IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: **A79/12**

GEORGE MAG CRT NO: **5935/2009**

In the matter between:

PETER MICHAEL BROUGHTON Appellant

And

SAFINTRA CAPE (PTY) LTD Respondent

JUDGMENT DELIVERED ON 6 NOVEMBER 2012

YEKISO, J

[1] This is an appeal against the judgment handed down in the magistrate's court, George on 9 September 2011 in terms of which the appellant was ordered to pay the respondent an amount of R145,811.97 plus costs, together with interest thereon at the rate of 15.5% per annum. In that court the respondent (as plaintiff in the court *a quo*) instituted an action against the appellant (the second defendant in the court *a quo*) and one George Sebastian Smit (the first defendant in the court *a quo*), jointly and severally, for recovery of the said sum of R145,811.97 together with costs and interest thereon.

[2] The claim referred to in the preceding paragraph was in respect of goods sold and delivered to George Roofing CC, a close corporation of which the appellant and the said George Sebastian Smit ("Smit") were members at the time the cause of action arose. On 16 April 1998 and at George the appellant and Smit bound themselves as sureties and co-principal debtors with George Roofing CC in favour of Safintra Cape (Pty) Ltd (the respondent in this appeal) for debts due and owing by George Roofing CC. George Roofing CC has since been liquidated hence the action in the magistrate's court against the appellant and Smit in their respective capacities as sureties and co-principal debtors. This appeal is against the whole of the judgment handed down by the magistrate, inclusive of the order that the appellant is jointly liable with Smit for debts due and owing to the respondent by George Roofing CC (in liquidation).

[3] On 3 April 1998 the representatives of the respondent, in response to an application for credit by George Roofing CC, faxed a form for an application for credit to the offices of George Roofing CC. The form was headed "APPLICATION TO OPEN A CREDIT ACCOUNT" ("the credit application"). The credit application was completed by the administrative officer of George Roofing CC and submitted to Smit and the appellant for their signature who both proceeded to sign the credit application form.

[4] The prominent heading of the document proclaims that it is an application to open a credit account. The credit application form is a three page document comprising 13 paragraphs inclusive of sub-paragraphs. Paragraph 4(a)(i) to (iii) makes provision for

completion of personal particulars of each member of the close corporation. Paragraph 4(b) seeks to elicit a response as to whether the signatory of the form is prepared to sign personal surety for the close corporation. A response to this question is indicated in the affirmative in the credit application.

[5] The terms and conditions of the credit application are contained in paragraphs 13(a) to 13(i) of the credit application. Paragraph 13(g) of the terms and conditions reads as follows:

> "I agree that by signing hereunder, I/we bind myself/ourselves as surety and co-principal debtors with the applicant for all monies which may now be or in the future become owing by the applicant to the supplier, hereby renouncing all benefits of excussion, division and cession of action."

[6] Paragraph (j) of the terms and conditions of the credit application reads as follows:

> "The purchaser acknowledges that he has read and agrees to the general conditions of sale which form part of this application to open a credit account."

Just below paragraph 13(j) there is provision for signature by a proprietor/partner/director/member followed by "obo George Roofing CC". It is common cause that the appellant and Smit signed the credit application form at the back thereof.

[7] In his plea the appellant denied that he bound himself as surety and co-principal debtor with George Roofing CC in favour of the respondent as paragraph 13(g)

of the credit application form would seek to suggest. In this regard the appellant contends that the conduct of the respondent, in causing the appellant to sign the credit application form in the condition it currently is, induced a fundamental mistake or a *justus error* on the part of the appellant rendering the surety obligation contained in the credit application form being void *ab initio*.

[8] The principles relating to *justus error*, cited with approval in such decisions as *Brink v Humpries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) are well established and have been stated as follows in *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 471A-D:

> When can an error be said to be justus for purposes of entitling a man to repudiate his apparent assent to a contractual term? As I read the decisions, our court, 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."

[9] Based on the authority cited in the preceding paragraph, it is contended on behalf of the appellant that it is because of misrepresentation by the respondent that the appellant was induced to sign the credit application form in the reasonable, but mistaken, belief that it did not constitute a suretyship agreement. The issue that calls for determination, therefore, is whether there was misrepresentation which induced the

appellant to sign the credit application in a reasonable, but mistaken belief that it did not constitute a suretyship agreement.

[10] *Mr Heyns*, for the appellant, in contending that the respondent induced the appellant into signing the credit application in the mistaken belief that it did not constitute a suretyship agreement, relies on *Sonap Petroleum SA (Pty) Ltd (formerly known as Sonarep (SA)(Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) where the then Appellate Division said the following:

> "... 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 inquiry is usually necessary, namely firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? ... The last question postulate two possibilities: was he actually misled and would a reasonable man have been misled?"

[11] *Mr Heyns* thus makes a point in his submissions that in deciding whether the appellant is to be bound by the suretyship obligation it stands to be considered whether:

[11.1.] the furnishing of the credit application constitutes misrepresentation;

[11.2.] whether such misrepresentation is attributable to the respondent;

[11.3.] whether the appellant was actually misled by the representation; and

[11.4.] whether a reasonable person, in the position of the appellant, would have been misled by the misrepresentation.

[12] In contending that the furnishing of the credit application form constitutes misrepresentation, *Mr Heyns* relies on *Keens Group Co (Pty) Ltd v Lötter* 1989 (1) SA 585 (C) where it was held that where a document headed "CONFIDENTIAL: APPLICATION FOR CREDIT FACILITIES" but also contained a suretyship clause similar to the one in the credit application under consideration in this appeal, that the furnishing thereof, without pointing out the suretyship clause, constitutes a misrepresentation for the purposes of *justus error.*

[13] *Mr Heyns* further submits that the approach adopted in *Keen Group Co (Pty) Ltd v Lötter,* supra, was followed by the Supreme Court of Appeal in *Brink v Humphries & Jewell (Pty) Ltd,* supra, where it was held at 422B that:

> "In deciding whether a misrepresentation was made, all the relevant circumstances must be taken into account and each case will depend on its own facts. For present purposes, all that needs be said in this regard is that the furnishing of a document misleading in its terms can, without more, constitutes such a misrepresentation."

[14] Based on these authorities *Mr Heyns* submits on behalf of the appellant that the credit application under consideration in this appeal is misleading in its terms in that, firstly, it is headed "APPLICATION TO OPEN A CREDIT ACCOUNT" whereas, the same form, inconspicuously incorporates the suretyship clause amongst the general terms and conditions of a credit agreement; and that it purports to be an agreement only between George Roofing CC and the respondent. *Mr Heyns* further submits that since

the credit application is a document generated by the respondent, and thus appears to be a standard document for the purposes of applying for credit from the respondent, such misrepresentation as would be conveyed by the document itself is attributable to the respondent.

[15] The appellant's evidence at trial, in broad terms, was that no person representing the respondent at any stage spoke to him or alerted him that the document he was required to sign contains a personal suretyship binding the signatory thereof as surety to George Roofing CC. He testified further that members of the close corporation (George Roofing CC) were advised by the financial advisor of the close corporation that, if at all possible, members should not sign personal sureties. He had in the past signed credit application forms and where the members of the close corporation were required to also sign as sureties, such a suretyship document would be contained in a separate document as opposed to it being inconspicuously enmeshed amongst the other terms and conditions of the proposed credit agreement.

[16] In his evidence at trial the appellant referred to a form for an application for credit with one corporate entity, Macsteel Service Centre (Pty) Ltd, which required the signatories to the document to bind themselves as sureties, but that the personal suretyship being given is contained in a separate document.

[17] The appellant concluded his evidence at trial by stating that the document he was required to sign, which without his knowledge contained a suretyship clause, is

misleading on the basis that the document reads "APPLICATION TO OPEN A CREDIT ACCOUNT" and that the word "surety" does not appear anywhere on the face of the document. He testified that other documents he was required to sign in the past which contained a suretyship clause, the word "surety" would appear on the face of the document and the document imposing suretyship obligation would be contained in a separate document.

[18] The appellant made several concessions in his evidence under cross examination, as for an example, that the close corporation relied on credit facilities by suppliers for the operation of its business; that the close corporation relies on credit facilities to manage its cash flow; and that had he read the document he would have seen the suretyship clause. But, in my view, these concessions are negated by some features of the credit application which, taken cumulatively, only have the effect of misleading the signatory thereof.

[19] As to whether a reasonable person would be misled by the credit application, the following features of the document itself are worth mentioning and these are: that the prominent heading of the document proclaims that it is a credit application and not a credit application and personal suretyship. As was pointed out in *Brink v Humphries & Jewell (Pty) Ltd*, supra, that itself is misleading. The signatory is not required to sign the credit application twice, that is, once in the capacity as a member of the close corporation and in a further capacity as surety. Immediately below the space provided for signature of the credit application appear the words

"PROPRIETOR/PARTNER/DIRECTOR/MEMBER". That the signatory thereof signs on behalf of the close corporation creates the impression that the signatory does not sign in a personal capacity. As a matter of fact, the overall impression created is that the signatory of the document merely signs in a representative capacity and not also in a personal capacity. I have already made a point that, in the instance of this matter, the suretyship clause is inconspicuously enmeshed amongst the general terms and conditions and with no indication at all to alert the signatory thereof that he or she is signing the document both in a representative capacity as well as in a personal capacity. In my view, in the instance of this matter, a reasonable person in the position of the appellant at the time of the signing of the document might well be misled into believing that he is signing a document not imposing a suretyship obligation on the part of the signatory thereof.

[20] *Mr De Bruyn,* for the respondent, in an attempt to persuade us that the magistrate was correct in holding that the appellant bound himself as surety in favour of George Roofing CC and relying on the adage *caveat scripto,* submitted that where a party actually signs a document which purports to contain the terms of a contract, he is irrebuttably presumed to have consented to those terms provided he had reasonable facilities for acquainting himself with such terms. *Mr De Bruyn* further submitted that in view of the fact that the credit application consists of only three pages; that the suretyship clause is contained on the same page as the applicant's signature; that the terms and conditions of credit consists of only ten clauses and that the credit application form had been in possession of the close corporation for 17 days, the appellant would

have had enough time to read the document; that all these factors taken cumulatively, point to the fact that the appellant, by signing the credit application, bound himself as surety for debts owed and due by George Roofing CC.

[21] Relying on such authorities as *Blue Chip Consultants (Pty) Ltd v Shamrock* 2002 (3) SA 231 (W); *Stiff v Q Data Distribution (Pty) Ltd* 2003 (2) SA 336 (SCA); *Slip Knot 777 (Pty) Ltd v Du Toit* 2001 (4) SA 72 (SCA), amongst other authorities, *Mr De Bruyn* submits that the appellant failed to make out a case that the respondent induced a fundamental mistake or *justus error* on the part of the appellant rendering the suretyship obligation contained in the credit application *void ab initio.*

[22] I have considered the authorities cited in the preceding paragraph relied on by *Mr De Bruyn.* In my view, the authorities relied on do not assist *Mr De Bruyn's* cause. In the instance of *Blue Chip Consultants (Pty) Ltd v Shamrock,* supra, the defendant's version that he did not read the document he was required to sign was rejected, the court holding that the defendant in the instance of that matter did in fact read the document he was required to sign. In the instance of this matter there is no evidence to suggest that the appellant read the document. Similarly, in *Stiff v Q Data Distribution (Pty) Ltd,* supra, the defendant's version was rejected on the basis that the defendant read the clause pertaining to the suretyship. Also, *Slip Knot Investment 777 (Pty) Ltd v Du Toit,* supra, does not assist the respondent in as much as the fraud or misrepresentation relied on in that matter was induced by a third party.

[23] With regards to the submission that the appellant had enough time to read the document, the appellant testified that he saw the credit application for the first time at the time the document was brought to him to sign; that at the time he signed the credit application he was in the design office; that the document was completed by the administrative officer in a separate office and was merely brought to him to append his signature. Having noted that the document purported to be an application for credit, with no indication on the face of the document that he would be binding himself as surety, the appellant proceeded to sign the document. I am thus not persuaded by *Mr De Bruyn*'s submissions and argument at the hearing of this appeal that the credit application the appellant was required to sign was, by design, not intended to mislead.

[24] In my view, a case has been made out that the document which the appellant was required to sign constitutes misrepresentation; that such representation is attributable to the respondent; that the appellant was actually misled by the form and the design of the credit application; and that a reasonable person, in the position of the appellant, would have been misled by such misrepresentation.

[25] In the result I make the following order:

[25.1.] The appeal is upheld with costs.

[25.2.] The order of the court *a quo* is set aside and is substituted with the following order:

[25.2.1.] Plaintiff's claim against the second defendant is dismissed.

[25.2.2.] Plaintiff is ordered to pay second defendant's costs in defending the action on a party and party scale;

[25.2.3.] Judgment is granted in favour of plaintiff against the first defendant for:

(a) Payment in the sum of R145,811.47;

(b) Interest on the aforementioned sum at the rate of 15.5% per annum from 28 February 2009 until date of final payment;

(c) Costs on an attorney and client scale up to, but excluding, trial.

N J Yekiso, J

I agree.

J H M Traverso, DJP