

IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA
HELD AT LOBATSE

CIVIL APPEAL NO. 39 OF 1995
[HIGH COURT CIVIL CASE NO. 1728 OF 1994]

In the matter between:

BRUCE BROTHERS

Appellant

and

FIRST NATIONAL BANK OF BOTSWANA LTD
t/a WESBANK

Respondent

Mr. N. Chadwick for the Appellant

Mr. T. Dambe for the Respondent

J U D G M E N T

CORAM: W.H.R. SCHREINER, J.A.
 P.H. TEBBUTT, J.A.
 LORD W.L.K. COWIE, J.A.

TEBBUTT J.A.;

The issue in this appeal is whether the managing director of a company who, when signing a written lease agreement on behalf of his company also signed a suretyship clause contained in the same agreement binding himself personally as surety for, and co-principal debtor with, his company can avoid summary judgment based on the document if he alleges that he did not realise what he was signing and that he was binding himself personally.

On 2 April 1992, TGB Drilling Contractors Botswana [Pty] Ltd

[TGB] hired a T66 Drilling Rig engine and chassis for a total rental price, including finance charges, of P218 032,85 payable in 23 monthly instalments of P9 085 and one final instalment of P9 077,85 payable on 2 April 1994, from Financial Services Company of Botswana [Pty] Ltd [Financial Services] in terms of a written agreement of lease. This written agreement was signed at Gaborone by the Appellant in this Court in his capacity as managing director of TGB, pursuant to a resolution of directors, dated 3 April 1992. It seems that the agreement was signed by him on 3 April 1992 as well, for although his signature on the actual lease document is undated, save for stating that it is in April 1992, Appellant's signature on the annexures to the document are all dated 3 April 1992. For Financial Services, one G.W.S. Rakwadi, described in the lease document as an "Executive Assistant" signed the agreement at Gaborone on 15 April 1992.

Included in the agreement, which I shall describe in more detail later, and at the foot thereof, was a clause headed "Suretyship". It reads thus:

"I/We the undersigned, do hereby bind and oblige myself/ourselves to the LESSOR as Surety/Sureties and Co-Principal Debtor/s in Solidum agreeing that the granting of extensions of time, the release of any security, the variation or alteration of the Agreement, acceptance of a compromise or composition, or the grant of any form of indulgence shall in no way prejudice the LESSOR'S rights to recover from me/us, jointly and severally in full.

And I/We the Surety/s aforesaid, consent to the jurisdiction of the Magistrates' Court in all matters arising out of my/our Suretyship."

Next to this clause Appellant's signature also appears.

It is common cause that ownership of the Rig remained vested in Financial Services until the sum of R218 032,85 had been paid in full and that if TGB failed punctually to pay any instalments, the full balance of the purchase price would become due and payable. Further, TGB would be liable to pay interest of 18% per annum on all overdue instalments and all costs incurred by Financial Services in repossessing the goods and/or recovering any monies owing by TGB. It is also common cause that TGB fell into arrears with its payments.

On 19 September 1994, the Respondent in this appeal issued summons as Plaintiff against Appellant claiming from him the sum of R137 903,55, [together with interest and costs on the attorney and client scale] relying upon his suretyship undertaking in doing so. The Respondent is described in the summons as "First National Bank of Botswana Limited t/a Wesbank [formerly known as Financial Services Company of Botswana Limited]". I shall refer to it herein as FNB. It averred that despite selling the machinery, after TGB had returned it, for P76 335,88 and taking that sum into account, it was still owed the aforesaid sum of R137 907,55 being arrear instalments, accrued interest, and

instalments on the unexpired portion of the contract. The summons was personally served on Appellant on 13 January 1995. On 3 March 1995 he entered appearance to defend, on the same day filing a plea to FNB's particulars of claim. On 23 March 1995 FNB lodged an application in the High Court for summary judgment. Appellant resisted the application, on 17 May 1995 filing an opposing affidavit and, at the same time, an application for leave to amend his plea. The matter was heard by Lesetedi AJ. who at the hearing granted Appellant's application for the amendment of his plea. The learned judge reserved judgment on the summary judgment application. On 5 June 1995 in a written judgment he granted summary judgment against Appellant in favour of the Respondent in the said sum of R137 905,55, with interest at 18% per annum from the date of issue of summons and costs on the attorney and client scale. Appellant did not file his notice of appeal timeously but on 13 October 1995, Aboagye J. granted him leave to appeal out of time against the judgment of Lesetedi AJ. It is that appeal which is presently before this Court.

It is necessary at this stage, for a proper understanding of Appellant's opposition to Respondents claim for summary judgment, to describe in some detail the written agreement of lease. It is obviously a standard form of lease agreement that was used by Financial Services. It is a printed document of four

FINANCIAL SERVICES COMPANY
OF BOTSWANA [PTY] LTD."

There follows, in very small print, the words "[hereinafter referred to as 'the LESSOR'] of the one part". The name and address of the lessee - in the present instance TGB - is typewritten in a space in the printed document provided for that purpose. Thereafter, in the same small print, appear the conditions of the agreement under clause headings which are in capitals in a slightly bolder print than the rest of the document. Those conditions are set out in two columns of the small print, with their slightly bolder headings, running down pages two, three and four of the document. There are 33 clause headings. Attached to the document in the same size print is a schedule headed "First Schedule" containing a description of the goods leased. This, too, contains a space in which the name of the lessee and the person signing on the latter's behalf - in this instance TGB and appellant - are typewritten, as is the name of the person signing on behalf of Financial Services - in this case G.W.S. Rakwadi. Below those spaces appear the signatures of Appellant as managing director of TGB and Rakwadi

respectively. Appellant's signature is dated 3 April 1992 and Rakwadi's 15 April 1992. Also attached to the lease document, again in the same size print as that used in the latter, is an "Acceptance Receipt" acknowledging that the goods were received by the lessee in good order. The signature on behalf of the lessee under the words "FOR TGB DRILL CONTRACTORS BOTSWANA [PTY] LTD" is that of Appellant as "Authorised Official". It also bears the date 3 April 1992.

Clause 33 of the Agreement is the all important one. It is headed "Execution" and sets out in the left hand column on the fourth page that the Agreement is "executed for and on behalf of the Lessor" by Rakwadi and "for and on behalf of the Lessee" by Appellant "in his capacity as Managing Director" of TGB. That portion of the document is typewritten. In the right hand column appears Rakwadi's signature and below that the signatures of two witnesses. Below their signatures appears Appellant's signature and below it the signatures of two witnesses. Below all this in the left hand column, in the same small print as the rest of the document, with a heading in the same print as the rest of the clause headings, under a heading reading "Suretyship", appear the words of the suretyship clause that I have set out above. Next to them in the right hand column is Appellant's signature, his address [given as PO Box 20679, Gaborone] and the signature of

a witness and his address [given as Box 1129, Gaborone]. The two addresses are handwritten, in obviously different handwritings.

In Appellant's amended plea he took a preliminary point that FNB was under an obligation in terms of the Registration of Business Names Act [Cap 42:05] to furnish a statement of particulars as required by that Act in respect of the business name "Wesbank" which, as I have said, appears in the description of the Respondent, FNB, in its particulars of claim. It had not done so by the time summons was issued i.e. on 19 September 1994 and that, so Appellant contended, precluded it, in terms of Section 11[1] of the Act, from enforcing its claim. However, it is common cause that there is in existence a Certificate of Registration of Respondent's business name "Wesbank" dated 26 April 1995. Section 11[1] of the Act in question provides that any disability to enforce a claim by reason of the default of registration of its name shall only exist "while the default continues". The argument that the Certificate of Registration of 16 April 1995 did not cure the default existing when summons was issued was raised in the Court a quo and rejected, rightly in my view, by Lesetedi AJ., who described it, for what it is, as a "tenuous, technical argument" in the light of the regularisation of the situation by Respondent. Mr. Chadwick, who appeared for the Appellant in this Court, also argued the point

contending that Lesetedi AJ., had erred in rejecting it. He did so, however, with little enthusiasm for the point which he rightly conceded was highly technical. It is certainly that and I agree with the learned Judge a quo that it has no merit, for the reasons set out by him. I need, therefore, say no more about it.

The substantial defence relied upon by the Appellant to Respondent's claim for summary judgment is a factual one. In his opposing affidavit he said:

"I confirm that at the time of signing the said document it was never suggested to me and I had no idea that I could potentially be incurring personal liability on behalf of the principal debtor. I had no proprietary interest in the principal debtor and would not knowingly have contemplated incurring personal liability on the lease agreement. Had it been brought to my attention that a suretyship was required by the plaintiff, I would have declined to sign same and referred back to those who did have a proprietary interest in the principal debtor."

What Appellant says happened when he signed the document is set out in his amended plea, the contents of which he confirmed in his opposing affidavit. In short what he says is this. At all material times he was merely an employee of TGB, having no proprietary interest in the latter. On 3 April 1992 he went to Respondent's premises by prior arrangement, to bind TGB to Respondent in a lease of the drilling rig, which Respondent had agreed to finance, subject to the signature on behalf of TGB of

a written lease agreement. This was pursuant to previous negotiations between one Pawson on behalf of the Respondent and him, Appellant, on behalf of TGB. In those negotiations he was, to Respondent's knowledge, so says Appellant, acting solely as TGB's representative and not in any personal capacity. Furthermore, at no stage in the negotiations was the subject of any suretyship or other undertaking of any personal liability, either by him or at all, raised or referred to by either party. When he went to Respondent's premises on 3 April 1992 he was intending solely to bind TGB in the lease transaction and "had no intention to nor any inkling that he might be required to undertake personal liability of any description." When he got there Pawson was not present and he dealt with a representative of Respondent who was not known to him but who he accepts was Rakwadi. Rakwadi, so says Appellant, simply presented him with the document and told him to "sign here and here". He accordingly signed the document in two places as directed in the belief that the document was a lease agreement as previously understood between the parties in which he was solely binding TGB. At no stage in the signing process was the subject of any suretyship or other undertaking of personal liability either by him or at all, raised or referred to. He was, therefore, not informed by or on behalf of Respondent and was totally unaware

of the fact that he was signing any document which "might in part be designed to impose or might have the effect of imposing personal liability upon him." Appellant further pointed out that the document is framed as a lease agreement between Respondent and TGB, styles itself as such, and is in law and in fact a lease agreement. He therefore did not know or have any reason to suspect, particularly by reason of the failure of Respondent or any of its representatives to bring it to his attention, that the document contained words which amounted to a suretyship or otherwise be designed to impose personal liability upon him.

Order 34 of the Rules of the High Court provides that in any application for summary judgment the Defendant may either [a] provide security for any judgment, including costs, that may be given or [b] satisfy the Court by affidavit or oral evidence -

"That he has a bona fide defence to the action. Such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied on therefor."

The Rule goes on to provide that if the Defendant does not find security or satisfy the Court as aforesaid, the Court may enter summary judgment for the Plaintiff. In other words, the Court has a discretion whether to do so or not.

The purpose of summary judgment is well-known. It is to provide a ready and speedy remedy for a plaintiff in an action based on one of the claims set out in the Rule against a

defendant who has no bona fide defence to the action brought against him but gives notice of his intention to defend solely in order to delay the grant of judgment in favour of the plaintiff. It is, however, an extraordinary remedy and one which is stringent in that it closes the door in final fashion to the defendant. Because of this it has been held in a number of cases in South Africa, where a similar rule exists, and in this Court, that summary judgment will only be accorded to a plaintiff who has "an unanswerable case" . In DU SETTO [SUNNYSIDE III] PTY LTD AND OTHERS & FINANCIAL SERVICES COMPANY OF BOTSWANA [Civil Appeal 19/94, unreported] this Court expressed the view that that dictum went too far and that if a Defendant did not set out a bona fide defence or set out the facts and evidence relied upon to substantiate his defence with sufficient particularity and completeness to enable the Court to decide whether he had disclosed a bona fide defence, the Court would be entitled, in its discretion, to grant summary judgment.

The issue presently before this Court, therefore, is whether the facts set out by the Appellant are sufficient to constitute a bona fide defence or, in other words, one sufficient to avoid his having the door closed by the Court in final fashion against him. I would stress that it is not necessary for the Court at this stage to find that the defence would succeed. All that a

defendant must do is to satisfy the Court that he has a defence which, if proved, would constitute an answer to the claim. Has Appellant done so?

It is undisputed that the signature appearing next to, and on the right of, the suretyship clause is that of Appellant. It is also implicit from what Appellant says in regard to the signing process, that he did not read the clause. Indeed, he says he was not aware of its existence. I think it can also be reasonably inferred from what he says that Appellant did not read the lease document before signing it.

In these circumstances the legal principle embodied in the maxim caveat subscriptor, applies. According to that there is a presumption that a person who appends his signature to a document is aware of its contents and intends to be bound thereby. In the South African Appellate Division in GEORGE V FAIRMEAD [PTY] LTD 1958 [2] SA 465 [AD] AT 472 A, Fagan CJ. said:

"When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by doing so, his assent to whatever words appear above his signature."

The signatory is bound, whether he has read those words or not. If he seeks relief he must convince the Court that he was misled as to the purport of the words to which he was signifying his assent [see KEENS GROUP CO [PTY] LTD V LOTTER 1989 [1] SA 585 AT 589 D, GEORGE V FAIRMEAD [PTY] LTD [supra]]. I have no doubt

that the law in Botswana is the same.

It is, however, now well accepted that in cases where a signatory seeks not to be bound by his signature, he can raise as defences, apart from fraud, illegality, duress and undue influence, misrepresentation and justus error. The concept of justus error in this context has been succinctly and clearly described by Fagan CJ. in the George case supra where at 471 A-D he said:

'When can an error be said to be justus for the purpose of entitling a man to repudiate his apparent consent 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 had led the other party as a reasonable man to believe that he was binding himself?"'

After referring to several cases in support of this proposition, the learned Chief Justice went on to say:

"In cases of the type I have mentioned a party who seeks relief must convince the Court that he was misled as to the purport of the words to which he was signifying his assent. That must be a question of fact to be decided on all the evidence led in a particular case."

While the onus would be on the Appellant at the trial to "convince the Court" that he was so misled, it is not necessary for him, at this stage, to discharge any such onus. All that is necessary now is for him to set out facts to satisfy the Court

that, if proved, they would make the defence of justus error available to him. In other words, has he put before the Court facts from which a trial Court may find that the Respondent was itself to blame for having misled him into believing that he was signing something other than he did and that, albeit that he was at fault in not reading the document, his error in signing it was justus. He does not, at this stage, have to show that he will succeed in his defence; he has only to show that there is a valid defence available to him and that it is bona fide.

In my view, the Appellant has done this.

The Respondent chose to include a suretyship obligation in a lease agreement. The suretyship obligation that it wished to obtain was a personal one; the lease agreement was one with a company. The suretyship is not in a separate document, which one would in those circumstances have expected. While not in a particularly inconspicuous place, as Appellant in his opposing affidavit suggests it is, the obligation is not made particularly conspicuous either. It appears in the same type style and size of print as the rest of the document. That document is headed boldly and conspicuously "Agreement of Lease of Plant Equipment and Vehicles" and it records that such agreement of lease is between Financial Services, who is described as the "Lessor" and TGB, who is described as the "Lessee". That recordal is also in

much bolder print and type than the print used in the security obligation. The words "Lessor" and "Lessee" are used throughout the document, which sets out, in 32 of the 33 clauses, the reciprocal obligations under the lease of Financial Services and, importantly, of TGB. In the "Execution" clause [clause 33] it is made quite clear that Appellant is called upon to sign the document in his representative capacity as managing director of TGB and that he is authorised to do so by a resolution of his company's directors. He also signed the Schedule and the "Acceptance Receipt" in a representative capacity; the former again in his capacity as Managing Director and the latter as "Authorised Official, for TGB Drilling Contractors Botswana [Pty] Ltd". Nowhere was there any question of any personal involvement of him in the lease. Appellant says, furthermore, that in the negotiations leading up to the lease agreement, Pawson, who was acting for Financial Services, knew that Appellant was acting solely as TGB's representative and not in any personal capacity. Moreover, he says that neither during the negotiations nor when he signed the document was the subject of any personal suretyship or liability on his part ever raised or referred to either by Pawson or Rakwadi. At this stage of the proceedings the Court is not in a position to say that Appellant is untruthful in those assertions. Could he, therefore, have reasonably expected that

some where in the document he would be called upon to agree to undertaking personal liability under the lease? I think it is arguable that he could not. I think, too, that it is not unlikely that Rakwadi, who had not been involved in negotiating the lease agreement, but was merely seeing to it that it was signed, saw that the document and the annexures i.e. the Schedule and Acceptance Receipt required signatures at several places and required Appellant to sign wherever it appeared that his signature was necessary, without appreciating the import of what he was asking Appellant to sign.

It was argued on Respondent's behalf that the suretyship obligation appeared so adjacent to his signature that he could not have failed to see and read it. I do not think that is necessarily so. By the very fact that it is contained in the same typestyle and size of print as the rest of the document and is not highlighted or made conspicuous in any way, his attention would not necessarily have been specifically attracted to it. Appellant's purpose in being at Respondent's premises was, on behalf of TGB, to sign a lease agreement and I do not think that it can necessarily be said that he could reasonably be expected to find a condition in the lease document between his company and Respondent in which he would bind himself as surety for his company's obligations. He was to bind his company and Respondent

in a lease agreement. Could he have reasonably expected that in the same document he was entering into a binding contractual relationship between two other parties namely Respondent and himself? Again, I think it is arguable that he could not.

It would, I feel, be impolitic for me at this stage to express any firm view as to what the final result of any action by Respondent against Appellant might be. I would, however, say this. In my opinion it is *prima facie* most unlikely that a mere employee of a company, such as Appellant was, albeit the managing director, without any proprietary interest in such company, would undertake personal liability for that company's obligations, amounting as they did under the agreement with Respondent to over P218 000.

I am therefore unable to find, at this stage, that Appellant has no bona fide defence to Respondent's claim against him and that he is not being honest and truthful when he says that he did not appreciate that the form he signed contained a personal suretyship obligation on his part but that he was misled into signing it and that therefore his error in signing it was justus. I do not think that, on the facts that he has set out, the Court can, at this stage, close the door finally on him.

It follows that in my view the Court a quo should have refused summary judgment. The appeal accordingly succeeds, with

costs, and the order of the Court a quo is altered to read as follows.

"Summary judgment is refused, with costs."

DELIVERED IN OPEN COURT AT LOBATSE THIS DAY OF FEBRUARY,
1996.



P.H. TEBBUTT
[JUDGE OF APPEAL]



I agree:

W.H.R. SCHREINER
[JUDGE OF APPEAL]



I agree:

LORD W.L.K. COWIE
[JUDGE OF APPEAL]