

SOUTH AFRICA / JUDGMENT

Telkom SA SOC Ltd v Pillay (27532/21) [2023] ZAGPJHC 296 (3 April 2023)

[2023] ZAGPJHC 296**COURT**

South Gauteng High Court, Johannesburg

BEFORE

T P Mudau

CASE / FILE NUMBER

27532/21

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Policy**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, JOHANNESBURG****Case****Number: 27532/21****(1)****REPORTABLE: NO****(2)****OF INTEREST TO OTHER JUDGES: NO****(3)****REVISED: NO****DATE:**

3 April 2023

Signature

In

the matter between: TELKOM
 SA SOC
 LTD
 Applicant
 AND
 PATHMANATHAN
 MADEVARAJAN PILLAY
 Respondent

JUDGMENT

MUDAU, J

- [1] The applicant, Telkom SA SOC Ltd (“Telkom”) moves for an order directing the respondent, Mr Pathmanathan Madevarajan Pillay, to make payment to Telkom in the amount of R 88 501 491.13 plus interest thereon at 5%, compounded monthly in arrears from 30 April 2021, to date of final payment with costs on attorney and client scale based on a suretyship agreement. Combined with this application is an application for rectification of the suretyship agreement conditional upon a finding that the wording of the suretyship excluded the outstanding balance.
- [2] The applicant, Telkom, is a public company registered in accordance with the laws of the Republic of South Africa with its principal place of business at The H[...], 6[...] O[...] Avenue, Centurion, Gauteng. The respondent is Pathmanathan Madevarajan Pillay, an adult business man whose domicilium citandi et executandi is at an address in Northriding, Roodeport falling under the jurisdiction of this Court.
- [3] In support of the application the applicant filed a founding affidavit, which accompanied the notice of motion, deposed to by its Managing Executive: Consumer Business of Telkom, Mr Albertus Theunis Venter. The applicant’s claims against the respondent, as indicated, is based on a deed of suretyship that the respondent signed on 30 May 2018, in which he bound himself to the applicant as surety and co-principal debtor in solidum for the due fulfilment and payment of any monies owed to Telkom by R&R Wholesalers and Distribution CC (“R&R Wholesalers”).

The respondent is a sole member of R&R Wholesalers.

Background facts

- [4] On 17 February 2017, Telkom entered into a written dealer agreement with R&R Wholesalers (“the agreement”). R&R Wholesalers was represented by the respondent. The terms of the agreement were, inter alia, that Telkom appointed R&R Wholesalers to sell, market and procure customers for Telkom’s services and products, including but not limited to, data devices, mobile phones/headsets, data cards, connection packs, mobile accessories and value added services as described in the agreement (“the products”). In terms of clause 2.1, the agreement expired after a period of three years due to effluxion of time but continued on

a month to month basis. The effect thereof being that the parties continued to perform their respective obligations in accordance and subject to the terms as contained in the original written agreement.

- [5] Clause 7.1 of the agreement provided that Telkom would provide a credit limit to R&R Wholesalers, in its sole discretion, to be used for the purposes of the agreement after a successful risk assessment is performed. Pursuant to clause 7.3, R&R Wholesalers may request the increase of the proposed credit limit by providing such collateral or security to cover the additional risk exposure as may be required by Telkom in its sole discretion.
- [6] Telkom reserved the right to request suretyship and/or any other form of security acceptable to it at its discretion as security for payments of any amounts due to Telkom. It was agreed in terms of clause 7.5 that R&R Wholesalers would make payment of all invoices within 30 days from the date of statement, with interest due and payable on late payments from the due date of the invoice until the date of payment thereof, compounded monthly in arrears.
Clause

7.7 provided that the interest rate will be based on a rate of 5% above the prime overdraft rate of Absa Bank Limited.

- [7] The agreement made provision that either party shall be entitled to terminate the agreement if the other party commits an act which constitutes an act of insolvency, becomes insolvent, is placed under business rescue, enters into voluntary or compulsory liquidation, passes a resolution for liquidation or makes an arrangement or compromise with its creditors, or takes steps to deregister itself or is deregistered.
- [8] R&R Wholesalers was initially granted a R3 million credit facility in terms of the Dealer Agreement. It had however been granted an option, in terms of clause 7.3 of the Dealer Agreement to request a credit increase against provision of a collateral or security, to cover the additional risk exposure. On 15 May 2018, the respondent, acting on behalf of R&R Wholesalers, requested the applicant for a credit limit increase from R3 million to R6 million which was granted. On 1 August 2019, Telkom forwarded airtime discount notification letters to R&R Wholesalers advising that the discount percentage would be varied from 6% to 5%, with effect from 1 September 2019.
- [9] On 26 October 2020, the respondent, on behalf of R&R Wholesalers requested Telkom to review its facility and increase it to a further R40 million, which was granted. The request for credit increase was granted and the credit limit increased from R80 million to R90 million pursuant to a similar request. In accordance with the terms of the agreement, R&R Wholesalers placed orders for products with Telkom during the period November 2020 to January 2021. In due compliance with its obligations in terms of the agreement, Telkom accepted the orders and provided R&R Wholesalers with the products ordered.

- [10] On 30 November 2020, December 2020 and January 2021, Telkom issued monthly invoices to R&R Wholesalers in the total amount of R89 998 389.60 in respect of which R&R Wholesalers was obliged to make payment of all invoices issued within 30 days from the date of each statement. It is Telkom's case that in breach of the agreement and notwithstanding demand, R&R Wholesalers failed to make payment of the amount due and owing.
- [11] On 28 January 2021, R&R Wholesalers, acting through the respondent, resolved to place R&R Wholesalers in business rescue, inter alia, on the basis that it is financially distressed. Harold Cesman and Sandra Beswick were then appointed as joint Business Rescue Practitioners ("BRPs"). R&R Wholesalers was then placed under business rescue on 4 February 2021. The

termination of the agreement clause was, as a result, triggered.

- [12] On 11 February 2021, Telkom, as it was entitled to do, forwarded a termination notice to R&R Wholesalers. The BRPs responded to the termination notice and made proposals to Telkom to reinstate the agreement. stating that: "[t]he debt to Telkom of R90 million will be repaid over a period, the terms of which will be determined based on the amount of discount afforded R&R, the higher the discount, the quicker the debt can be repaid". Telkom also reversed the sales of the vouchers for which it had not received payment, deactivated such vouchers and credited an amount of R4 368 544.60 to R&R Wholesalers. On 9 June 2021, the current application was launched but amended on 23 September 2021.
- [13] It is common cause that on 8 June 2022, this Court in case 21033/2021 (per Spilg J) made an order placing R&R Wholesalers CC under final winding up in the hands of the Master pursuant to section 141(2)(a)(ii) of the Companies Act 71 of 2008. The respondent admits that R&R Wholesalers is indebted to Telkom. He however disputes the exact quantum of the amount owing.

The Suretyship Agreement

- [14] On 30 May 2018, the respondent concluded a written deed of suretyship in favour of Telkom ("suretyship agreement"). In relevant parts, the surety stipulates as follows:

"I/We the undersigned Pathmanathan Madevarajan Pillay do hereby bind myself/ourselves as surety(ies) and co-principal debtor (s) in solidum with R&R Wholesalers and Distributors CC. (The principal debtor) for the fulfilment and payment on demand by TELKOM SA SOC ("Telkom") of any outstanding balance on the accounts in respect of the telecommunication service rendered to the principal debtor by Telkom to R and R Wholesalers and Distributors CC Reg number: 2[...]. The surety is inclusive of all telecommunication services provided in terms of an agreement (s) between the principal debtor and Telkom for the provision of telecommunication services in accordance with the Electronic Communication Act 36 of 2005 and Telkom's Standard Terms and Conditions of Service as amended from time to time." (Emphasis added.)

[15] In clause 1 the surety agreement also stipulated that the respondent renounced the benefits of excussion and division of debt, non numeratae pecuniae, non causa debiti, errore calculi, beneficium ordinis seu excussionis et divisionis and de doubus vel pluribus reis debendi, revision of accounts and no value received. In addition, it was agreed that any admissions and acknowledgements of debt by R&R Wholesalers would be binding on the respondent. The acknowledgment of indebtedness is, of course, weighty evidence

against the respondent. Significantly, the effect of the respondent renouncing the benefits of excussion is that he bears the onus of proving that R&R Wholesalers is not indebted in the the amounts that are claimed by Telkom.[1]

[16] In para 34 of the replying affidavit, the deponent to Telkom's affidavit avers that the surety agreement may be amended to read as follows:

"The respondent hereby binds myself/ourselves as surety(ies) and co-principal debtor(s) in solidum with R&R Wholesalers (the principal debtor) for the due fulfillment and payment on demand by Telkom SA SOC Limited of any outstanding balance on the accounts in respect of telecommunications services and products rendered to the principal debtor by Telkom, in terms of the agreement(s) between Telkom and R&R Wholesalers including but not limited to any amounts outstanding in respect of the Dealer Agreement entered into between the parties".

[17] The defence put up by Mr Pillay is as follows. In his answering affidavit, Mr Pillay contends that the suretyship is for a completely separate service provided by Telkom, unrelated to the dealer agreement. He avers that, in approximately 2018, R&R Wholesalers requested an updated telephone line and switchboard to the wireless LTE system, to be installed at its premises, and for the existing Telkom telecommunication services to the business to be modernised. The person(s) he dealt with at Telkom for the telephone services, attended at his office and filled out an application form, and he was requested to sign a suretyship, which is the surety attached to Telkom's papers.

[18] Also, the respondent in a further affidavit, blames his employee, Moosa and contended that Moosa or Naidoo (from Telkom) never advised him that he was signing an unlimited suretyship for a credit facility, otherwise he would have capped the facility for the R6 000 000.00 being offered. On his version, at all material times, he believed that the suretyship he was signing was for Telkom to provide his Corporation with telephone lines.

[19] In the replying affidavit, Telkom attached various email communications ("RA3.1 - RA6") between the parties, evidencing that the respondent was advised that Telkom would not only need to conduct a risk assessment and credit review and thus required R&R Wholesalers' annual Financial Statements ("AFS"), when it initially requested a credit limit increase from R3 million to R6 million but security, in the form of suretyship before it could increase R&R Wholesalers' credit limit and in order to cover the additional risk exposure.

[20] On 23 May 2018, Mr Naidoo of Telkom forwarded a copy of the suretyship form to the respondent and requested him to "complete/sign the attached and send back to me". Notably, the email is titled "Request for limit increase! Suretyship Form". On 1 June 2018, a Ms Zannel Cherubin from R&R Wholesalers returned a signed copy of the suretyship together with a certified copy of the respondent's identity document to Mr. Naidoo by email. Importantly, the contention that Telkom personnel provided him with a suretyship for signature, is contradicted by the emails of 15 May - 1 June 2018, which clearly establish that the suretyship that was signed by the respondent was sent to him by email and returned to Telkom also by

email.

[21] Against this uncontroverted evidence, it stands to reason that Mr Pillay's contention in this regard is not only fanciful and disingenuous, but far-fetched as Telkom also submitted. Importantly, Mr Pillay fails to disclose the identity of, the "Telkom personnel" whom he dealt with as counsel for Telkom also pointed out. Equally significant, Mr Pillay fails to produce the agreement for telephone services, signed in 2018 on his version, and on the basis of which he allegedly signed a suretyship, which in any event is disputed by Naidoo. As for capping the surety at R6 000 000.00, this is hugely contradicted by the fact that he asked for the facility to be increased to "a further 80 million Rand", on 26 February 2020 as per "RRA1". There is, in my judgment, no merit in the contentions of the respondent in this regard.

[22] It is trite that a suretyship (or guarantee) may be contracted with reference to a principal obligation which has not yet come into existence. Suretyship (or guarantee) is defined in Caney's as:

"[A]n accessory contract by which a person (the surety) undertakes to the creditor of another (the principal debtor), primarily that the principal debtor, who remains bound, will perform his obligation to the creditor and, secondarily, that if and so far as the principal debtor fails to do so, he, the surety, will perform it or, failing that, indemnify the creditor".[2]

As Corbett JA pointed out in *Trust Bank of Africa Ltd v Frysch*:^[3]

"The contract is accessory in the sense that it is of the essence of suretyship that there be a principal obligation. At the same time it is not essential that the principal obligation exists at the time when the suretyship contract is entered into. A suretyship may be contracted with reference to a principal obligation which is to come into existence in the future".

[23] When due regard is had to the nature of the business that is operated by Telkom in the preamble to the Dealer Agreement, it is recorded that:

"Telkom is a provider and operator of electronic communication services and envisages entering into a nonexclusive relationship with R&R Wholesalers in terms of which Telkom appoints R&R Wholesalers to sell, market and procure customers for Telkom's services and products including but not limited to data services, mobile phones, headsets data cards, connection packs, mobile accessories and value added services as described in the agreement".

It is within this context, that the second paragraph to the suretyship which states that "the surety is inclusive of all telecommunications

services" must be viewed.

- [24] There can be no doubt, however, that by his conduct in appending his signature to the document, he misrepresented that it was his intention to be bound by the suretyship and thereby misled the applicant in granting the credit facilities, so that it is equally clear that the contract came into existence by quasi mutual consent. Once this is so, the onus rests upon the party seeking not to be bound by it to prove that his error in signing it was iustus as defined in *George v Fairmead*. [4]
- [25] 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.
- [26] 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. [5] The respondent's claim that that he was unaware that he was executing this deed of suretyship and that his error was induced by the failure of Naidoo and Moosa to inform him of this fact is without any firm basis. [6] As Corbett JA eloquently stated in *Frysch*: [7]

"A party who seeks to establish the defence that the contract which he entered into is voidable on the ground of misrepresentation must prove (the onus being upon him) (i) that a representation was made by the other party in order to induce him to enter into the contract; (ii) that the representation was material; (iii) that it was false in fact; and (iv) that he was induced to enter into the contract on the faith of the representation".

Pillay failed to discharge this onus.

- [27] In the present case, the deed of suretyship is so headed, being a separate annexure; it is not a complicated document, containing only seven clauses. The suretyship binds the respondent as surety and co-principal debtor for the due fulfilment and payment of an outstanding balance on the accounts in respect of telecommunications services rendered by

Telkom to R&R Wholesalers. The respondent's contention that the suretyship relates solely to the provision of "telecommunication services" and does not apply to items that were provided in terms of the Dealer Agreement is misplaced and falls foul of the applicable process of interpretation. I have no difficulty in concluding that the suretyship was granted in relation to the amounts owing on accounts relating to the Dealer Agreement.

- [28] As for the introduction of an extra affidavit by the respondent on 10 November 2021, the argument by counsel for Telkom did not contend that Telkom was prejudiced by the introduction of all the averments contained therein, but that it stands to be struck out in its entirety, alternatively, save for those that respond to the rectification application (contained in paragraphs 32-37) of the replying affidavit i.e. paragraphs 58 - 72 of Pillay's affidavit.
- [29] It is trite that in motion proceedings, only three sets of affidavits are allowed, i.e. the founding affidavit, the answering affidavit and the replying affidavit. The filing of further affidavits is permitted only under exceptional circumstances coupled with a proper explanation which negates mala fides or culpable remissness as to why the information was not placed before court earlier by a party introducing the further affidavit. Adopting a common-sense approach based on want of prejudice, the allegations made in the additional affidavit to the extent limited to paragraphs 58-72 do not, in my view, advance the respondent's case in any material way. In any event, Telkom filed further affidavits by Mr Venter and Mr Naidoo in reply, dealing with the issues raised by the respondent.
- [30] It is trite that a real, genuine and bona fide dispute of fact can exist only where the party who purports to raise the dispute has, in his affidavit, seriously and unambiguously addressed the fact said to be disputed.[8]
- [31] The defence of iustus error is not available to Mr Pillay. The version that he did not intend signing surety that rendered him personally liable as alleged does not constitute a defence on the basis of the well-known caveat subscriptor rule upon which the doctrine of quasi-mutual assent is based. Accordingly, it is not open to Mr Pillay to rely on the defence of iustus error.
- [32] I conclude that the suretyship which Telkom relies upon as a basis for its claim against the respondent applies to the debt which forms the subject of this matter and, on proper interpretation, is enforceable against surety and co- principal debtor, Mr Pillay.
- [33] As for the discount percentage that was provided to R&R Wholesalers and the levying of interest on the amounts owing, the amounts owing were levied in accordance with clauses 10.2, 8.3 and 7.7 of the Dealer Agreement, which provided for the varying of the discount rate. The agreement, furthermore, provided for the levying of 5% interest on outstanding amounts. The challenge by the respondent in this regard is accordingly without merit.

[34] There is accordingly no material dispute of fact I find, that cannot be resolved on these papers. As for the conditional application for rectification, it is trite that in circumstances where a written contract fails to reflect the true intention of the parties to it, but has been executed by them in the mistaken belief that it does, it may be rectified judicially so that the terms which it was always meant to contain are attributed in fact.[9]

[35] The factual dispute raised on the papers by the respondent is accordingly not bona fide. With the conclusion arrived at, there is accordingly no need for this Court to deal with the question regarding rectification of the suretyship agreement, which in any case is meritorious. Consequently, in my view the applicant is entitled to the relief sought. In terms of the agreement of suretyship, Telkom is entitled to costs on the attorney and client scale and such an order will follow.

Order

[1] The respondent, Mr Pathmanathan Madevarajan Pillay is directed to make payment to Telkom in the amount of R88 501 491.13 plus interest thereon at 5% above ABSA's prime rate, compounded monthly in arrears from 30 April 2021 to date of final payment.

[2] Costs of suit on the scale as between attorney and client including costs of counsel.

T P MUDAU

Judge of the High Court

Gauteng Division

Johannesburg]

Date of Hearing: 1 February 2023

Date of Judgment: 3 April 2023

APPEARANCES

For the Applicant: Adv. Lebogang Kutumela Instructed by: Werkmans Attorneys For the Respondent: Adv. Rael Zimmerman Instructed by: Taitz & Skikne Attorneys

[1] See in general, Cohen v Louis Blumberg (Pty) Ltd and Another

[1949] 2 All SA 295 (W) at page 296.

[2] Forsyth and Pretorius Caney's: The Law of Suretyship in South Africa 6 ed (Jutastat e-publications, 2017) at 29.

[3] Trust Bank of Africa Ltd v Frysch (Frysch)1977

(3) SA 562 (A) at 584G-H.

[4] George v Fairmead (Pty) Ltd 1958 (2) SA 465 A.

- [5] See generally *George v Fairmead* above n 4; *Mans v Union Meat Co* 1919 AD 268; *Shepherd v Farrell's Estate Agency* 1921 TPD 62; *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A); *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A).
- [6] *Slip Knot investments 777 (Pty) Ltd v Du Toit*
- [2011] ZASCA 34; 2011 (4) SA 72 (SCA).
- [7] *Frysch* above n 3 at 588A-B.
- [8] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) at para 13.
- [9] *Levin v Zoutendijk* 1979 (3) SA 1145 (W) at 1148A.

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Prepared on 10 October 2026 · Esheria