South Africa: Supreme Court of Appeal

Slip KnotInvestment 777 (Pty) Ltd v Du Toit (176/2010) [2011] ZASCA 34 (28 March 2011)

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 176/2010

In the matter between:

SLIP KNOT INVESTMENTS 777 (PTY) LTD .....Appellant

and

WILLEM MALAN DU TOIT .....Respondent

(Fifth Respondent in the court a quo)

Neutral citation: ***Slip Knot v Du Toit*** **(176/2010) [2011] ZASCA 34 (28 March 2011)**

Coram: NAVSA, NUGENT, HEHER, CACHALIA and MALAN JJA

Heard: 7 March 2011

Delivered: 28 March 2011

Summary: Suretyship – fraud or misrepresentation by third party – whether surety bound

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ORDER

On appeal from: Free State High Court (Bloemfontein) (A Kruger J sitting as court of first instance):

1. The appeal is upheld with costs.

2. The judgment of the court a quo is set aside and replaced with the following:

> 'Judgment is granted in favour of the applicant against the fifth respondent jointly and severally with the first to third respondents in their capacities as trustees of the Smitskop Trust (IT Number 207/96) and the fourth and sixth respondents, for –

1. payment of the sum of R 7 950 000,00;

2. interest on the aforesaid sum at the rate of 1,5 per cent per week, calculated daily, from 8 May 2008 to date of payment;

> (c) costs of suit on the attorney and own client scale.'

JUDGMENT

MALAN JA (NAVSA, NUGENT, HEHER, CACHALIA JJA concurring)

[1] This appeal concerns the defence of *iustus error* to a claim seeking to enforce an agreement of suretyship. The respondent (the fifth respondent in the court below), although admitting that

he signed the deed of suretyship, denied that he was liable and averred that he signed by mistake and without the intention to incur contractual liability. In determining whether a mistake is *iustus* the courts have posed the following question: '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.'[1]

[2] This case is not concerned with a misrepresentation, whether innocent or not, by the appellant inducing the respondent to sign a suretyship. The appellant, Slip Knot Investments 777 (Pty) Ltd, did not negotiate with the respondent, nor did it have any contact with him prior to him signing the suretyship. On the contrary, the respondent relied, if not on fraud, on the omission of a third party to inform him of the nature of the document he was called upon to sign.[2]

[3] At the time of the hearing of the application the respondent was a sixty-year old farmer in the district of Luckhoff. He was also a trustee of the Smitskop Trust (the 'trust') along with his brother and the latter's son. The appellant, Slip Knot, advanced a sum of R6 million to the trust. The respondent, his brother and nephew signed a deed of suretyship in favour of Slip Knot. Judgment was obtained against the trust and the sureties after the trust had failed to adhere to the terms of a settlement agreement. The sequestration of the trust and the estate of the respondent's brother followed. The respondent was unaware of the proceedings against the trust and the sureties. He brought an application for rescission of the judgment against him, which was granted. The main application subsequently came before Kruger J in the Free State High Court. He dismissed Slip Knot's application for judgment against the respondent but gave leave to appeal to this court.

[4] The trust was created in 1996 by the respondent's brother who was a beneficiary of the income of the trust. Although decisions of the trustees had to be taken by a majority vote the brother had to be part of the majority. He had the power to determine by will the date of vesting of the trust funds and to determine the way in which its assets were to be divided at the termination of the trust. The brother also administered the trust in his own interests and those of his heirs. The respondent had no interest in the trust assets or its income. He was, however, one of the three trustees albeit, as he said, only in name. The business of the trust was managed by the respondent's brother and nephew. The trust had farming interests in Fauresmith but those interests were unrelated to the farming activities of the respondent. The respondent controlled trusts of his own, of which his brother was a trustee, but they were managed by the respondent alone. The respondent knew before he signed the suretyship that his brother was involved in major business transactions elsewhere in Africa. He regarded them as risky.

[5] The suretyship was signed on 6 November 2007. It appears that on that day the respondent's nephew had telephoned the respondent's friend, Altro Potgieter, and told her that he had certain documents that required the respondent's signature. They concerned the business transactions

that his father was conducting in Africa and had to be signed urgently and returned by fax on the same day. The respondent and his own son were at that time busy on his farm outside Luckhoff. Potgieter told him of the conversation and informed him of the need to sign the documents before a commissioner of oaths. He was, however, busy and asked her to wait. After two further calls to her from his nephew, Potgieter again spoke to the respondent and emphasised the urgency of the matter. Potgieter gave him a bundle of documents comprising some 75 pages that had already been signed by his brother and nephew. The respondent remarked that it would have taken him a day to read through them. He was prepared to sign the documents without reading them because he thought that he was not personally affected and because the two other trustees had already signed. The respondent assumed that his brother and nephew had agreed to the terms on which Slip Knot would advance monies to the trust and that his signature was required as a trustee only.

[6] The respondent and his son went to the manager of the First National Bank in Luckhoff, a commissioner of oaths, to sign the documents. Although the manager had occupied that position for a week, he used to be manager at the Fauresmith branch of the same bank and knew of the transaction. This reassured the respondent that the documents concerned his brother's trust. He signed on each of the pages at the places where his brother and nephew had signed. He also initialled every page where their initials appeared. Potgieter and the respondent's son witnessed his signature and also initialled where his initials appeared. Neither the respondent nor the bank manager or any of the two witnesses read the documents or paid any attention to their contents. They were thereafter faxed to the respondent's brother. The respondent could not afterwards, when requested by his attorney, find his copies and assumed that they were destroyed after faxing; he had, he stated, no reason to keep them because they did not affect him financially. He had never negotiated with the appellant and had never discussed the transactions with his brother or nephew, and he would not have signed as surety in respect of such a large amount borrowed at a very high rate of interest and concerning a business venture he regarded as risky.

[7] The documents comprised the memorandum of agreement providing for the R6 million loan to the trust. Annexure A to it is a resolution by the trustees of the trust authorising it to enter into the loan agreement. Annexure B is an extract of a resolution of the directors of Slip Knot. Also included was the deed of amendment of the Smitskop Trust signed by all the trustees; the amended letter of authority of the Master; the suretyship agreement; Annexure A thereto, an extract of a resolution by Slip Knot authorising a director to enter into the deed of suretyship; a letter of undertaking authorising a firm of attorneys to pay Slip Knot the sale proceeds of certain properties belonging to the trust; a letter by the attorneys to Slip Knot undertaking to pay these proceeds; a power of attorney to pay a bond in favour of Slip Knot over certain trust properties; a covering mortgage bond; and a cession of loan accounts in the trust by the trustees to Slip Knot. All these documents were signed and initialled by the respondent and the other trustees. The individual documents were headed differently but the headings of the memorandum of agreement, its Annexures A and B, and the suretyship are all in bold capital letters similar to the

recitation of the parties to the agreements. They are in larger print than the remainder of the document. Although he did not read the documents the respondent stated that he never expected a suretyship to be amongst them. No one drew his attention to the suretyship.

[8] It was submitted on behalf of Slip Knot that, although the respondent's mistake may have been induced by fraud, ie the omission of his brother or his nephew to draw the suretyship to his attention, the binding force of the suretyship was not affected thereby. It is correct that, as was said in *Karabus'* case,[3] where 'the fraud which induces a contract does not proceed from one of the parties, but from an independent third person, it will have no effect on the contract.' But the mistake relied upon in *Karabus* was an error in motive: the intention of the defendant in that case was directed at the conclusion of the contract on the cheque and his mistake concerned only the reason for entering into it.[4]

[9] The respondent's defence is that he lacked the intention to be bound and therefore that no agreement of suretyship was concluded. Contractual liability, however, arises not only in cases where there is consensus or a real meeting of the minds but also by virtue of the doctrine of quasi mutual assent. Even where there is no consensus contractual liability may nevertheless ensue.[5] The respondent's mistake is a unilateral one. Referring to the mistake of the kind the respondent laboured under it was said in *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board*:[6]

'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.'

The 'decisive question' to be asked in cases such as this has been formulated as follows:[7]

'[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 misrepresentation; 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?'

[10] In the court below Kruger J found that the respondent's mistake was reasonable. In coming to this conclusion he emphasised that the respondent was a farmer who had nothing to do with the business of the trust and the loan to it. He was not a businessman. He knew that the documents related to his brother's venture into Africa and, although he considered it risky, thought that they did not concern him. It was because he was put under considerable pressure to sign them forthwith that led him to believe that they did not affect him. Slip Knot did not negotiate with the respondent at all and the latter became aware of their existence only afterwards. The bank manager, in addition, informed the respondent that he was aware of the

transaction and that had set his mind at rest. The suretyship was also not prominent among them. In a sense, Kruger J opined, his brother and nephew, in forwarding the documents to him, had acted as the appellant's agents who should have warned him of the suretyship in the bundle. The heading of the suretyship was in the same type as the other words on the first page. The respondent, the court below found, had no reason to expect a suretyship, in terms of which he would personally undertake liability as a surety to be among them.

[11] In argument before us counsel for the respondent expressly disavowed that the respondent was misled by Slip Knot – whether by reason of the form in which the documents were couched or in any other way. To the extent that the respondent was misled he placed the blame squarely and solely at the doors of his brother and nephew. Nor is there any suggestion that the fraud or misrepresentation of the respondent's relatives could or should be attributed to Slip Knot. There is every reason to infer that Slip Knot, as a reasonable person, believed that the respondent's declared intention to be bound as surety as evidenced by his signature to the suretyship also represented his real intention. The respondent entered into the suretyship relying, not on any representation by Slip Knot, but on representations made to him by his nephew and conveyed to him by Altro Potgieter.

[12] A contracting party is generally not bound to inform the other party of the terms of the proposed agreement.[8] He must do so, however, where there are terms that could not reasonably have been expected in the contract.[9] 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. As I have said, counsel for the respondent conceded that there was nothing misleading in the bundle and that a suretyship among the documents was not unexpected. The court below emphasised the fact that the respondent was a farmer and not a businessman and that he had nothing to do with the trust and the loan advanced to the trust. This is incorrect. The respondent was a trustee of the trust. He may have been a farmer but this is of no consequence. The respondent had his own trusts and managed them. He must have known what a trust was and what the duties and responsibilities of a trustee were.[10] 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.[11] 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. The rate at which interest was charged was not placed in issue in the court below or in this appeal.

[13] The following order is made:

(1) The appeal is upheld with costs.

(2) The judgment of the court a quo is set aside and replaced with the following:

> 'Judgment is granted in favour of the applicant against the fifth respondent jointly and severally with the first to third respondents in their capacities as trustees of the Smitskop Trust (IT Number 207/96) and the fourth and sixth respondents, for –

1. payment of the sum of R 7 950 000;

2. interest on the aforesaid sum at the rate of 1,5 per cent week, calculated daily, from 8 May 2008 to date of payment;

3. costs of suit on the attorney and own client scale.'

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F R MALAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant: A C Botha

Instructed by:

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Johannesburg

Lovius Block
Bloemfontein

For Respondent: J P de Bruin SC

Instructed by:

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1*George v Fairmead (Pty) Ltd* **1958 (2) SA 465** (A) at 471A-D.

2The position where the misapprehension has been caused by a third party was left open in *Brink v Humphries & Jewell (Pty) Ltd* [2005] 2 All SA 343 (SCA) para 2 n 6.

3*Karabus Motors (1959) Ltd v Van Eck* **1962 (1) SA 451** (C) at 453C-D.

4*Saambou-Nasionale Bouvereniging v Friedman* **1979 (3) SA 978** (A) at 999H-1000C.

5See eg *Sonap Petroleum (SA) Pty Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* **[1992] ZASCA 56**; **1992 (3) SA 234** (A) at 238I-240B; *Be Bop a Lula Manufacturing & Printing CC v Klingtex Marketing (Pty) Ltd* **[2008] 1 All SA 529** (SCA) paras 10, 11 and 14.

6 **1958 (2) SA 473** (A) at 479G-H. For a discussion of *Musgrove & Watson (Rhod) (Pvt) Ltd v Rotta* 1978 (2) SA 918 (R) (on appeal reported as *Musgrove & Watson (Rhodesia) Ltd v Rotta* (1978 (4) SA 656 (RA)) and *Standard Credit Corporation Ltd v Naicker* **1987 (2) SA 49** (N) see Carole Lewis 'Caveat subscriptor and the doctrine of justus error' (1987) 104 *SALJ* 371.

7*Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* **[1992] ZASCA 56**; **1992 (3) SA 234** (A) at 239I-240B. See *Davids & andere v ABSA Bank Bpk* **2005 (3) SA 361** (C) paras 13-15 and cf the discussion by Dale Hutchison '"Traps for the Unwary": when careless errors are excusable' in Graham Glover (ed) *Essays in Honour of AJ Kerr* (2006) p 39.

8*Constantia Insurance Co Ltd v Compusource (Pty) Ltd* **2005 (4) SA 345** (SCA) para 19.

9*Afrox Healthcare Bpk v Strydom* **[2002] ZASCA 73**; **2002 (6) SA 21** (SCA) para 36 and cf *Fourie v Hansen & another* [2001] 1 All SA 510 (W) at 516.

10See Edwin Cameron with Marius de Waal, Basil Wunsh, Peter Solomon and Ellison Kahn *Honoré's South African Law of Trusts* 5 ed (2002) p 262ff.

11See *Glen Comeragh (Pty) Ltd v Colibri (Pty) Ltd & another* **1979 (3) SA 210** (T) at 214D-F.