents necessary for the development of the Property and the Collateral Property including the approved township conditions of establishment);

6. the respondent and Idada agreed on *inter alia* the following special conditions:

6.1 a minimum valuation of the Property by a valuer appointed by the respondent for an amount of not less than R30 million and compliance by Idada with such conditions as the valuer may impose;

6.2 a minimum valuation of the Collateral Property by a valuer appointed by the respondent for an amount of not less than R55 million and compliance by Idada with such conditions as the valuer may impose;

6.3 The pre-sale amount had to provide 2.5 times cover of the capital outstanding under the loan agreement at all times. A minimum pre-sale amount of R25 million had to be obtained prior to the advance of any portion of the capital in terms of the loan agreement;

6.4 The special conditions had been inserted for the respondent's benefit. The respondent could waive or defer fulfilment of one or more of the special conditions in its sole and unfetterd discretion;

6.5 Notwithstanding anything else in clause 2 of the loan agreement, the respondent had the right in its sole discretion to advance the capital (or any part of it) before the fulfilment of the special conditions. (My underlining). With effect from the date of that advance, all of the terms of the loan agreement would apply to that advance (mutatis mutandis, as applicable), whether or not the special conditions had been fulfilled, that advance would not:

6.5.1 constitute a waiver of the rights of the respondent to require fulfilment of all of the special conditions in terms of clause 2.4 of the loan agreement;

6.5.2 oblige the respondent to advance any further part of the capital to Idada, if the advance was of a part of the capital only or;

6.5.3 prejudice the respondent's rights under or in relation to any finance document.

7. The driving force behind the developments (which were the underlying reason for Idada requiring the loan amount) was Armand Theron. He is the first appellant's son-in-law. He was at all material times, unbeknown to the respondent, an un-rehabilitated insolvent.

8. The first advance in terms of the loan agreement was made to Idada on 10 July 2006 and accordingly the capital and interest outstanding became repayable on 11 July 2007. The respondent continued to make advances to Idada until was indebted to the respondent in the sum of R44 789 553.24.

Idada failed to repay the capital and interest outstanding on 11 July 2007 or thereafter, resulting in the respondent launching an application for its winding-up. Prior to the hearing of the matter Idada was placed in final liquidation.

9. On 27 June 2006 the appellants executed identical deeds of suretyship in favour of the respondent. In terms of the deeds of suretyship the appellants bound themselves in

favour of the respondent as sureties in *solidum* for and co-principal debtors jointly and severally with Idada for the due and punctual payment by Idada of all and any monies which Idada may then or from time to time in the future owe to the respondent from whatsoever cause and howsoever arising, including any judgment debt against Idada (clause 1.1.1); and for the due and punctual performance and discharge by Idada of its obligastions under or arising from, any contract or agreement entered into or to be entered into in the future by Idada, from whatsoever cause and howsoever arising (clause 1.1.2).

The amount recoverable from each surety was limited to R38 million plus such further sums for interest, charges, expenses and costs as may from time to time and howsoever arising be incurred or become payable by the respondent in or about the exercise of any of the respondent's rights in terms of the deeds of suretyship (clause 1.2).

It would always be in the respondent's discretion to determine the extent, nature and duration of facilities or obligations to be allowed to Idada (clause 3.1).

No variation or cancellation (whether oral, consensual or otherwise) of the terms of the deeds of suretyship would be of any force or effect unless it was reduced to writing and signed by the appellants and the respondent (clause 16).

The appellants acknowledged in the deeds of suretyships that no representations whatsoever had been made to them in order to induce the appellants to sign the deeds of suretyship (clause 17).

10. It is important to note that the last page of each of the deeds of suretyship was in a larger font than the rest of the document, and recorded that the appellants reaffirmed by their signatures appended below that they understood that the deeds of suretyship would secure not only one transaction but also and all future transactions entered into

between Idada and the respondent as provided for in the deeds of suretyship;

When the deeds of suretyship were signed by the appellants, there were no blank spaces therein which were still required to be completed and no deletions which were still required to be made and that in particular the name of the debtor had been duly inserted and that the deeds of suretyship were in all respects complete and not subject to any conditions precedent to their coming into force.

They understood their rights and obligations under the deeds of suretyship.

They understood that they may become liable with Idada or instead of Idada as provided for in the deeds of suretyship.

They understood that their liability in terms of the deeds of Suretyship would be continuous until all Idada's existing

and future obligations had been met as provided for in the deeds of suretyship.

They acknowledged that they had the right to obtain independent legal advice on the deeds of suretyship.

11. On 23 April 2009 the respondent sent a letter to Idada, calling up Idada's indebtedness to the respondent. Neither Idada nor the appellants replied to these letters. The respondent submits what they did do, was to seek extensions of time for payment.

THE APPELLANTS' DEFENCES

On behalf of the respondents it was argued, correctly in my view, that the appellants do not contend that they were misled as to the nature of the document signed by them. They both concede that all material times they knew that what they were signing was a suretyship and agreed to bind themselves as sureties.

The essence of their complaint is that the terms of the suretyships did not *"accord with the common intention of the parties when the*

suretyships were signed". In her answering affidavit the first appellant expressly states that " I informed the [second appellant] that I would be prepared to sign a suretyship based on those assurances" and that "the common intention of the arties was based on the assurances that were given to us prior to the signing of the suretyships. The suretyships do not reflect this common intention of the parties."

The appellants however contend that the deeds of suretyship fall to be rectified. This would mean that once the deeds of suretyship are rectified to reflect the "common intention of the parties," as contended for by them, they are bound as sureties for the debts of Idada.

It was argued on behalf of the respondent that this is in direct contradiction to their claim that they are entitled to resile from the suretyships. As I understood the argument on their behalf is, once the suretyships are rectified, they are entitled to resile therefrom.

The first appellant, in her answering affidavit, articulates ten specific respects in which the deeds of suretyship should be rectified in order to reflect the common intention of the parties.

On behalf of the respondent it was argued that several of the rectifications sought are not consonant with the assurances asserted and several would, in any event, not constitute a bar to the respondent's claim. In the heads of argument the counsel for the respondent then analyse each of the proposed rectifications to illustrate their point.

In his judgment Southwood J dealt with these proposed rectifications as follows:

> *"Significantly ... the respondents' (the present appellants)counsel did not attempt to rely on the rectification pleaded by the respondents in their answering affidavits. Instead he attempted to persuade the court, that without this being pertinently dealt with in the answering affidavits, the respondents could rely on a term which they formulated in the course of argument (it was not even referred to in the respondents' heads of argument) – "provided that the surety will not be liable in terms of the deed of suretyship unless Investec prior to advancing any funds to the debtor has pre-sale agreements to the value of 2.5 times the funds to be advanced to Idada.' They argued that the*

respondents were entitled to rely on this common intention even though it was not pleaded. I do not agree. The respondents have filed a detailed answering affidavit in which they seek a specific rectification of the deeds of suretyship. In the absence of exceptional circumstances they are not entitled to disavow the case made out in the answering affidavits."

In argument before us there was also not an attempt to persuade us that the ten pleaded rectifications should be made. Counsel on behalf of the appellants persisted in his stance before Southwood J. I am not persuaded that Southwood J erred in this finding.

On behalf of the respondent it was pointed out that the appellants have not sought to rely upon this in their grounds of appeal.

The respondent further correctly state that the appellants' claimed entitlement to rectification (like the claimed entitlement to resile) was raised for the first time in the answering affidavits and is contradictory to what occurred prior to the launching of the application.

It is significant that the appellants do not seek to rectify the following clauses on the last page of the suretyships:

Clause 3 on the last page of the document, which contains an acknowledgement that the appellants' understand their rights and obligations under the suretyships, as contained in the printed documents which were signed.

Clause 4 on the last page of the document, which provides that the appellants understand that they may become liable jointly or severally for Idada's debts.

Clause 5 on the last page of the document, which provides that the appellants understand that their liability in terms of the suretyships will be continuous until all Idada's existing and future obligations have been met.

As stated before these clauses on the last page of each of the documents are in larger print than the rest of the document. Southwood J further held there is no evidence tendered by the appellants that the parties pertinently discussed the terms of the deeds

of suretyship after they had been drafted. This is evident from paragraph 18 of the answering affidavit where the first appellant states:

> *"Shortly before the [second appellant] and I signed the suretyships on 27 June 2006, I had several discussions with the representatives of the [respondent]" and*

> *"During our discussions they had given me various assurances. It was as a result of these assurances that the [second appellant] and I were convinced to sign the sureties."*

In paragraph 21 of the answering affidavit the first appellant states that *"we did not bother to read the suretyships"* and in paragraph 22 the first appellant states that the deeds of suretyship were *"merely produced."*

There is no evidence that the parties pertinently agreed or even intended that the terms of the deeds of suretyship should be amended in the ten respects contended for by the appellants in the first

appellants answering affidavit, nor the new rectification sought for during argument before Southwood J and before us.

In addition, Southwood J found the following assurances (assuming they were given) merely constituted an expression of opinion, or a speculation concerning the future: that the respondent's representatives had never seen a development with so much potential as that of Idada and Abrina; and Idada's compliance with the terms of the loan agreement would ensure that the appellants *"would have almost no risk."*

If the future did not unfold as forecast the appellants cannot rely on these opinions or speculation, unless they were not honestly made. It was argued, and I agree, that Southwood J correctly found that there is no evidence to show that the respondent's representative's opinions were not honestly held. The respondent, in my view correctly argued that the evidence shows that the opinion must have been held at the time when the suretyships were signed otherwise why would the respondent have lent in excess of R40 million to Idada.

It is furthermore important to note that one of the clauses on the last page of the deeds of suretyship (in larger print) (clause 6) specifically provides:

> *"The surety acknowledges that he has the right to obtain independent legal advice on this deed of suretyship."*

I find it highly improbable that the representatives of the respondent would under those circumstances have made such grave fraudulent misrepresentations as alleged by the appellants running the risk to be found out should the appellants sought independent legal advice.

Southwood J held in the Court *a quo,* the following assurance had nothing at all to do with the deeds of suretyship: If something went wrong with the development, the first appellant would be able to recover each and every cent which she had advanced to Idada and Abrina in her personal capacity. This finding is clearly correct.

The respondent correctly points out that the alleged assurance that the Parys Property had been valuated by an expert valuator who was

employed by the respondent was true as is evident from annexures H1 H6 to the respondent's Rule 35(12) reply.

There was no evidence to suggest that the alleged statement that the market value of the Parys property at the time of the conclusion of the loan agreement exceeded the purchase price was not true.

The alleged assurance that the Bela-Bela property would be used as additional security for Idada's debt was true – a mortgage bond was indeed registered over the Bela-Bela or Collateral Property by Abrina for the sum of R38 million on 13 September 2006.

Southwood J found that the appellants had also to show that they elected to resile from the deeds of suretyship. They do not allege that they in fact elected to resile from the deeds of suretyship. In the answering affidavit, the first appellant merely contends that: *"I am advised, and accordingly submit, that as a result of the negligent, alternatively fraudulent misrepresentations that were made by [the respondent's] representatives, both the [second appellant] and I are entitled to resile from the suretyships"; "Even if it is found by the Honourable Court that the [second appellant] and I are not entitled to*

resile from the suretyships..."; and "This is a further reason why we are entitled to resile from the suretyships...";

This finding by Southwood J was criticized on behalf of the appellants. On behalf of the respondent however the following was eluded to by the respondent: when they were called upon to perform in terms of the deeds of suretyship they did not seek to resile from them, but they indeed negotiated extensions of time for the performance of the obligations of Idada and Abrina and undertook to service the interest on the indebtedness, during October 2007 when the respondent called up the loan to Idada.

This was followed, after telephonic discussions between the deponent to the respondent's affidavits and the first appellant, by an application in December 2007 to wind-up Idada and applications for payment against all sureties. This is not disputed by the appellants. The first appellant in response to this assertion simply states that, facing a claim for payment of R38 million, she was aware of negotiations but was unaware of the detail. This, in my view, is so improbable that it can be rejected out of hand. The winding up of an entity for which she signed a deed of suretyship for such an amount would surely have

After further negotiations a request was made for a postponement of the applications against an undertaking to service interest on the debts. As said the first appellant alleges she was aware of negotiations taking place but avers she was unaware of the details thereof.

It is important to note that the stay of proceedings was confirmed by the respondent in an email dated 26 August 2008. In this email the respondent confirmed, *inter alia*, that the motion proceedings against the sureties would be postponed and that the *"shareholders"* would service the interest on the indebtedness;

In response to this email, the second appellant confirmed that *"we accept your decision"*. These allegations are not disputed and indeed are not dealt with by the appellants. There is no suggestion of being misled by the respondent.

During argument it was suggested on behalf of the appellants that the "Marius Theron" referred to in the emails (Annexure "O") was not proven to refer to the second appellant. There is no merit in this

argument. We know from the papers who all the *dramatis personae* are. No other Marius Theron figures anywhere.

In her answering affidavit the first appellant makes the following startling statement:

> *"Both the (second appellant) and I were shocked when the terms of the suretyships were recently explained to us and we realised that the terms thereof were directly contradictory to what had been stated to us by the (respondent's) representatives".*

At no stage prior to the filing of the answering affidavit the appellants suggested that they were entitled to resile from their suretyship obligations.

The first appellants answering affidavit was signed on 31 August 2010. The deeds of suretyship were signed in June 2006.

Thereafter followed the winding up and further negotiations referred to above during 2007 and 2008.

In my view Southwood J correctly observed, if the attitude of the appellants was that they were not bound to the terms of the deeds of suretyship there can be no doubt that they would have raised this instead of undertaking to be party to the servicing of interest on the indebtedness and seeking in return the postponement of the applications against them. I agree with the respondent's submission that had the appellants been bona fide in the defence now asserted they would, undoubtedly not have raised these defences for the first time in their answering affidavits.

I am also in agreement that the Judge *a quo* relied correctly on the line of cases which hold that a person who signs a contract is taken to be bound by the document concerned – *caveat subscriptor.* See Burger v Central African Railways 1903 TS 571 at 578 and George v Fairmead (Pty) Ltd 1958 (2) 465 (A) at 472A.

I am, and so was Southwood J aware of the attitude a court must have where there is a dispute of fact in motion proceedings set out in inter alia Plascon-Evans Paints Ltd v Van Riebeeck Paints Ltd 1984 (3) SA 623 (A) at 634F. In such an event the court will decide the matter on the version of the respondent and the common cause facts. The

alia Plascon-Evans Paints Ltd v Van Riebeeck Paints Ltd 1984 (3) SA 623 (A) at 634F. In such an event the court will decide the matter on the version of the respondent and the common cause facts. The exception to this rule is a finding that the respondent's version set out in the answering affidavit, taken as a whole, is so palpably implausible, far-fetched and untenable that it must be rejected on the papers.

On an objective analysis of the defences the version of the appellants is so far-fetched that it falls to be rejected.

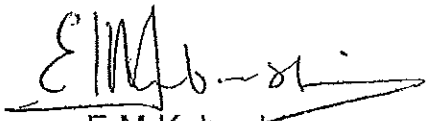
It was argued on behalf of the appellants that in the alternative to the setting aside of the judgement of the court *a quo* the matter should be referred to trial. I am in agreement with counsel on behalf of the respondent that there would be no benefit in referring the mater to trial. The appellants have already stated under oath that the common intention of the parties was based on the alleged assurances and have stated the respects in which they seek to rectify the deeds of suretyship. I agree that even if the appellants' allegations are accepted (to the extent that the rectifications sought are consonant with the alleged assurances), it would still not constitute a bar to the respondent's claim. The matter is thus capable of being finally

decided on the papers. Oral evidence and cross-examination will take the matter no further.

The appeal is dismissed with costs, including the costs of two counsel.

E Jordaan
Judge of the High Court

I agree



E M Kubushi
Judge of the High Court

I agree

D S Fourie
Judge of the High Court