**IN THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN CAPE DIVISION – GRAHAMSTOWN)**

**Case no. 26/14**

**Date heard: 12/6/14**

**Date delivered: 13/6/14**

**Not reportable**

**In the matter between:**

**ABSA Bank Ltd Applicant**

**and**

**Glenn Leander McCreath Respondent**

**Application for summary judgment – whether *bona fide* defence disclosed by respondent – *caveat subscriptor* rule – leave to defend granted.**

**JUDGMENT**

**PLASKET J**

[1] This is an opposed application for summary judgment arising from an action in which the applicant (ABSA) sued the respondent (McCreath) for the payment of R284 502.98, interest thereon and costs on an attorney and client scale, a debt ABSA claims arises from a deed of suretyship signed by McCreath. The principal debtor is Amhappy 135 Properties CC (Amhappy) of which McCreath is a member.

[2] In his affidavit opposing summary judgment, Mc Creath admits signing the deed of suretyship but says that he did not know that he was signing a deed of suretyship. The crux of his defence is set out in the following paragraphs of his affidavit:

‘6. There is no written credit agreement in respect of cheque account 4064057297.

7. During 2007 and due to the exemplary conduct of the account . . . by the account holder, Amhappy 135 Properties CC the Plaintiff granted the said Close Corportion a revolving credit facility in the amount of R185 000.00 (which was later increased by the Plaintiff to R285 000.00).

8. The Plaintiff did not request the Close Corporation to enter into a written agreement and no agreement was signed.

9. The Close Corporation had no need for the facility at first but shortly after accessing the facility an official of the Plaintiff contacted me advising that there were documents which required signing by the Close Corporation in order to continue having access to the facility.

10. The bank official and I, in my capacity as representative of Amhappy 135 Properties CC, met on the veranda of the Pig and Whistle Hotel in Bathurst in the presence of Sheila Jones, the bookkeeper of the Close Corporation.

11. The official assured me that the documents he required me to sign were standard terms and conditions in respect of the facility enjoyed by the Close Corporation and that the documents are limited to the agreement between the Plaintiff and the Close Corporation. I accepted his word and signed the documents where he indicated. At no stage did the official indicate to me that the documents represented a personal surety agreement. If he did I would have refused to sign as this was not the terms on which the Plaintiff offered the facility to the Close Corporation in the first place. The documents were signed at Bathurst and not at Grahamstown and no witnesses were present (save for Sheila Jones who did not sign the agreement).’

[3] This version is confirmed by Jones. She states that she received a call from a Mr Rieck of ABSA to say that a document concerned with Amhappy’s overdraft facility had not been signed and had to be signed urgently. She arranged for McCreath to meet Rieck at the Pig and Whistle Hotel in Bathurst. She was present at the meeting. Rieck, she said, took a document out of an envelope and told McCreath ‘that a document for the loan had still to be signed’. He turned each page of the document, indicating where McCreath had to sign. She confirms that McCreath never read the document.

[4] Rule 32(3)(b) of the uniform rules requires a respondent who opposes an application for summary judgment to ‘satisfy the court by affidavit . . . that he has a *bona fide* defence to the action’ It also provides that ‘such affidavit . . . shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor’.

[5] What is required of a respondent in order to satisfy the rule was set out in *Maharaj v Barclays National Bank Ltd*[[1]](#footnote-1) in which Corbett JA said:

‘Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has “fully” disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word “fully”, as used in the context of the Rule (and its predecessors), has been the cause of some Judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence.’

[6] McCreath’s defence is that he is not bound by the deed of suretyship that he signed because he was led to believe by Rieck that he was signing a document of an altogether different nature – the ‘standard terms and conditions in respect of the facility enjoyed by the Close Corporation’ – and in his capacity as a member of Amhappy, rather than in his personal capacity. I am satisfied that he has disclosed his defence fully within the meaning of rule 32(3)(b). I now have to decide whether he has raised a defence that is good in law.

[7] ABSA relies on the *caveat subscriptor* rule which is to the effect that a party who signs a document containing contractual terms is bound by his or her signature whether he or she read the document or not.[[2]](#footnote-2) This rule is not absolute. As appears from Fagan CJ’s judgment in *George v Fairmead (Pty) Ltd*,[[3]](#footnote-3) it all comes down to whether the party who signed the document created the impression for the other party that he or she had agreed to the terms contained in the document:

‘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.’

[8] In other words, the ‘true basis of the principle is the doctrine of quasi-mutual assent, the question being simply whether the other party is reasonably entitled to assume that the signatory, by signing the document, was signifying his intention to be bound by it’.[[4]](#footnote-4)

[9] In *Brink v Humphries & Jewell (Pty) Ltd*[[5]](#footnote-5)Cloete JA, with reference to the passage cited above from *George v Fairmead (Pty) Ltd*, stated that an innocent misrepresentation by the other party suffices to enable a signatory to escape the usual consequences of his or her signature, before proceeding to say:

‘The law recognises that it would be unconscionable for a person to enforce the terms of a document where he misled the signatory, whether intentionally or not. Where such a misrepresentation is material, the signatory can rescind the contract because of the misrepresentation, provided he can show that he would not have entered into the contract if he had known the truth. Where the misrepresentation results in a fundamental mistake, the “contract” is void *ab initio*. In this way, the law gives effect to the sound principle that a person, in signing a document, is taken to be bound by the ordinary meaning and effect of the words which appear over his/her signature, while, at the same time, protecting such a person if he/she is under a justifiable misapprehension, caused by the other party who requires such signature, as to the effect of the document.’

[10] McCreath’s affidavit, supported by that of Jones, makes it clear that Rieck misrepresented the nature of the document that he wanted McCreath to sign. McCreath stated in terms that had he known that Rieck wanted him to bind himself as a surety for Amhappy’s debts, he would have refused to do so. In my view, if these facts are proved in a trial in due course, they would establish a defence that is good in law: that on account of a *justus error* on the part of McCreath, induced by Rieck’s misrepresentation, McCreath is not bound by his signature on the deed of suretyship – and that the deed of suretyship would consequently be void.

[11] That being so, leave to defend must be granted. Before making an order to that effect, I must first deal with the costs that were reserved on 27 March 2014, when this matter was postponed on the application of McCreath so that he could obtain legal representation. In my view, those costs must be paid by McCreath as ABSA were ready to proceed and he sought an indulgence. For the rest, there is no reason to depart from the usual costs order when leave to defend is granted.

[12] I make the following order:

(a) The respondent is granted leave to defend.

(b) Subject to paragraph (c) below, the costs of the summary judgment application shall be costs in the cause.

(c) The respondent is directed to pay the applicant’s costs in respect of the postponement of the matter on 27 March 2014

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C Plasket

Judge of the High Court

APPEARANCES

Applicant: K Watt instructed by Wheeldon, Rushmere and Cole

Respondent: HP Jefferys SC instructed by the Legal Resources Centre

1. *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A-D. [↑](#footnote-ref-1)
2. See *Burger v Central South African Railways* 1903 TS 571 at 578; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para 34. [↑](#footnote-ref-2)
3. *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 471B-D. [↑](#footnote-ref-3)
4. RH Christie and GB Bradfield *Christie’s The Law of Contract in South Africa* (6 ed) at 182. [↑](#footnote-ref-4)
5. *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) para 2. [↑](#footnote-ref-5)