

FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ no: 50

PARTIES: **ABSA BANK LIMITED** **APPLICANT**

AND

T I VERMAAK TRUST **1ST RESPONDENT**

SANET VERMAAK **2ND RESPONDENT**

JOHANNES JACOBUS BLIGNAUT **3RD RESPONDENT**

ANDRIES DU TOIT VERMAAK **4TH RESPONDENT**

REFERENCE NUMBERS -

- Registrar: **CA151/2006**
- Magistrate:
- Supreme Court of Appeal/Constitutional Court:

DATE HEARD: **3/11/06**

DATE DELIVERED: **3/11/06**

JUDGE(S): **C. PLASKET**

LEGAL REPRESENTATIVES -
Appearances

:

- for the State/Applicant(s)/Appellant(s):
- for the accused/respondent(s):

Instructing attorneys:

- Applicant(s)/Appellant(s):
- Respondent(s):

CASE INFORMATION -

- *Nature of proceedings* : Civil Appeal

- *Topic:*

- *Keywords:*

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)**

CASE NO: CA151/2006

DATE HEARD: 3/11/06

DATE DELIVERED: 3/11/06

NOT REPORTABLE

In the matter between:

ABSA BANK LIMITED

APPELLANT

and

T I VERMAAK TRUST

1ST RESPONDENT

SANET VERMAAK

2ND RESPONDENT

JOHANNES JACOBUS BLIGNAUT

3RD RESPONDENT

ANDRIES DU TOIT VERMAAK

4TH RESPONDENT

JUDGMENT

PLASKET J

[1] The respondent was sued in the court below in respect of an unlimited suretyship in respect of moneys lent to a business trust run by his late son.

The issue for determination was whether the respondent had concluded a valid deed of suretyship duly consented to by his wife to whom he was married in community of property.

[2] The basis of the respondent's defence was that, although he admitted that he signed the deed of suretyship and knew that he was signing a deed of suretyship, he thought he was committing himself as surety to a maximum of R50 000.00 only, that the document was not complete, there being blank spaces that were only later filled in by hand, that the terms were not explained to him and that, had he known that he was being required to commit himself as surety, for an unlimited amount, he never would have signed.

[3] His wife testified that when she signed the consent, it too was in blank and the details were inserted by hand at a later stage. She too would not have consented had she known the true state of affairs.

[4] The magistrate, in his judgment, held that the onus rested on the appellant, as plaintiff in the court below, to establish that the respondent, as defendant, was under no misapprehension about what he was signing. After considering the evidence, the magistrate was of the view that 'the scales are evenly balanced' and that therefore the respondent succeeded because the appellant had failed to discharge the onus resting on it.

[5] Whether the magistrate was correct in this respect is the central issue in this appeal. The respondent has not opposed the appellant's appeal.

[6] In my view of the evidence, the magistrate was overly generous to the respondent in holding that the scales were evenly balanced. Not only were the respondent and his wife poor witnesses, but the probabilities were heavily stacked against their version. For present purposes, however, I shall,

nonetheless proceed on the assumption, in favour of the respondent, that the scales were evenly balanced and that the onus is determinative of the result.

[7] The only issue that then needs to be addressed is whether the onus was on the appellant, as the magistrate found, or on the respondent, as the appellant contends. That, in turn, concerns whether the magistrate's reliance on *Brink v Humphries and Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) on the incidence of the onus in a case such as this was correct.

[8] I do not find in this judgment any indication that the onus rests on the party seeking to enforce the terms of a written contract, signed but not read by the other party, to establish that the latter was not misled in a way that constitutes a defence, or that no other defence is available. Indeed, the tenor of the judgment, which does not deal directly with the onus at all, is to the opposite effect.

[9] In any event, such an approach would run counter to the general principle that the party who alleges a fact bears the onus of proving it. See *Pillay v Krishna* 1946 AD 946 at 951-952. The magistrate erred, therefore, in deciding that the onus rested on the appellant. It rested on the respondent and if the scales were evenly balanced, he would not have succeeded in discharging the onus. The appeal must consequently succeed.

[10] That aside, however, there is further basis for concluding that the magistrate erred. It lies in a simple application of the *caveat subscriptor* rule. The respondent was aware that he was signing a deed of suretyship. The document stated prominently at the top and very close to where he initialled the revenue stamps that it was for an unlimited amount. On his version, there were certain blank spaces which were later filled in by the appellant's officials. The information thus filled in did not contain any contractual terms. They

contained details such as the identity of the debtor and the respondent's details.

[11] In these circumstances, and in the absence of terms one would not have expected to find in a deed of suretyship -- see *Brink v Humphries and Jewell (Pty) Ltd supra* -- the respondent was bound by the terms to which he appended his signature, even though he never read the document (*National and Grindley's Bank Ltd v Yelverton* 1972 (4) SA 114 (R)). On these facts, all of which were common cause, none of the recognised defences are established.

[12] Before turning to the order that must be made, it is necessary to deal with the costs of the appeal. The respondent did not oppose the appeal. He also did not abandon the judgment in his favour if he realized that he could not defend it. In these circumstances, the appellant had no choice but to proceed to have that judgment set aside on appeal. I see no reason why the respondent should not pay the appellant's cost of appeal. See *Louhen Financial Services v Van Der Merwe* ECD (Case no. CA17/03) unreported, para 16.

[13] The following order is made:

(a) The appeal succeeds, with costs, and the judgment of the court below is set aside.

(b) The order made in the court below is replaced with the following order:

'Judgment is granted against the fourth defendant, jointly and severally with the first, second and third defendants for:

(i) payment of the sum of R185 642.75;

- (ii) interest thereon at the rate of 15.5 percent per annum as from
16 May 2000 to date of payment, both dates inclusive;
- (iii) costs of suit.

C. PLASKET

JUDGE OF THE HIGH COURT

I agree.

B. SANDI

JUDGE OF THE HIGH COURT