Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: **21032/2009**

In the matter between:

MR DION VAN NIEKERK NO Plaintiff

and

MR ANDRÉ FRANCOIS VAN DER MERWE Defendant

JUDGMENT: 9 NOVEMBER 2012

MEER J.

[1] The plaintiff sues the defendant for the sum of R2,450,260.35 in the defendant's capacity as surety and co-principal debtor. The claim is based on a suretyship granted in favour of the plaintiff in terms of a written loan agreement ("the consolidation agreement"), concluded between Helderberg Projekte 101 Trust (the trust), represented by the plaintiff, and Pacific Heights Investments 145 (Pty) Ltd ("Pacific Heights"), represented by the defendant. In his plea the defendant admitted the conclusion of the consolidation agreement but denied

that he is liable to the plaintiff as claimed, relying on the defence of *iustus error* or his unilateral mistake. He contended that he concluded the consolidation agreement without reading the suretyship clause or being aware of it. In his replication the plaintiff countered that the defendant expressly agreed to the suretyship and accordingly there was no unilateral mistake. In addition the plaintiff contended that any mistake alleged by the defendant could neither have been reasonable nor iustus.

Background and Common Cause Facts

[2] On 29 May 2009 the Helderberg Projekte 101 Trust of which the plaintiff is a trustee, and Pacific Heights Investments, of which the defendant was a director, entered into a written agreement for the consolidation and repayment of certain loans made by the trust to Pacific Heights. The agreement, titled "Agreement of Consolidation and Repayment of Loans", was signed by the plaintiff on behalf of the trust and the defendant on behalf of Pacific Heights. The material and express terms of the agreement were set out in the following paragraphs:

> *"1. **ACKNOWLEDGEMENT OF DEBT***
>
> *1.1 The Borrower hereby acknowledges its indebtedness to the Lender in the sum of R2 450 260,35 **(TWO MILLION FOUR HUNDRED AND FIFTY THOUSAND TWO HUNDRED AND SIXTY RAND AND THIRTY FIVE CENTS)** ("The Loan Amount") comprising the Capital amount of monies lent and advanced to it in the past and the capitalised accumulated interest thereon as on the Effective Date.*
>
> *2. **EFFECTIVE DATE***
>
> *The Effective Date shall be 1st June 2009.*
>
> *3. **LOAN PERIOD***
>
> *The loan period shall commence on the Effective Date and shall run until 31 May 2010 when the Loan Amount with interest accrued will be repaid in full.*
>
> *5. **INTEREST PAYMENT AND REPAYMENT OF CAPITAL***
>
> *5.1 Unless agreed otherwise in writing, the repayment of the interest on the Loan*

Amount will be partially paid by the Borrower in equal payments of R30 000,00 (THIRY THOUSAND RAND) per month. Payments will first be applied to partially cover outstanding interest and after interest has been serviced, the excess will be towards repayment of capital.

6. BREACH

Should the Borrower fail to pay on due date any interest or any other amount due by it in terms of this Agreement, or commit or allow the commission of any other material breach of this lease and fail to remedy that breach within a period of ***30 (THIRTY)*** *days after receipt of notice to that effect from the Lender, then the Lender shall have the right, but shall not be obliged, to either*

6.1 demand specific performance; or

6.2 to forthwith cancel this Agreement in which case the Capital Amount and all interest outstanding at date of cancellation will become due immediately, but without prejudice to its claim for damages which it may have suffered by reason of the Borrower's breach of contract.

9. SURETY AND CO-PRINCIPAL DEBTOR

The person who signs this Agreement on behalf of PACIFIC HEIGHTS INVESTMENTS 145 (PTY) LTD will also be liable in his personal capacity as Surety and co-principal debtor of the outstanding amount due to the Lender."

[3] Pacific Heights, in breach of the consolidation agreement, failed to comply with its obligations and in particular to make the requisite payments as specified at Clause 5.1. Consequently on 6 August 2009 Pacific Heights was put to terms by the trust to rectify the breach within 30 days, but it failed to do so. Pacific Heights was thereafter placed under liquidation. On 8 October 2009 summons was issued against the defendant as surety and co-principal debtor for payment of the outstanding amounts.

[4] The issue that fell to be determined at the trial was a narrow one, namely, whether the defendant's defence of iustus error to the effect that he mistakenly concluded the suretyship agreement, could be upheld. By agreement the defendant assumed the onus to prove his alleged iustus error and the duty to begin. The defendant therefore testified first, whereafter the plaintiff testified.

The Evidence

[5] The defendant testified that he has worked in the banking environment for 18 years rising from teller to regional bank manager. Since 2004 he has worked in the field of property development and has been the director of several property development companies. He was one of three directors of Pacific Heights at the time when the consolidation agreement was concluded. The defendant said he has a very good knowledge of contracts. He has been exposed to hundreds of contracts during his career and as a property developer has himself drafted contracts. He had drafted all the contracts for Pacific Heights including the consolidation agreement, after discussion with his co- directors. It was his practice normally to read through a contract before he signed it, he said. Contrary to such practice he had neglected to read the entire consolidation agreement in question before signing it.

[6] His testimony pertaining to the consolidation agreement and his signing thereof in ignorance of the surety and co-principal debtor clause providing for his personal liability, was as follows: In 2008 Pacific Heights purchased a property in Worcester for the development of an old age home. The plaintiff was appointed as the project manager. The plaintiff had on several occasions made loans to Pacific Heights amounting to approximately R1.9 million for the development, as was recorded in four separate Investment Agreements concluded between December 2007 and February 2008. The defendant had drafted and negotiated these agreements on behalf of Pacific Investments with the plaintiff. The Investment Agreements made no provision for the directors of Pacific Heights to stand as surety. They however provided for security by way of a bond registration in favour of the investor at clause 2.7 in the event of breach, and security by way of the investor's share entitlement, also in the event of breach, at clause 4. A further eighty percent of the financing for the old age home development was loaned from Standard Bank. In respect of that loan three separate surety agreements were signed by each of the directors of Pacific Heights.

[7] The development proved not to be a success due to the economic downturn. The bank refused additional funding and later withdrew its financing for the development. Pacific Heights was unable to commence re-paying its loan to the plaintiff as provided for in the agreements, and the defendant consequently approached the plaintiff on behalf of the company for an extension of the repayment period. The plaintiff agreed and entered into the Agreement of Consolidation and Re-payment of Loans to consolidate the amount due to the trust and provide for more lenient terms of repayment.

[8] It was agreed that the defendant would draft the consolidation agreement and send it to the plaintiff for consideration. This was done and a draft agreement was emailed to the plaintiff by the defendant on 26 May 2009. Such draft agreement ended at clause 8 and therefore did not contain the suretyship clause which appears as clause 9 of the final consolidation agreement.

[9] The plaintiff's testimony was that upon receiving the draft agreement from the defendant, he had sought legal advice. His attorney advised him that the contract should be amended to provide that repayments would be employed to firstly pay off the interest and thereafter the capital. His attorney also advised him that the contract should make provision for a surety clause.

[10] In his testimony during cross-examination the plaintiff explained that it was on the advice of his attorney that the defendant and not his co-directors was cited as surety. This was because the defendant, who would be the signatory to the agreement was the director who had always arranged loans. It was also the defendant who had negotiated the previous investment agreements. The advice he received was that the person who signed the agreement, must stand surety. The plaintiff's attorney had conducted a deed search and found that there was property registered in the defendant's name, making him a suitable candidate to stand surety. The plaintiff was adamant that under no circumstances would he have

entered into the consolidation agreement without making provision for surety especially since the money loaned comprised all his savings for which he had worked and which he had not inherited. The plaintiff stated that he knew about suretyships. He had qualified with a degree in BSC Building Management and had operated his own construction business before moving into property development.

[11] When cross-examined as to why provision had not been made for surety in the four investment agreements which had been concluded prior to the consolidation agreement, the plaintiff stated this was not necessary, given that clauses 2.7 of those agreements made provision for a bond registration in favour of the investor within a specified time in the event of breach, and clause 4 provided for the investor's share entitlement in similar circumstances. The plaintiff pointed out that as of May 2009 when the consolidation agreement was entered into, the time had lapsed for him to ask for the benefits as contained in these clauses.

[12] The plaintiff said that after being advised by his attorney about the aforementioned amendments, he had telephoned the defendant and informed him of the suggested changes to the agreement. He was adamant that he had discussed the suretyship with the defendant. He said that he informed the defendant that he regarded the furnishing of security as an absolute *sine qua non* for entering into the consolidation agreement. He said the defendant had expressly agreed to the insertion of the surety clause. He had also agreed to the amendment relating to interest. Thereafter the plaintiff's attorney had re-drafted the agreement. He inserted the changes pertaining to interest at clause 5.1 of the agreement and added a new clause, being clause 9, which provided for surety by the signatory to the agreement. The re-drafted agreement was then emailed to the defendant on 28 May 2009.

[13] The defendant's testimony in contrast is that only the amendment in respect of the interest was discussed with him by the plaintiff before the amended contract was emailed to him. This amendment pertained to clause 5.3. After obtaining the approval of his co-directors

he had consented to this amendment. The defendant denied that there was any discussion between him and the plaintiff about the addition of a surety clause. He testified that when he received the re-drafted agreement by email, he noticed immediately on opening the document that it was not his original document, but a document in a different format. It did not, he explained, have a border like his document. It was also a word file and not a "pdf" document as his had been. This notwithstanding, he did not read the entire document but only what he described as "die kern" or crux of the agreement, being paragraphs 1 to paragraphs 5.6. The reason for this he said was that paragraphs 6 onwards contained standard clauses which are contained in all loan agreements concluded by his company, his exact words being:

" Dit is standaard klosules in leningskontrakte wat ons maatskapy sluit".

[14] During cross-examination, however, when probed on this aspect he contradicted himself. When it was put to him that these clauses did not appear in the four investment loan agreements which preceded the consolidation agreement, he changed his evidence to state these were normally standard clauses in loan agreements generally, but then seemed to again suggest they were standard clauses in contracts his company used. Ultimately he testified, contrary to his evidence in chief, that clauses six to eight had been used for the first time in the consolidation agreement and had been created from a template taken from a precedent. He admitted that it was not as though the clauses existed in various other loan agreements of the company. Contrary also to his evidence in chief, he then said the reason that he had not checked paragraphs six onwards of the re- drafted consolidation agreement emailed to him, was because there had been no discussion between him and the plaintiff about changes other than to Clause 5.1 and 5.3. It was, he said reasonable for him to accept there were no other changes. His testimony was also that he noticed that paragraphs 1 to paragraphs 5.6 were the same word for word as the draft he had sent with the exception of paragraph 5.1 which had been changed in accordance with his discussion about interest with the plaintiff.

[15] The defendant had telephoned the plaintiff and arranged for the signing of the consolidation agreement on 29 May 2009. On that date the plaintiff, the defendant and his co-director, Mr Jansen Van Rensberg, met at a coffee shop in Stellenbosch for the signing. Before signing, the defendant pointed out to the plaintiff that paragraph 5.3 was repetitive of paragraph 5.1 and they agreed to delete paragraph 5.3, which they did. Even though the suretyship clause 9 appears on the last page of the contract, in bold capitals immediately above the section where the plaintiff and defendant signed the contract, and Jansen Van Rensberg witnessed their signatures, the defendant said he had not seen the security clause at the time of signing.

[16] The defendant could not satisfactorily explain this omission or why he had not read through the entire agreement before the signing. When asked during cross-examination to explain how he could not have noticed an extra clause after clause 8, his response was simply that he had not seen it. He however conceded that he had sufficient time to read the document before signing it and that it had been in his possession for a day before the signing. He acknowledged that at the time of signing he had no doubt that the loan would be repaid in accordance with the terms of the consolidation agreement. The defendant insisted that he had signed on behalf of the company. He said he would not have bound himself alone, that his co-directors too would have signed surety if a suretyship had been agreed to, as usually occurred when the directors signed for surety in separate documents, on behalf of the company. The defendant conceded that the security provisions at clauses 2.7 and 4 of the investment agreements would disappear on the signing of the consolidation agreement. The suretyship was not discussed at the signing meeting which was an affable one.

[17] After the agreement was signed only two payments were made by Pacific Heights. The plaintiff's attorney accordingly sent demands for payment and on 21 August 2009 a meeting was held attended by the plaintiff, his attorney, the defendant and another director, Mr Jansen. The meeting was very heated and during the course thereof the defendant was

alerted to the fact that he had signed as surety and co-principal debtor. The defendant testified that although he was shocked to discover this information he displayed no reaction. He expressed neither shock nor dismay, and said nothing. His explanation for his stance was that he did not want to infuse further conflict into an already heated gathering by disputing his suretyship. He further said, explaining his stance at the meeting, and I quote:

"Ons het 'n ver pad om te stap en die ding moet werk en hy is 'n integrale deel van die proses".

When the defendant was cross examined as to how Pacific Heights and the plaintiff could have had a long way to go together as of 21 August, given that on 20 August the defendant himself had signed the founding affidavit in the provisional liquidation application of Pacific Heights, which had occurred on 26 August, he could not provide an answer. He testified further that Mr Jansen had intimated at the meeting of 21 August, that not one of the directors of Pacific Heights had the means to provide surety.

[18] The defendant testified that after the meeting he had looked at the signed consolidation agreement and was shocked to discover that there had been a clause pertaining to surety when he signed the agreement. He however did not confront the plaintiff about this as he thought it would serve no purpose. The first time he had raised the absence of the surety clause 9 in the agreement he had signed, he said, was during these proceedings. He pointed out that his financial situation in 2009 when he had signed the consolidation agreement was very different to his situation in 2008 when he had signed surety for the bank loan. He said he was currently unemployed and has no assets.

Findings

[19] A person who signs a contract signifies his assent to the contents of the document and the other party is reasonably entitled to assume that the signatory, by signing the document,

was signifying his intention to be bound by it. This is known as the *caveat subscriptor*[1] rule. See *Burger v Central South African Railways* 1903 TS 571. See also *Christie*, the Law of Contract in South Africa[2],

[20] Iustus error, the defence relied upon by the defendant, is one of the recognised defences to the *caveat subscriptor* rule[3]. A party who relies on the defence of iustus error must show that his error was iustus in the sense that he or she was labouring under a mistake which was both operative and reasonable. A mistake is regarded as reasonable where it was induced by a misrepresentation made by the other party or where the other party appreciated, or ought as a reasonable person to have appreciated, that an offer was being made or accepted, or that terms were being agreed to, under a misapprehension. See *Lawsa* Volume 5, paragraph 387.

[21] The concept of iustus *error* was considered by the Appellate Division in a triad of oft quoted cases commencing with *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A). In that case Fagan CJ stated at 471 A-C[4]:

> *"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*

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1 The maxim, *caveat subscriptor* can be translated as "Let the signer beware". LAWSA Volume 5(1) para 432.

2 6th Edition Lexis Nexis 20 11 at 181 - 182

3 Christie *supra* at 183

4 Dictum applied in the matter of *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) at 239A-C.

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."

In the matter of *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) at 479G-H[5], Schreiner JA stated the following:

> *"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."*

Harms AJA (as he then was) in the matter of *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) at 239 I-240 B, after referring to the above two dicta, held that the decisive question is the following[6].

> *". . . 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)at 157.*
>
> *To answer this question, a three-fold enquiry 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? See also Du Toit v Atkinson's Motors Bpk1985 (2) SA 893 (A) at 906C-G; Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd1986 (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) Ltd1983 (1) SA 978 (A) at 984D-H, 985G-H."*

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5 [1] Dictum applied in the matter of *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) at 239D-E.

6 [1] At 239I. Applied in the matter of *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) at para [8], *Cecil Nurse (Pty) Ltd v Nkola* 2008 (2) SA 441 (SCA) at para [15], and *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA) at para [9].

[22] In applying the enquiry enunciated in *Sonap supra* to this matter, it must be determined whether the defendant before me led the plaintiff as a reasonable man to believe that his declared intention to be bound by the suretyship clause as contained in clause 9 of the consolidation agreement, represented his actual intention. In order for this issue to be determined in the defendant's favour the defendant must show that his declared intention did not constitute his actual intention and the plaintiff was not misled by the defendant's declared intention. I proceed to determine this issue by way of the three-fold enquiry enunciated in *Sonap supra*.

Was there a misrepresentation as to the defendant's intention

[23] For this question to be answered in the affirmative I must be satisfied from the evidence on a balance of probabilities that the defendant was not aware of the suretyship and that his declared intention to be surety and co- principal debtor as per clause 9 of the consolidation agreement which he signed, was not his actual intention.

[24] I commence by noting that the defendant's version that the insertion of clause 9 was never pointed out to him, is irreconcilable with the version of the plaintiff who is adamant that he discussed the suretyship with the defendant, advised the defendant that he regarded the furnishing of the suretyship as an absolute *sine qua non* for entering into the consolidation agreement and that the defendant expressly verbally agreed thereto.

[25] The probabilities or improbabilities of the versions of the plaintiff and defendant and the comparative candour, calibre and cogency of their respective testimonies is crucial in determining whether the defendant was truly not aware of the suretyship clause when he signed the consolidation agreement.

[26] It is in my view improbable that the defendant would not have read the entire draft consolidation agreement emailed to him by the plaintiff when he opened the document and immediately realized that the document had been re- drafted and had a format different to the

earlier draft emailed by him to the plaintiff. It is improbable that a seasoned businessman like the defendant with considerable experience in drafting contracts would not have read through the entire draft agreement which he knew had been prepared and amended by the plaintiff's attorney. The defendant's reason furnished during evidence in chief for failing to read beyond paragraph 5.6 of the agreement, namely that the clauses beyond that were standard clauses appearing in contracts used in his company, did not withstand cross examination, when he gave contradictory evidence to the effect that what he had earlier suggested to be oft used standard clauses, had in fact been used for the first time in the consolidation agreement

[27] It is moreover in my view improbable that both the defendant and his co-director who signed the last page of the agreement would not have noticed the suretyship clause which appears immediately above their signatures. The words "**SURETY AND CO- PRINCIPAL DEBTOR"** appear clearly in bold capitals as a heading to clause 9. It is improbable that the clause would not have caught the eye of the two experienced businessmen who affixed their signatures to the document just below the clause. It is moreover improbable that they would have signed the document had their intention not been to be bound by the clause. The likelihood is that their eagerness to obtain the crucial extension for the repayment of the loans, and the perception that there would be no difficulty in repaying, as testified by the defendant, prompted them to sign, notwithstanding the surety clause.

[28] Furthermore the defendant's silence and extraordinary lack of emotion at the meeting of 21 August, on learning for the first time, on his version, that he had bound himself as surety in the consolidation agreement, was completely at odds with that of a person who had no knowledge of the surety clause. His explanation for his silence, namely to avoid conflict is unconvincing, given his knowledge of and participation in the liquidation of Pacific Heights. His response was more in keeping with one who was aware of the suretyship and his obligations in that regard.

[29] The version of the plaintiff by comparison is not afflicted with similar difficulties. The plaintiff's version was convincing in the telling thereof and did not falter under cross examination. Given the fact that Pacific Heights had failed to honour its obligations to the plaintiff as per the previous agreements and that it was known to be in severe financial difficulties, the probabilities are that the plaintiff would have insisted on a surety clause in the re-negotiated loan agreement. This is especially so given that under the consolidation agreement the plaintiff would lose the security previously afforded in clauses 2.7 and 4 of the Investment Agreements and would moreover receive his money later. It is undisputed that plaintiff got legal advice that the agreement should provide for a suretyship. It is extremely improbable, as contended by Mr Van der Merwe for the plaintiff, that the plaintiff would have discussed the legal advice he received with the defendant, yet fail to mention that he required a suretyship to be furnished.

[30] It is also improbable that the defendant would have loaned his total savings without first getting an assurance in respect of surety. I note also that the plaintiff's explanation that the defendant was singled out for surety as he was the director with whom loans were negotiated, and who was to sign the agreement, is plausible.

[31] In the light of the above, on an analysis and evaluation of the probabilities of the defendant's version and that of the plaintiff, their comparative demeanour and the calibre of their respective testimonies on the disputed issue of the surety, I come to the view that the defendant has not succeeded in discharging the onus of proving that his actual intention was not to be bound by the surety clause contained at clause 9 of the consolidation agreement. Accordingly I find that the defendant failed to cross the very first leg of the enquiry as set out in *Sonap supra*. He failed to prove that his actual intention did not conform to his declared intention. I accordingly find that there was no misrepresentation in this regard and that the defendant intended to conclude the suretyship agreement.

[32] In so far as the next two legs of the enquiry as specified in Sonap *supra* may still be relevant, it is clear that the defendant made a representation that he was binding himself as surety and that the plaintiff as a reasonable man accepted that he was so bound. I note however that even if the defendant had mistakenly signed as surety, the circumstances of this case, when compared with those cases to which I was referred, where parties who had mistakenly signed suretyships, relied on iustus error to escape liability, would not have favoured a finding that the defendant's error was iustus.

[33] In *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) for example, it was found that the appellant's error in signing a credit application form without knowing that it embodied a personal surety application, was iustus on the basis that, unlike in the instant case, the form was a trap for the unwary[7] and the appellant was justifiably misled by it. The court found that the manner in which the surety clause was included in the form, did not sufficiently alert the signatories that they were undertaking a personal suretyship. Similarly in the unreported judgment of this Court in *Metcash Trading Africa (EDMS)BPK en De Villiers* (Western Cape High Court, Case Number A312/2010, judgment delivered by BlignautJ on 26 May 2011), the appellant's error in mistakenly signing a franchise agreement containing a surety clause, was found to be *iustus*. There, also unlike the instant case, the documentation was found to be even more misleading than the documentation in *Humphries supra*, the suretyship having been relegated to the 26th page of a 30 page annexure[8].

[34] Furthermore, in a case factually similar to the present, *Roomer v Wedge Steel Pty Ltd* 1998 (1) SA 538 (N), the appellant who had mistakenly signed for suretyship without

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7 [1] At paragraph 8

8 [1] See Judgment of Cleaver J in the court a quo, *Metcash Trading Africa (Pty)Ltd vDe Villiers* Case No 4469/2007 at paragraphs 19 and 22

reading the form on which the surety terms were in bold type, did not succeed in raising iustus error as a defence. The Court found (at 543 D-E and 543 F - G) that the fact that a practice such as the requirement of a personal surety when granting credit to a small company was prevalent, would have been present in the mind of the reasonable person in the position of the appellant and would have militated against the necessity of warning parties applying for credit that they would also have to stand personal surety.

[35] In respect of the third leg of the enquiry specified in *Sonap supra*, namely as to whether the plaintiff was misled about the defendant's intention, I note that not an iota of evidence was presented by the defendant on this aspect. There was no evidence that the plaintiff as a reasonable person should have been aware that the defendant did not intend to conclude the suretyship. Accordingly this leg of the enquiry too, cannot be determined in the defendant's favour.

[36] In the light of all of the above the defendant has failed to discharge the onus of proving that he should be released from the suretyship on the basis of *iustus error*. He is accordingly liable for payment in terms of the surety clause. I grant the following order:

1. The defendant shall pay to the plaintiff the sum of R2,450,260.35 together with interest thereon at 25% per annum, with effect from 1 June 2009, such interest to be compounded and capitalised annually on 1 June of each and every year thereafter, until payment of the total amount.

2. The defendant shall bear the costs of the action.

Y S MEER

Judge of the High Court