IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, PORT ELIZABETH

Case No.: 3916/2015

Date Heard: 6&7 February 2018

Date Delivered: 13 February 2018

In the matter between:

BEACON LIGHTING (PTY) LIMITED Plaintiff

and

INFRA-MEG (PTY) LIMITED First Defendant

ANDRé MARAIS Second Defendant

JUDGMENT

EKSTEEN J:

[1] The plaintiff issued summons against the first defendant for payment of the amount of R1 306 865,23 in respect of goods sold and delivered. It is alleged that second defendant, a director of the first defendant, is liable, jointly and severally with the first defendant, for payment of the aforestated amount as surety and co-principal debtor. At the trial the first defendant admitted its liability to the plaintiff and the parties agreed that the quantum of the plaintiff's claim as against the first defendant amounts to R1 139 696,00. What remains in issue is the liability of the second defendant.

[2] The dispute arises from the completion of a credit application form completed on 11 July 2014 at Port Elizabeth which purports to embody a personal suretyship by

the directors of the first defendant. The second defendant denies that he bound himself as surety and co-principal debtor in respect of the debt of the first defendant.

[3] It is common cause that the first defendant carried on the business of civil and general construction in Port Elizabeth. The first defendant had secured a sub-contract in respect of the supply and installation of streetlight facilities in John Tallant Road (the John Tallant Road project) in Port Elizabeth. The plaintiff is a supplier of lighting and related materials. The first defendant wished to obtain materials from the plaintiff in order to perform its obligations under the contract. In order to do so it was required to open an account and to submit an application for credit.

[4] A pro forma application form was provided to the second defendant for completion. The information required on the form was completed by the second defendant's wife, Natasha Marais (Natasha) for signature by the second defendant. For reasons which are not apparent from the evidence there appears to have been some delay in the signature of the document. In the interim, materials ordered by the first defendant and required for the John Tallant Road project were invoiced to Mega-Arc CC (Mega-Arc) a close corporation of which the second defendant was the sole member. This was done as Mega-Arc already had an account with the plaintiff.

[5] Natasha is employed as a senior accounting clerk in a large firm of accountants and she was charged with the bookkeeping of both Mega-Arc and the first defendant. Upon receipt of the invoice reflecting the materials required for the John Tallant Road project on the account of Mega-Arc she requested that a credit

note be issued to Mega-Arc and that the materials be invoiced to the first defendant. In order to achieve this an account had to first be opened in the books of the plaintiff for the first defendant. The plaintiff was unwilling to open an account for the first defendant unless and until a signed credit application was submitted and approved. In these circumstances, whereas the second defendant was not immediately available, Natasha signed the credit application form in his stead and forwarded same to the plaintiff. The application was approved and an account was duly opened. For an extended period thereafter during the performance of the John Tallant Road project materials were supplied to the first defendant. For reasons which are not material to the present judgment the first defendant was unable to meet its obligations to the plaintiff, hence the summons.

[6] It is not in dispute that the plaintiff bears the onus to establish its contract of suretyship and the terms thereof. It is therefore necessary to have regard to the written document. The application appears on a single page printed on both sides. At the top of the page is a prominent heading “CREDIT APPLICATION FORM” in large bold print. The remainder of the first page reflects the particulars of the first defendant completed in the hand of Natasha. At the foot of the page the following appears:

> “I, the undersigned, acting on behalf of the DEBTOR and being duly authorised thereto, do hereby warrant that the above information is true and correct and further, do hereby accept and agree to the conditions as set out on the reverse hereof which conditions I acknowledge having read and understood.
>
> Signature: pp Natasha Marais Full Name: André Marais
> Capacity in which signed: Director Date: 2014/07/11”

[7] On the reverse side of the page the heading “B EACON LIGHTING (PTY) LIMITED CONDITIONS FOR CREDIT” appears in large bold letters. Immediately below that the words “please sign this page” are reflected in bold letters of slightly smaller print. Thereafter the document reflects 20 paragraphs in small print. Of significance are paragraphs 19 and 20 which record:

> “19. The conditions set out above are the only conditions applicable and no other terms, conditions or representations shall be of any effect whether made prior to or subsequent to the date of the order unless confirmed by the CREDITOR in writing.
>
> 20. If the DEBTOR is a Close Corporation or Company, the Members or Directors bind themselves as sureties and co-principal DEBTORS for any debt and or liabilities incurred by the DEBTOR.”

[8] The second defendant admits that the application form was signed by Natasha on his behalf. He contends, however, that she was authorised only to sign the credit application on his behalf as signatory for the first defendant and that she did not have authority to bind him personally as surety and co-principal debtor. He contends further and in any event, that Natasha was unaware that the document contained a suretyship provision as the document is headed “Conditions for credit” and no reference is made on the face of the document to any suretyship nor was her attention drawn to such a provision contained in the small print on the revere side of the document. His evidence in this regard finds support in Natasha’s testimony.

[9] Three issues arise. Firstly, whether, on the proper interpretation of the document, the second defendant was bound as surety and co-principal debtor to the plaintiff. Secondly, in the event that I find for the plaintiff on the first issue, whether Natasha, in signing the document on behalf of the second defendant, was authorised to bind the second defendant as surety to the plaintiff in respect of the debts of the first defendant. Thirdly, in the event of my finding for the plaintiff in respect of both the first and the second issues, whether the second defendant is excused from the consequences of the suretyship by virtue of a unilateral error on the part of Natasha at the time of signature thereof.

[10] The first issue relates purely to the interpretation of the contract. There has been some development in the law relating to the interpretation of documents in recent years, however, the current position was authoritatively summarised in **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) in para [18] where Wallis JA stated:

> "[18] Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what

> they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[11] Save that the document was prepared by the plaintiff for purposes of the adjudication of credit applications little is known as to the preparation and production of the document. The application appears, however, as alluded to earlier, under the bold heading "CREDIT APPLICATION FORM" and the undisputed evidence is that the signature of the form was required before an account could be opened for the first defendant. The reverse side of the document reflects the terms and conditions which would apply to the agreement between the parties. On the face of it the apparent purpose of the document is to assess the creditworthiness of the first defendant and to regulate the contractual terms which would find application to the credit agreement.

[12] I have quoted the declaration at the foot of the first page of the application which is signed by Natasha. It records, unequivocally that the "undersigned" is acting on behalf of the "debtor" being duly authorised thereto. The debtor, it is common cause, is the first defendant. There is no indication in the language of the document that the signatory, irrespective of the identity of the signatory, acts in his personal capacity so as to bind himself as surety. In considering the language used in these provisions in the light of the ordinary rules of grammar and syntax in the context in which it appears together with the declared intention of the document as

reflected in the heading thereto I conclude, as a matter of interpretation, that the document clearly and unambiguously declares that the signatory is acting only on behalf of the first defendant.

[13] Moreover, the document proceeds to record that the signatory undertakes to "accept and agree to the conditions as set on the reverse" of the document which conditions she acknowledged having read and understood. The signatory does not purport to agree to any other undertaking. This undertaking must, in accordance with the ordinary rules of interpretation, be read in the context of the document itself. The content of paragraph 19 on the reverse is set out earlier herein. Accordingly what the signatory has accepted and agreed to are the conditions set out in paragraph 1 to 18 on the reverse. Paragraph 20 on the express provisions of paragraph 19, does not constitute part of the conditions which the signatory accepted and agreed to. In the circumstances, as a matter of interpretation, I do not consider that the document purports to bind the second defendant to the plaintiff as a surety for the liabilities of the first defendant. On this ground alone the action must fail.

[14] In the event that I err in the conclusion to which I have come in respect of the interpretation of the document and on the assumption that it may be found that the document does purport to bind the second defendant as surety it is necessary to consider the authority of Natasha to have bound the second defendant as surety and co-principal debtor. This is a purely factual enquiry. The plaintiff acknowledges, correctly, that it bears the onus of proving the authority of Natasha to bind the second defendant as a surety and co-principal debtor. The only evidence upon which

the plaintiff relies for this contention is the document itself and the passage which I have referred to earlier. It is not in dispute that Natasha signed the document with the letters “pp” alongside her signature and that the name of the signatory is reflected as “André Marais” in his capacity as director of the first defendant. While her evidence casts some doubt on her understanding of the abbreviation “pp” Natasha acknowledges that she signed the document on behalf of second defendant. This she did without recourse to him as he had authority to represent the first defendant. The evidence of both the second defendant and Natasha was that they had not discussed the issue of suretyship prior to her signing the documentation and she was not authorised to bind him as surety. Her evidence, to which I shall revert in greater detail below, is that she was unaware of the fact that the document even contained a suretyship clause and that she had not read the reverse side of the document prior to signature. Her objective, as revealed in the evidence, was to submit an application for credit facilities in order to facilitate the opening of an account in the name of the first defendant.

[15] Natasha testified that it was her understanding that the application form which she signed and upon which the plaintiff relies was merely an interim measure and that the second defendant would be required to sign an application for credit himself and deliver the original thereof to the plaintiff which would then supersede the document which she had signed. This, the second defendant states that he did on 14 July 2014. A copy of the latter document is annexed to the second defendant’s plea. Significantly on this copy paragraph 20 on the reverse side of the document (the alleged suretyship) was deleted and initialled by the second defendant. Second defendant says that he delivered this application form to the plaintiff, either to Mrs

Spriggs or to one Dwayne, a sales representative of the plaintiff, shortly after signature and probably on the same day. He cannot, however, recall with any certainty to whom he handed the document. Mrs Spriggs, who was the office manager of the plaintiff, denies that she received such a document. She cannot, however, dispute that the document was delivered on 14 July 2014 to someone in the office. The only significance of this document to the present enquiry is that it does exhibit a reluctance on the part of the second defendant at the time to bind himself as surety. This reluctance Natasha confirms and I think that it enhances the probability that the second defendant did not authorise Natasha to bind him as personal surety.

[16] Natasha made a favourable impression as a witness and her evidence in this regard was untainted by cross-examination. I have no reason to doubt the integrity of her evidence on this issue and in view of the form of the document and the events of 14 July 2014, which are set out earlier, I do not find her evidence to be improbable. In the circumstances the plaintiff has failed to establish the authority of Natasha to bind the second defendant personally as a surety. On this ground too the action must fail.

[17] In the event that I err in both of the aforegoing respects and on the assumption that both these issues ought to have been decided in the plaintiff's favour there remains the issue of the alleged unilateral error. In **Tesoriero v Bhyjo Investments Shareblock (Pty) Ltd** 2000 (1) SA 167 (W) at 175F-H Wunsh J considered the circumstances in which a mistake or *justus error* would provide a defence for a surety and concluded:

> "The general principle, where a person has signed a contract and wishes to escape liability on the ground of justified error as to the nature or contents of the document, is that he or she must show that he or she was misled as to the nature of the document or as to the terms which it contains by some act or omission (where there was a duty to inform) of the other contracting party. The misrepresentation need not have been fraudulent or negligent. The duty to inform would or could arise where the document departs from what was represented, said or agreed beforehand or where the other contracting party realises or should realise that the signatory is under a misapprehension or where the existence of the provision or the contract is hidden or not apparent by reason of the way in which it is incorporated in a document or where the provision, not clearly presented, is unusual or would not normally be found in the contract presented for signature."

(See also **George v Fairmead (Pty) Ltd** 1958 (2) SA 465 (A) at 472A-B; **Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd** 1986 (1) SA 303 (A).)

[18] Natasha's ignorance of the suretyship clause would therefore not, of itself, excuse the second defendant from the consequences of the agreement. The second defendant bears an onus to establish that Natasha was misled as to the nature of the document and the terms thereof through the misrepresentation on the part of the plaintiff as to the nature of the document and the terms thereof. If the misrepresentation which led to her error is material he may be entitled to rescind the contract provided that he is able to show that she would not have signed the document had she known the truth (see **Brink v Humphries and Jewell (Pty) Ltd** 2005 (2) SA 419 (SCA) at 421G). Even that is, however, not enough. The question must still be asked: would a reasonable man have been misled? If so the error would be *"justus"*.

[19] Natasha testified that prior to the completion of the forms she had communication with Mrs Spriggs. Mrs Spriggs advised that an account could not be opened until the application for credit had been made and only when that had occurred could goods ordered be invoiced to the first defendant. I do not understand the evidence of Mrs Spriggs to place this evidence in dispute. It was Natasha's understanding flowing from these communications that it was an administrative requirement to provide the particulars of the first defendant and trade references in order to assess the creditworthiness of the first defendant. It was her further understanding from the interaction with Mrs Spriggs that the document which she completed was intended merely for administrative purposes to enable the opening of the account in the interim whilst awaiting the original application for credit bearing the signature of the second defendant. She submitted the application for credit under the cover of an email sent to Mrs Spriggs recording as follows:

> "Hi Dawn
> Sorry to only send this to you now. I'm still waiting for André to give me his signed copy. I have signed on his behalf in the meantime, for you to be able to open the account. I will send you the one with his signature next week.
>
> Will this be ok in the meantime?"

[20] This was followed by an email from Mrs Spriggs an hour later recording:

> "That will be in order. Please I need the original back. If it can be dropped off at our offices next week some time."

[21] There was much debate at the Bar as to the meaning of these emails. Suffice it to say that there was dissensus between Natasha and Mrs Spriggs as to their respective understandings. Whatever Mrs Spriggs may have intended by the term "original" the covering email which accompanied the submission of the application signed by Natasha lends support to her understanding and lends credence to the second defendant's evidence in respect of the return of the further application for credit signed by himself. In all the circumstances I think that the second defendant has established that Natasha was misled in respect of the nature and the terms of the document. Her evidence that it was never suggested to her that the document contained an undertaking on behalf of the second appellant to be bound as a surety and co-principal debtor accords with the probabilities.

[22] The prominent headings on each side of the page are not suggestive of any suretyship contained in the credit application. The declaration appearing immediately above the signature creates the impression that the signature is intended only to bind the debtor. The alleged suretyship clause is disguised on the reverse side of the document along with the conditions for credit, although it is not such a condition. It is afforded no prominence in the form and is not separated from the terms of credit. In these circumstances there was indeed a duty on the plaintiff, or its representatives, to inform the signatory that signature of the document would bind the directors of the first defendant as sureties for the debts of the first defendant. This was not done. I therefore find that Natasha was misled as to the nature of the document by the omission to inform her of the nature of the document and of the specific suretyship clause in circumstances where a duty had arisen to alert her to this provision.

[23] The second defendant, supported by Natasha, testified that she, employed as she is, by a firm of accountants, had repeatedly advised him never to bind himself as a surety. This accords with his deletion of the suretyship clause contained in the document which he completed and delivered on 14 July 2014. Natasha's evidence that she would not have signed the document had she known that it purported to bind the second defendant as a surety and co-principal debtor accords with the probabilities. She acknowledged under cross-examination that she is acquainted with suretyships and understood that suretyships were often sought where credit was extended to juristic persons. She conceded that this custom made good business sense. I do not, however, consider that this evidence is destructive of her assertion that she would have declined to sign the document had she known of the implication.

[24] Finally, the question arises whether the reasonable man would have been misled into believing that the document did not bind the second defendant as a surety. For the reasons set out in paragraph 22 above I think that this question must be answered in the affirmative. The form which was presented to Natasha for completion and signature was a trap for the unwary and she was justifiably misled (compare **Brink v Humphries and Jewell** *supra* 425D-426C).

[25] In these circumstances I have come to the conclusion that the second defendant has established a unilateral error in the signature of the agreement which entitles him to rescind the contract. For this reason too the action must fail.

[26] The terms of credit which was granted to the first defendant provides expressly for an order for costs on a scale as between attorney and client against the first defendant where the plaintiff is required to litigate in order to recover money due to it. Plaintiff is therefore entitled to such costs.

[27] In the result:

1. There will be judgment for the plaintiff against the first defendant for:
   (a) Payment of the amount of R1 139 696,00;
   (b) interest on the amount of R1 139 696,00 calculated at the legal rate from the date of demand to the date of payment; and
   (c) costs of the suit on a scale as between attorney and client.

2. The plaintiff's claims against the second defendant are dismissed with costs.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv Gajjar instructed by Goldberg & De Villiers, Port Elizabeth

For Defendant: Adv Mullins SC instructed by Lawrence Masiza Vorster Inc, Port Elizabeth