

SOUTH AFRICA / JUDGMENT

Sunlyn (Pty) Ltd and Others v Smart Drawn Projects (Pty) Ltd and Others (1937/2022)

[2023] ZANWHC 145 (17 August 2023)

[2023] ZANWHC 145

COURT

North West High Court, Mafikeng

BEFORE

A H Petersen

CASE / FILE NUMBER

1937/2022

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IN THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION -

MAHIKENG

CASE NO.: 1937/2022

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YES / NO

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YES / NO

In

the matter between:

SUNLYN (PTY) LTD
(Registration number:
1988/000417/17)
FIRST PLAINTIFF
SASFIN BANK LIMITED
(Registration number:
1951/002280/06)
SECOND PLAINTIFF
SOUTH AFRICAN
SECURITISATION
PROGRAMME (RF)
LTD
(Registration number:
1991/0027060/06)
THIRD PLAINTIFF
and
SMART DRAWN PROJECTS
(PTY) LTD
(Registration number:
2014/139450/17)
FIRST DEFENDANT
BONNIE
ELTON OOR
SECOND
DEFENDANT
PALESA
AUGISTINAH OOR
THIRD DEFENDANT
Delivered: This judgment
was handed down electronically by circulation to the parties'
representatives via e-mail. The date and time for hand-down is
deemed to be 14h00PM on 17 AUGUST 2023.
ORDER
In the result, summary
judgment is granted in favour of the plaintiffs' against the
first, second and third defendants, jointly
and severally, the one

paying the other to be
absolved, for:

(i)
Payment of the sum of R91 586.18.
(ii)
Interest at a rate of 6% above the prime
interest rate per annum from 25 September 2020, being the date of
default, to date of final
payment thereof.
(iii)
Costs of suit on a scale as between
attorney and client.

JUDGMENT

PETERSEN ADJP

Introduction

[1] This is an opposed application for summary judgment in terms of Rule 32 of the Uniform Rules of Court. The plaintiffs' seek an order for payment of an amount of R91 586.18 (together with interest and costs) from the first, second and third defendants', jointly and severally.

[2] In terms of Rule 32 of the Uniform Rules of the High Court:

"32 Summary judgment

(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only—

...;

(b) for a liquidated amount in money;

...

together with any claim for interest and costs.

(2)(a) Within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.

(b) The plaintiff shall, in the affidavit referred to in subrule (2)(a), verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.

(3) The defendant may—

(b) satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or with

the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant 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 upon therefor.

- (4) No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2), nor may either party cross-examine any person who gives evidence orally or on affidavit: Provided that the court may put to any person who gives oral evidence such questions as it considers may elucidate the matter.
- (5) If the defendant does not find security or satisfy the court as provided in paragraph (b) of subrule (3), the court may enter summary judgment for the plaintiff...”

Background

- [3] The first plaintiff (‘Sunlyn’) duly represented by an authorized representative and the first defendant (‘Smart Drawn Projects’) duly represented by the second defendant, concluded a written rental agreement, the Master Agreement of Hire, together with a Schedule to the Master Agreement of Hire (‘the Agreement’) on or about 12 February 2018 at or near Waverley, Johannesburg, Gauteng Province. In terms of the Agreement Sunlyn rented to Smart Drawn Projects a Konica Minolta Bizhub C227 printer with serial number A[...] (‘the goods’) for a monthly rental of R2192.90 (inclusive of VAT) per month, for a minimum period of sixty
- (60) months.
- [4] The second and third defendants further signed a Written Guarantee binding themselves as guarantors and co-principal debtors, jointly and severally, with Smart Drawn Projects.
- [5] In terms of an agreement concluded between Sunlyn and the second plaintiff as financier of the goods (‘Sasfin’) on 29 March 2006, the Agreement was ceded by Sunlyn to Sasfin. On 17 April 2018, Sasfin entered into a sale transfer agreement with the third plaintiff (‘SASP’), in terms of which Sasfin sold to SASP all Sasfin’s rights, entitlement and interest in and to specified equipment leases, which included the lease agreement with Smart Drawn Projects.

The defences

- [6] The defendants’ raise two defences to the application for summary judgment. Firstly, they contend that they contracted with Konica Minolta and not Sunlyn; and secondly, that Sunlyn failed to deliver to Smart Drawn Projects, the correct printer identified as the goods in the Master Agreement of Hire and Schedule to Master Agreement of Hire.
- [7] The defendants’ take no issue with the citation of all the parties, the jurisdiction of this Honourable Court, that Smart Drawn Projects concluded the Master Agreement of Hire and Schedule to Master Agreement of Hire, inclusive of the terms contained therein, save to allege that they entered into such agreement with Konica Minolta and not Sunlyn. The defendants’ further take no issue with the cession agreement between Sunlyn and Sasfin and the sale transfer agreement between Sasfin and SASP, of which they have no knowledge.

[8] The defendants' opposition to the plaintiffs' claim is based on the legal principle of iustus error. In relying on iustus error, the defendants' first defence is that the agreement was concluded and signed under the pretext that they were contracting

with Konica Minolta. As such they contend that they do not have any knowledge of an agreement, alternatively any contractual relationship

with the plaintiffs'. The defendants' elaborate on the aforesaid contention by contending that the documentary evidence, at first blush, would clearly establish a reasonable impression with any reasonable person called upon to inspect the documents, that the agreement was concluded between Konica Minolta and Smart Drawn Projects.

[9] The defendants' provide the following background to the conclusion of the Agreement in putting forward this defence. According to the defendants', representatives of Konica Minolta approached them at the premises of Smart Drawn Projects, to demonstrate their products. As Smart Drawn Projects is a construction company, which also offers architectural services and requires certain equipment, the representatives of Konica Minolta presented to the defendants' a printer identified as an "A1" printer and specifically suggested it as an appropriate printer for the scope and nature of the business conducted by the defendants'. The defendants' accepted the proposed printer upon conclusion of the presentation.

[10] The duly authorized representatives of Sunlyn informed the defendants' that the "A1" printer would be ordered

and installed upon conclusion of the necessary paperwork between the relevant parties. Whilst awaiting the arrival of the "A1"

printer, an "A3" printer was installed on as a temporary solution at the premises of Smart Drawn Projects. According to the defendants', the "A1" printer was never delivered nor installed by Konica Minolta as per the Agreement. They allege that the plaintiffs' have provided no evidence in the papers dealing with the difference between the "A1" and "A3" printers, or that the "A3" printer was installed as a temporary solution. The defendants' lastly allege that they attempted to use the "A3" printer but it was not suitable for their business purposes.

The plaintiffs' response to the defences

[11] In respect of the defendants' first defence, the plaintiffs' contend that the defendants' mistaken belief that they were contracting with Konica Minolta does not constitute a bona fide defence and/or a defence which is good in law for a number of reasons. The plaintiffs' counter the defendants' reliance

on the principle of iustus error, by relying on the principle of caveat subscriptor.

[12] As Smart Drawn Projects does not deny signing the Agreement duly represented by the second defendant, the plaintiffs' point out numerous references to Sunlyn in the Agreement signed by the first defendant and the Guarantee signed by the second and third defendants'.

The most obvious and glaring indication as to the identification of the contracting parties, is found at the introductory paragraph of the Master Agreement of Hire, which reads that, “You or ‘User’ Smart Dawn Projects (Pty) Ltd ... asks us Sunlyn (Pty) Ltd ... to hire to you and which we agree to do, the equipment listed in the schedule/s hereto ...”. The second defendant appended his signature to all the documents and the third defendant appended her signature to the Guarantee. The Guarantee itself is replete with references to Sunlyn.

- [13] The plaintiffs’ further point out, that the defendants’ contention that they were under the mistaken belief that they were contracting with Konica Minolta based on the representatives identifying themselves as such, is further contradicted by clause 15 of the Master Agreement of Hire which reads that, “You and we both agree that this is the entire Agreement, regardless of any representations that may have been made regarding the goods or this agreement and no variation, waiver, suspension, extension of time or agreement to cancel shall be of any force or effect unless in writing and signed by both you and us.”
- [14] In respect of the defendants’ second defence, specifically that the goods described in the Agreement was not delivered, the plaintiffs’ contend that the defence raises no triable issue. In this regard, Smart Drawn Projects duly represented by the second defendant, acknowledged and agreed in the Schedule to the Master

Agreement of Hire that, “You state that you have received all of the goods as scheduled above and that it is exactly what you ordered and you have tested it and found it to be in good working order...”. A deal information sheet adduced as evidence further reflects that the goods were duly delivered, and installed as per the serial number reflected therein. The defendants’ further utilized the goods for more than two years and paid the monthly rental for that period without any complaint raised that the goods were not suited for purpose.

Discussion

- [15] In respect of the defendants’ reliance on the principle of iustus error, the defendants’ do not allege any misrepresentation on the part of Sunlyn and neither do they allege that Sunlyn’s duly authorised representatives knew or ought to have known, as reasonable persons, of the defendants’ mistake in respect of the party they were contracting with.
- [16] The defendants’ reliance on iustus error for their own mistaken belief that they were contracting with Konica Minolta and not Sunlyn, is best considered having regard to Slip Knot Investments 777 (Pty) Ltd v Du Toit[1]. In Slip Knot, where reliance was placed on iustus error in the context of an omission of a third party to inform the defendant of the nature of a document he was requested to sign, the Supreme Court of Appeal held that:

‘A contracting party is generally not bound to inform the other party of the terms of the proposed agreement. He must do so, however, where there are terms that could not reasonably have been expected in the contract. The court below came to the conclusion that the suretyship was “hidden” in the bundle, and held that the respondent was in the circumstances entitled to assume that he was not personally implicated. I can find nothing objectionable in the set of documents

sent to the respondent. Even a cursory glance at them would have alerted the respondent that he was signing a deed of suretyship ... Slip Knot was entitled to rely on the respondent's signature as a surety just as it was entitled to rely on his signature as a trustee. The respondent relied entirely on what was conveyed to him by his nephew through Altro Potgieter. Slip Knot made no misrepresentation to him, and there is no suggestion on the respondent's papers that Slip Knot knew or ought, as a reasonable person, to have known of his mistake.'

(my emphasis)

[17] The Supreme Court of Appeal in Slip Knot Investments recognized the principle enunciated in National and Overseas Distributors Corporation (Pty) Ltd v Potato Board[2] that:

'Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (error) would have to be reasonable (justus) and it would have to be pleaded.'

[18] Slip Knot further endorsed the approach in Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis[3] that:

"The 'decisive question' to be asked in cases such as this has been formulated as follows:

'(D)id the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? ... To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? ... The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?'"

[19] The high watermark of the first defence postulated by the defendants' is that at first blush or in other words, a cursory glance of the Agreement any reasonable person would believe that they were contracting with Konica Minolta. The documentary evidence adduced by the plaintiffs', however, demonstrates that the second defendant and later the third defendant in respect of the Guarantee,

could not have only a first blush at the Agreement. In fact, even at first blush and with a mere cursory glance of the Agreement, it is apparent that once the introductory paragraph is read, it becomes abundantly clear that the agreement is being concluded with Sunlyn. If the defendants' mistakenly believed that they were contracting with Konica Minolta, any reasonable person before proceeding to read the Agreement further and sign in acknowledgment of all the terms thereof, would have raised a query with Sunlyn's duly authorized representative, why the other contracting party was identified as Sunlyn. Instead the second and third defendants' appended their signatures to the Agreement and Guarantee respectively. The second and third defendants signed the aforesaid documents in circumstances where it would reasonably be expected that

they had read what they were signing. If that were not the case, it would imply that the documents were blindly signed without any regard to the content thereof, which is not the defendants' case.

[20] If in fact the documents were signed with no regard to the content thereof, this implicates the plaintiffs' response to the defendants' opposition on both defences, which is predicated on the principle of caveat subscriptor. It is not the case of the defendants' that there was no intention to enter into the agreement for the lease of the goods.

[21] The second defendant in the absence of any evidence to the contrary, is a businessman. Having regard to the nature of the business of Smart Drawn Projects, where contracts undoubtedly would be concluded in the ordinary course of its business, the second defendant is clearly no 'babe-in-the wood' as was the position with the defendant, a business person, in *Langeveld v Union Finance Holdings (Pty) Ltd*[4].

[22] In *Langeveld, Willis J (Lamont concurring)* stated as follows in respect of the principle of caveat subscriptor:

"[12] The appellant is no 'babe-in-the-wood', never mind an illiterate. She is an accomplished businesswoman of many years' standing. There is a strong praesumptio hominis (popular presumption or presumption common among persons) that anyone who has signed a document had the animus (intention) to enter into the transaction contained in it, and she is burdened with the onus of convincing the Court that she in fact had not entered into the transaction by virtue of the maxim caveat subscriptor (a person who signs must be careful). As A J Kerr says: 'It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature.'

[23] It should therefore be clear from *Slip Knot* and the authorities cited therein, that the unilateral mistake on the part of the defendants' regarding the identity of the party they were contracting with is not material and does not exclude consensus between the parties in respect of the salient terms of the Agreement and who the contracting parties are. A mistake must be iustus error and an error is iustus when it is reasonable or excusable in all the circumstances of the case, when a reasonable person in the position of the defendants' would have been misled.

[24] The principle of caveat subscriptor is also clearly still regarded as valid in our law. The principle is therefore that a person who signs a contract is taken to be bound by the ordinary meaning and effect of the words which appear above his signature.[5] The defence premised on iustus error on a consideration of the evidence therefore cannot be sustained and is trumped by the principle of caveat subscriptor.

Conclusion

[25] Both defences raised by the defendants' accordingly stand to be dismissed on the basis that it does not constitute a bona fide defence to the plaintiffs' claim as envisaged in Rule 32. The plaintiffs' are therefore entitled to summary judgment as prayed for.

Costs

[26] Costs follow suit. The plaintiffs' have been successful in the opposition to the application for summary judgment. I can find no compelling reason not to award the plaintiffs' the costs of suit. The costs are awarded on an attorney and client scale in accordance with the Agreement between the parties.

Order

[27] In the result, summary judgment is granted in favour of the plaintiffs' against the first, second and third defendants, jointly and severally, the one paying the other to be absolved, for:

A H PETERSEN

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

COUNSEL FOR THE PLAINTIFFS: ADV B C BESTER Instructed by Van Wyk Attorneys c/o Smit Stanton Inc 29 WARREN STREET GOLFVIEW MAHIKENG COUNSEL FOR THE DEFENDANTS' : ADV C ZWIEGELAAR Instructed by: Theron, Jordaan and Smit Inc c/o CJP Oelefse Attorneys 9 AERODROME CRESCENT MAHIKENG INDUSTRIAL MAHIKENG DATE OF HEARING: 27 JULY 2023 DATE OF JUDGMENT: 17 AUGUST 2023

[1] 2011

(4) SA 72 (SCA) para 12.

[2] 1958 (2) SA 473 (A) at 479G-H.

[3]

[1992] ZASCA 56; 1992 (3) SA 234 (A) at 238I-240B.

[4] 2007

(4) SA 572 (W).

[5] Absa Bank Ltd v Trzebiatowsky and Others (2240/2010) [2012] ZAECPHC 13; 2012 (5) SA 134 (ECP) (23 February 2012) at paragraph [25].

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