IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

APPEAL CASE NO : A208/14
CT/CASE NO : 26097/11

In the matter between:

PARYS DEVELOPMENT PROPERTIES (PTY) LTD Appellant

And

URS METZER 1st Defendant

ELEANOR YVONNE FARBER MITCHELL Respondent

HEARD : 15 SEPTEMBER 2015

DELIVERED : 3 DECEMBER 2015

JUDGMENT

Nuku, AJ

[1] This appeal concerns the defence of *iustus error* to appellant's claim based on an agreement of suretyship. Appellant also brought two applications for condonation. The first application is in respect of appellant's non-compliance

with Rule 50 of the Uniform Rules of Court. The second application is in respect of appellant's non-compliance with Rule 51 of the Magistrate's Court Rules. Respondent opposed both applications. Respondent also brought an application to have appellant's appeal struck from the roll and for the dismissal of appellant's application for condonation for its non-compliance with Rule 50 of the Uniform Rules of the Court.

[2] The appeal was initially set down for hearing on 28 August 2015. On 21 August 2015 appellant filed its application for condonation for its non-compliance with Rule 50 of the Uniform Rules. On 26 August 2015, respondent filed its opposing papers to the application. On 28 August 2015, respondent filed an application to strike the appeal from the roll as well as an application to have appellant's application for condonation dismissed. On the same date respondent filed its replying affidavit to the application for condonation. Due to these applications, the matter was postponed to 17 September 2015 and appellant tendered the wasted costs. On 8 September 2015 appellant filed an application for condonation for its non-compliance with Rule 51 of the Rules of the Magistrate's Court read with Rule 50 of the Uniform Rules of Court.

[3] In the court below, respondent denied binding herself as a surety in favour of the appellant. At a pre-trial held by the legal representatives of the parties it was agreed to separate issues on the basis that the hearing would first proceed in respect of the determination of liability (the so called "merits") with the quantum standing over for determination at a later stage. It was also

agreed that respondent had a duty to begin. Respondent testified and also called one witness, David Thomas Crymble. Appellant closed its case without calling any witness. After both parties had closed their respective cases respondent filed a notice of intention to amend its plea and appellant did not object thereto. After the expiry of the prescribed time period within which appellant had to object respondent filed the amended plea. In the amended plea respondent admitted signing the deed of suretyship; alleged that she did not see any surety document and that she was at all times under the impression that she was only signing a lease agreement.

[4] I do not intend to summarise the evidence except as in so far as it is relevant for the determination of this appeal. The respondent testified that: she was a member of Alexia's Catering CC, a close corporation which acquired premises for the purposes of operating a restaurant; she was not involved with the operation of the business and described herself as "*a sleeping partner*"; she was not involved in negotiating the lease for the premises; George Manousakis ("George") was responsible for all the work necessary to set up the restaurant including finding the premises and negotiating the lease for such premises; on the day when the lease was to be signed she received a call from George requesting that they meet at Seaside Village to sign off the lease as all the members of the close corporation had to be there; present also at the meeting was appellant's representative; documents were passed around the table and they were told where to initial and sign; that there is no way that she would have signed the agreement of suretyship if she had known that the document she was signing was an agreement of suretyship;

that she was not aware that she was signing a deed of suretyship and that she was under the impression that she was signing a lease agreement; she saw these documents for the first time at the meeting; she never read the documents; the reason why she did not read these documents is because she was only presented with the documents for signature at the meeting and she had left the matters in the hands of George and first defendant as she trusted them; she only realised that she had signed a deed of suretyship when her attorney drew her attention to it and this was after the proceedings had been instituted against her by appellant; the agreement of suretyship was not brought to her attention at the meeting and that no one explained the need for her to sign the agreement of suretyship.

[5] The question that this appeal raises is whether on the facts, respondent's mistake in signing the agreement of suretyship can excuse her from liability. The other question is whether the appellant's failure to comply with Rule 51 of the Magistrate's Court Rules as well its failure to comply with Rule 50 of the Uniform Rules of Court should be condoned.

[6] Counsel for the respondent submitted, correctly in my view, that it is well-established law that the factors which a Court takes into consideration when considering an application for condonation are:

6.1. The degree of non-compliance;

6.2. The explanation therefore;

6.3. The importance of the case;

6.4. A respondent's interest in the finality of the judgment of the court below;

6.5. The avoidance of unnecessary delay in the administration of justice.

(See ***Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company*** [2013] 2 All SA 251 and referred to with approval in ***Express Model v Dolphin Ridge*** 2015 (6) SA 224 (SCA) at 229B-D)

[7] Counsel for respondent further submitted, also correctly in my view, that the appellant's prospects of appeal are also taken into consideration when considering an application for condonation.

[8] Appellant's non-compliance with the rules can be summarised as follows: appellant failed to file security timeously as required in terms of Rule 51(4) of the Rules of the Magistrate's Court and did so 44 days out of time; appellant failed to timeously file the record and to apply for the assignment of a date for the hearing of appeal as required in Rule 50(4) of the Uniform Rules of Court and did so 71 days out of time; appellant applied for condonation for its non-compliance with Rule 50 only after this issue was raised by respondent in her heads of argument; appellant filed its application for condonation for its non-compliance with Rule 51 after the matter had been postponed on 28 August 2015 and only after this was raised by the respondent.

[9] The degree of non-compliance by appellant is not a matter of being few days out of time. As appears above appellant was 44 days out of time with its filing of security and 77 days out of time with the filing of the record and the

application for the date for the hearing of the appeal. The reasons proffered by appellant's attorney range from the misunderstanding that the documents required to be filed had to have a case number to administrative oversight. In essence, these reasons are nothing but an indication of the slackness on the part of appellant's attorney. There is no doubt that it is in the interest of respondent that the matter is finalised. There is also no doubt that appellant's conduct albeit through its attorneys resulted in the unnecessary delay in the administration of justice. This court also had to be inconvenienced as the matter could not proceed on 28 August 2015.

[10] Appellant's heads of argument did not address the application for condonation at all. During the hearing Counsel for appellant argued that the matter is of great importance to appellant. It was submitted that appellant enters into a number of lease agreements with corporate entities in respect of which it, as a matter of practice, requires the directors or members of those entities to sign agreements of suretyship.

[11] Respondent's counsel submitted that appellant's non-compliance with the Rules was so flagrant and gross that its prospects of success should not even be considered. She further submitted that even if the appellant's prospects are considered, they are poor. Whilst I agree that appellant's non-compliance was flagrant and gross, I am of the view that the merits should be considered as not to do so may at times lead to injustice. In any case the Court exercises a discretion when considering an application for condonation. I now turn to deal with the merits of the appeal.

[12] The issue in this appeal concerns the application of the principles laid down in ***Sonap Petroleum v Pappadogianis*** 1992 (3) SA 234 (A) in instances where a party seeks to avoid liability under a contract on the basis of its unilateral mistake. These principles were stated as follows at page 238I-204B;

"The law, as a general rule, concerns itself with the external manifestations, and not the workings, of the minds of the parties to a contract… 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 the contract has come into being, resort must be had to the reliance theory… This court has, in two judgments delivered on the same day by different constituted Benches, dealt authoritatively with the question of iustus error in the context of a so-called unilateral mistake."

The first part is George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A) at 417B-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 Shreiner JA's statement in ***National and Overseas Distributors Corporation (Pty) Ltd v Potato Board*** *1958 (2) SA 473 (A) at 479 G-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 representation 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.'

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?... 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?... The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?"

[13] In the Court below the magistrate, in dismissing the appellant's claim came to the conclusion that there was no consensus between the parties and as a result appellant could not rely on the agreement of suretyship. Her reasons for coming to this conclusion appear to be based on the following: that the appellant would have been aware that the respondent had not been involved in the negotiations prior to signing the documents; that appellant could not have assumed that the respondent was aware that an agreement of suretyship was amongst the documents when she had to sign; that it would have been appropriate for appellant to point out to respondent what documents were being presented as well as the purpose thereof; and that it is not bona fide to present a lease agreement for signature where the agreement of suretyship is part of it and not to lay it out clearly so that the signatory is not aware of the nature of the document.

[14] The evidence that was not contested is that respondent signed the agreement of suretyship without reading it and that she was under the impression that she was signing a lease agreement. This constitutes her mistake and it can be accepted that the mistake was material and caused *dissensus*. What remains then is the three-fold enquiry as stated in the *Sonap* case referred to above.

[15] As to the first two stages of the enquiry it can also be accepted that respondent, by signing the agreement of suretyship, misrepresented to appellant that she intended to bind herself in favour of appellant for the obligation of Alexia Catering CC.

[16] As to the third stage of the enquiry it can also be accepted that appellant was misled by respondent into believing that she intended to be bound as a surety. What requires more examination is whether a reasonable man would have been misled.

[17] Counsel for appellant submitted that the test whether a reasonable person would have been misled must be answered by applying an objective test based from the appellant's perspective on facts known to a reasonable person in the position of appellant and I am in agreement with the formulation of the test. He further submitted that it is sometimes necessary for a contract assertor to lead evidence in order to assist the court in this objective enquiry: whether a suretyship agreement was reasonably objectively expected or not. Appellant, so argues his counsel, was prevented from presenting such evidence in the court below when its application to re-open its case was refused. Although the appellant argues that the appeal should succeed on this basis, it failed to provide this court with the record dealing with the application for the re-opening of the appellant's case in the court below. As this court does not have the record referred to above, it cannot deal with appellant's protestations. As such the appeal must be dealt with on the basis of the material before this court.

[18] Counsel for respondent submitted that a reasonable man would not have been misled for the following reasons: respondent did not negotiate and was not required to sign the lease agreement; appellant did not negotiate the suretyship agreement with respondent; the first page of the document presented to her on the day for signature was a lease agreement; as an

annexure to the lease agreement, however forming one single document, was a personal suretyship for her to sign; it was the first time she ever saw the document; that she did not read the document before signing it; that it was pointed out to her where to initial and sign; there was no discussions about the document presented for signature; the bundle of documents was bound at the top and the pages were lifted from the bottom upwards causing her not to see the top of the pages.

[19] It is common cause that the appellant drafted the lease agreement and the agreement of suretyship. The evidence of respondent in the court below was that respondent was not involved in the negotiations for the lease agreement. The lease agreement provided for members of the closed corporation to bind themselves as sureties in respect of the obligations of the lessees in terms of the agreement. It is evident that, the respondent, not having been a party to the lease agreement, was neither aware nor informed of this term. On the probabilities this fact was known to the representative/s of appellant who negotiated the lease agreement. The evidence of respondent was also that appellant never negotiated any suretyship agreement with respondent. On the probabilities, this was a fact known to the representative/s of appellant. The representative/s of appellant who was at the meeting when the agreement of suretyship was signed probably knew of the fact that the agreement of suretyship was presented to respondent for the first time at that meeting. The representative/s of appellant must also have observed that the agreement of suretyship was signed by respondent without having read it. Considering the above factors in conjunction with the fact that the agreement of suretyship

was drafted by the appellant, I am of the view that the appellant had a duty to speak and to alert the respondent that she was required to bind herself as surety in respect of the lease agreement prior to her signing the document. The inference is inescapable that the representative/s of appellant was or were aware of respondent's mistake. On these facts it is my view that the reliance by appellant on respondent's signature of the agreement of suretyship as respondent's intention to be bound is unreasonable. A reasonable person who had negotiated neither the agreement of lease nor the agreement of suretyship with respondent would have brought respondent's attention to the agreement of suretyship. In my view there are no prospects of success in appellant's appeal and as such the application for condonation must be refused.

[20] **In the result I propose the following order**

The application for condonation is refused and the appeal is dismissed with costs.

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NUKU, AJ

I agree. It is so ordered.

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GOLIATH, J