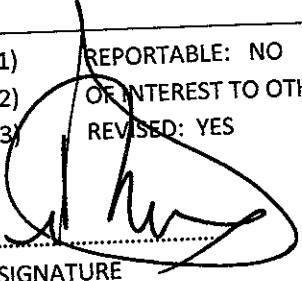




OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION, MIDDELBURG
(LOCAL SEAT)**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
	
SIGNATURE	DATE
	18/6/19

CASE NO: 3759/2018

In the matter between:

STANDARD BANK OF SOUTH AFRICA LTD

APPELLANT

and

AMORICOL (PTY) LTD

FIRST RESPONDENT

JANUARY JOSEPH MABENA

SECOND RESPONDENT

JUSTIN TRIGOL

THIRD RESPONDENT

JOHN GEORGE SIEBERT SCROOBY N.O

AND

VINCENT BASIL SCROOBY N.O

FOURTH RESPONDENTS

JUDGMENT

BRAUCKMANN AJ

INTRODUCTION

- [1] This is an application for monetary judgment against the First, Second and Fourth Respondents jointly and severally, the one to pay the other to be absolved.
- [2] This court, on 7 May 2019, already granted judgment against the Third Respondent as prayed for in the Notice of Motion.
- [3] The First, Second and Fourth Respondents (the Respondents) opposes the application for monetary judgment.

THE DEFENCES



[4] The Respondents raise three defences:

[4.1] The first defence raised is one of jurisdiction in that it states that due to the fact that some of the Respondents are not residing, or doing business within the jurisdiction of this court this court does not have jurisdiction to entertain the matter. At the hearing, the Respondents' counsel, Mr Steyn, correctly so, abandoned this defence;

[4.2] The second defence is a defence raised by the Second Respondent (Mr Mabena). I will refer to this defence as the "Mabena defence". Mr Mabena states that at the time he signed the suretyship¹ he was not aware of the fact that he signed a suretyship and the consequences of signing a suretyship was not explained to him. He alleges that English is not his first language and he did not know that he was signing a suretyship;

[4.3] The third defence raised by the Respondents is the quantification of the amount due to the Applicant. Correctly so, this defence was also abandoned at court by Mr Steyn.

¹ Bundle, Page 206



APPLICANT'S CASE

- [5] Applicant's case is that the Respondents are indebted various amounts after the conclusion of various finance agreements with B & S Material Handling (Pty) Ltd as principal debtor. The Applicant, to secure the indebtedness, obtained over a period a series of suretyships and a guarantee. The present application seeks judgment against three sureties and a guarantor each limited to the maximum amount of recoverable under the respective suretyships and guarantee. As the principal indebtedness owing by BSMH significantly exceeds the limit of each suretyship and a guarantee, judgment is sought against the Respondents only to the respective limits of each suretyship and a guarantee.

DISCUSSION

- [7] The following seems to be common cause:

[7.1] That over a period of August 2015 to March 2017 and arising from the credit facilities to BSMH various amounts were forwarded to the said creditor;



[7.2.] The credit agreements consisted of:

[7.2.1] A factoring agreement;

[7.2.2] A vehicle and asset finance credit facility;

[7.2.3] A revolving credit plan agreement;

[7.2.4] An overdraft on a business current account.

- [8] The only serious defence raised by the Respondents was the Mabena defence. As stated *supra*, the balance of the defences were correctly abandoned by Mr Steyn on behalf of the Respondents.
- [9] The suretyship that Mr Mabena allege he signed without being aware that it is a suretyship, or without being made aware of the consequences of him signing a suretyship, is an annexure to the bundle.² On the first page of the suretyship the word "surety" or "suretyship" appears at least

² Bundle, page 206, FA36



14 times. I did not count the use of the said word or words alone or in any combination in the balance of the suretyship.

[10] The Second Defendant then state in a confirmatory affidavit, annexed to the opposing affidavit,³ that:

"6. It was never a common intention between the applicant and me that I would bind myself as surety and co-principal debtor in favour of BSMH.

7. English is not my first language and I am more comfortable in Afrikaans than English as a second language.

8. When I signed the suretyship at the applicant's office, nobody from the applicant explained the terms of the suretyship, or in fact that it was a suretyship.

9. I never knew that if the company was liable for debts and could not pay the debts, that I would be held liable.

³ Bundle, page 299, paragraph 6 to 11



10. It was only during consultation with my legal representatives for the purposes of an affidavit filed in proceedings that have since been withdrawn, that I realised the effect of the suretyship.

11. Although this affidavit is drafted in English, I confirm that the contents have been fully explained to me."

[11] To this the Respondents replies as follows:

"13. AD PARAGRAPHS 6 TO 11

13.1 I dispute these allegations.

13.2 The second respondent signed the document on 11 November 2013 at the applicant's branch at corner OR Tambo and Mandela Drives, Witbank.⁴ The document was signed in the following circumstances, as described by Clement Mawele, the facts of which fall within his personal knowledge:

⁴ Bundle, page 213

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13.2.1 Mawele was the account executive at the Witbank branch at the time responsible for the BSMH portfolio of credit facilities. Mawele left the employ of the applicant during September 2015;

13.2.2 Mawele was responsible, as account executive, to arrange for the signature of the suretyship by each of the three sureties.

13.2.3 The third respondent and Grant Steytler were able to attend at the applicant's branch to sign the document, and did so and signed the document (as appears from indexed pages 211 and 214);

13.2.4 The second respondent was not available to accompany them but the third respondent and Grant Steytler informed Mawele that they would explain to the second respondent that he needed to sign the document and that they would ask the second respondent to telephone Mawele to make the necessary arrangements;

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13.2.5 The second respondent telephoned Mawele, and made arrangements to attend upon Mawele at the Witbank branch to sign the document;

13.2.6 The second respondent, together with his wife, EE Merriam Mashiane, to whom he is married in community of property, attended upon Mawele, as arranged;

13.2.7 Mawele explained to the second respondent, in the presence of his wife, the requirement of the suretyship and its import, namely that the sureties, including the second respondent, would be personally responsible for the debts of BSMH if they signed the document and BSMH defaulted, and informed them that they were entitled to seek independent legal advice;

13.2.8 The second respondent and his wife informed Mawele that they understood and both signed the suretyship, as appears from indexed pages 212 and 213),

A handwritten signature in black ink, consisting of a stylized, cursive letter 'D' or 'P' with a loop at the end.

13.2.9 Although neither second respondent nor his wife gave any indication that they did not understand English, Mawele spoke predominantly Zulu to the second respondent, both in arranging signature of the document and then later in explaining the document. All were fully conversant in Zulu.

13.3 I annex a confirmatory affidavit by Mawele as "RA2".

13.4 The document is clearly headed a suretyship and is confined to suretyship with multiple references throughout, including in bold typeface and in headings to the fact that the document is a suretyship

13.5. The second respondent has been a director of BSMH since its inception in 1998. BSMH had assets worth tens of millions of rands, rendering services for tens of millions of rands and was a large company.

13.6 Moreover, as appears from a current Companies and Intellectual Property Commission Certificate ("CIPC"), the second respondent is presently an active director of no less

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than fourteen different entities, excluding BSMH. It is improbable that the second respondent did not understand English in light of his directorship at various, long-standing entities. | annex a copy of the relevant CIPC report as "RA3".

13.7 It is in any event improbable that the second respondent as a director if did not understand English or appreciate the nature of the suretyship.

13.8. Even if the second respondent did not have an intention to conclude the I suretyship (which is denied), he cannot rely thereon as the applicant was unaware of such lack of intention and the second respondent lead the applicant to reasonably believe that the second respondent was agreeing to be bound in terms of the suretyship."

[12] The Applicant dealt fully with the allegations by the Second Respondent that he never intended to sign a suretyship, and that he was not aware of the contents and the affects of the suretyship.

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[13] Second Respondent never sought permission from the court to file an additional affidavit dealing with the allegations contained in the Applicant's replying affidavit. As such the explanation by the Applicant's employee, Mr Clement Mawele, must be accepted as true.

[14] The assertion by the Second Respondent that he did not intend binding himself personally liable for the debts of BSMH can be rejected as far-fetched and fanciful.⁵ Once the Second Respondent's version is rejected, there are no competing factual versions and accordingly there is neither scope, nor a need to apply the Plascon-Evans Rule to resolve any dispute of fact on motion proceedings.⁶

[15] I reject the Third Respondent's version as far-fetched and fanciful for the following reasons:

[15.1] The explanation contained in the opposing Affidavit by him is very terse in facts. From reading of the affidavit one cannot get all the facts to infer that he never intended to sign a surety or that it was not explained to him. In contrast, the Applicant's version through

⁵ Truth and Verification Testing Centre v. PSE Truth Detection CC & Others 1998 (2) SA 689 (W) at 698 I to J

⁶ Plascon-Evans Paints v. Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A); and
National Director of Public Prosecution v. Zuma (Mbeki & Other Intervening) 2009 (2) SA 279 (SCA),
paragraph 26

the evidence of Clement Mawele, the account executive with personal knowledge, is very detailed.⁷

[16] The version that the Second Respondent did not know that he was signing a document that rendered him liable is improbable which result in his version be wholly untenable. He does not say that he does not understand English, but only that English is his second language. He states he is further more comfortable in Afrikaans, but the uncontested evidence by Mawele is that they conversed in Zulu, which is the Second Respondent's home language.⁸

[17] The document (suretyship) is clearly headed "Suretyship" and is confined to a suretyship with multiple references as indicated earlier.⁹

[18] The Respondent was a director of BSMH since its inception thereof in 1998, and a company that had assets with millions of rands rendering services to the same effect.¹⁰

⁷ Replying Affidavit, paragraph 13 at page 316 to 319

⁸ Replying Affidavit, paragraph 13.2.9 at page 318

⁹ **Roomer v. Wedge Steel (Pty) Ltd** 1998 (1) SA 538 (N) at page 541 and 543

¹⁰ Replying Affidavit, paragraph 13.5 at page 318



[19] The Second Respondent is also a director of no less than 14 different legal entities and is hardly likely not to appreciate that he is signing a document that could render him personally liable.¹¹

[20] His wife, to whom he is married in community of property, also signed the suretyship. His wife is hardly likely not to have asked him why she is signing what she is signing prior to signature thereof. They both attended upon Mr Mawele at the bank specifically to sign the suretyship.¹²

[21] For the reasons stated above I reject the Second Respondent's version and therefore his defence as untenable and wholly fanciful.

[22] Even if I am incorrect in rejecting his evidence, the Second Respondent's version fails to disclose a defence. It is difficult to distil what his defence is from his version, even if accepted that he did not intend signing a suretyship. A statement that he did not intend signing a document that rendered him personally liable does not constitute a defence as is apparent from the *caveat subscriptor* rule,¹³ the basis of the *caveat subscriptor* rule is the doctrine of quasi-mutual assent.

¹¹ Replying Affidavit, paragraph 13.6 at page 318 and Report RA3 at page 324

¹² Replying Affidavit, paragraphs 13.2.3 to 13.2.5 at pages 316, 317

¹³ **Brink v. Humphries & Jewell (Pty) Ltd.** 2005 (2) SA 419 (SCA) at paragraph 2,

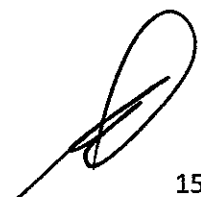
[23] Any error that the Second Respondent made in signing a document that he did not intend binding himself with cannot avail him as a defence unless the error *justus*. No facts are alleged to support his defence of *justus error*.

[24] Second Respondent does not state that he was misled into signing the document by either misrepresentations by the Applicant's representative or by the document itself. Where a suretyship is contained in a separate document with brief and simple wording and the surety (Second Respondent) makes no enquiries and the creditor did not foster a mistake, the surety shall be held liable.¹⁴ The Second Respondent further does not state that the bank was aware that he was labouring under the misimpression or that he was signing a blank document and that the bank remained silent.¹⁵

[25] In any event the Applicant is entitled to rely on the doctrine of quasi-mutual assent and to hold the Second Respondent liable on the document that led the bank to reasonably believe that he was agreeing to: by the signing of the suretyship without qualification, he represented to the bank that he had the intention to be bound by its contents. The

¹⁴ Tesoriero v. Bhyjo Investment Share Block (Pty) Ltd. 2000 (1) SA 167 (W)

¹⁵ Prince v. ABSA Bank Ltd. 1998 (3) SA 904 (C)



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Applicant acted on those representations and extended credit under facility agreements.¹⁶

[26] I accordingly reject the Second Respondent's defence and it is clear that no factual disputes and issues arose or was raised by the Second Respondent or any other Respondent for that matter in this application.

[27] Respondents challenge the indebtedness, but not seriously. The Applicant annexes to its founding affidavit, amongst others, certificates of balance.¹⁷ One of the concerns raised by Mr Steyn on behalf of the Respondent, was that the judgment sought by the Applicant exceeds the amount as set out in the Applicant's application. I do not agree with the contention.

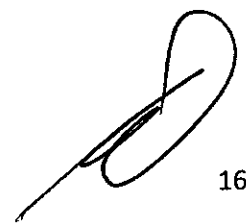
[28] In the application itself it appears that the indebtedness will be limited to R 43 316 633.98 together with interest as agreed.¹⁸

[29] Having regard to the above the following order is made:

¹⁶ **Roomer v. Wedge Steel** *supra* at 541 H-J and 543 B-C

¹⁷ Bundle, Pages 243 to 246

¹⁸ Bundle, Page 3



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[29.1] Judgement is granted against the First Respondent for:

[29.1.1] R 21 700 000.00;

[29.1.2] Interest on R 21 700 000.00 at the prescribed rate of interest at 10.25% per annum from 20 October 2017 to date of final payment;

[29.1.3] Costs of suit.

[29.2] Judgment is granted against the Second Respondent for:

[29.2.1] R 8 091 000.00;

[29.2.2] Interest on R 8 091 000.00 at the prescribed rate of interest at 10.25% per annum from 20 October 2017 to date of final payment;

[29.2.3] Costs of suit.

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[29.3] Judgment is granted against the Fourth Respondents in their capacities as the trustees for the Teal and Red Trust for:

[29.3.1] R 17 500 000.00;

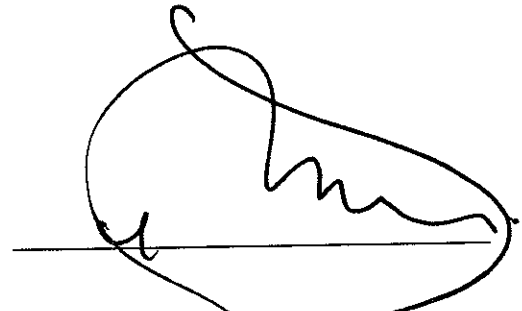
[29.3.2] Interest on R17 500 000.00 at the prescribed rate of interest at 10% per annum from 6 September 2018 to date of final payment;

[29.3.3] Costs of suit;

[29.4] The judgments granted in respect of sub- paragraphs 29.1., 29.2. and 29.3 above are joint and several as between the First, Second and Fourth Respondents and are also joint and several with any judgment that has or may be granted against any other surety in respect of the indebtedness owing by B & S Material Handling (Pty) Limited to the Applicant, including as against the Third Respondent;

[29.5] The total amount recoverable by the applicant under sub- paragraphs 29.1, 29.2 and 29.3. above and under any other judgment that has or may be granted against any other sureties

in respect of the indebtedness owing by B & S Material Handling (Pty) limited to the Applicant shall not exceed R 43 316 633.98, together with interest thereon at the prescribed rate of interest at 10.25% per annum, calculated daily and compounded monthly in arrears from 25 January 2018 to date of final payment.



HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

REPRESENTATIVE FOR THE APPELLANT: Advocate BM Gilbert

INSTRUCTED BY: Werkmans Attorneys
c/o Birmans Inc

REPRESENTATIVE FOR THE RESPONDENTS: Advocate BH Steyn

INSTRUCTED BY: Schoeman Esterhuizen Attorneys
c/o Kruger & Bekker Attorneys

DATE OF HEARING: 10 June 2019

DATE OF JUDGMENT: 19 JUNE 2019