



SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

FROM

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Tshepe and Another v Rustia Feed (Pty) Ltd (Case no 90/2020) [2021] ZASCA 104
(23 July 2021)

Today the Supreme Court of Appeal (SCA) dismissed with costs the application for special leave to appeal brought by Mr E Tshepe and Ms V Tshepe (the Tshepes) against the respondent, Rustia Feed (Pty) Ltd.

Mr Tshepe, a chemical engineer with a Master's degree in business leadership and Ms Tshepe, a former primary school educator with a diploma in teaching are married to each other in community of property. They signed an undated standard credit application form, which embodied a suretyship clause, supplied by Rustia Feed, in their capacity as the representatives of Bonolo Farms. The question was whether they also assented to what is contained in the application form in their personal capacity as sureties.

The credit application, incorporating the suretyship, comprises two pages. The first page is a credit application form. The second page embodies the conditions of sale consisting of 13 clauses. Mr Ottermann, Rustia Feed's director, handed over the form to Mr Tshepe to complete which the latter returned a few days later. On diverse occasions, Rustia Feed delivered chicken feed to Bonolo Farms which failed to effect payments of the amounts due under the credit agreement. Rustia Feed issued summons against the Tshepes in the Rustenburg Magistrates' Court, founded upon the deed of suretyship. The Tshepes' defended

the action and pleaded, *inter alia*, that Rustia Feed failed to draw their attention to the suretyship clause 'hidden' in the conditions of sale; that it was not obvious to them that the credit application form embodied the deed of suretyship. The magistrate rejected the Tshepes' defences and entered judgment against them in favour of Rustia Feed for the payment of R992 403 plus interest. They appealed to the high court. The two main questions before the high court were whether the magistrates' court lacked monetary jurisdiction to adjudicate the action and, in respect of the deed of suretyship, whether the defence of *iustus error* availed the Tshepes. The high court found against the Tshepes on both questions and dismissed the appeal with costs.

On appeal before the SCA the Tshepes contended that special circumstances existed which warranted the grant of special leave to appeal against the decision of the high court on the following bases. They did not consent in writing to the monetary jurisdiction of the magistrates' court in terms of s 45(1) of the Magistrates' Courts Act 32 of 1944 (the Act). That they were, on the basis of *iustus error*, not bound by the terms of the suretyship as embodied in the credit application. On this score, the Tshepes further contended that *ex facie* the credit application no reference was made to the existence of the suretyship. Rustia Feed therefore misled them. They further argued that Mr Ottermann failed to draw their attention to the fact that the application form also embodied a suretyship clause. Their mistake, they claimed, which had been induced by Rustia Feed, would have misled any reasonable person similarly situated.

The majority judgment of the SCA, held, that the terms of clause 7 of the credit agreement were wide enough to also include the creditor's claim against the sureties. Therefore, consent to jurisdiction of the magistrates' court applied to Bonolo Farms and to the Tshepes in their personal capacity. Such a construction of the clause was compatible with the credit agreement read as a whole.

With respect to the Tshepes' reliance on the defence of *iustus error* the SCA held further that the credit application and its accompanying conditions of sale were not of a complex nature. The deed of suretyship was not inconspicuous because it was written in the same font as the remainder of the conditions of sale. There was no pressure exerted upon the Tshepes to sign or evidence to suggest that they were required to sign the agreement in haste. They had ample opportunity to study the agreement and could not have overlooked the suretyship clause.

It was further held that regard being had to the Tshepes' level of education and Mr Tshepe's business acumen, it was more probable than not that he read the credit agreement. A reading of the suretyship clause could not have escaped any reasonable director of his level of

sophistication that he undertook liability for Bonolo Farm's debt. To the extent that Ms Tshepe did not read the credit agreement, her husband was satisfied that she could sign it because he had already done so. The Tshepes *iustus error* defence was not sustainable on the facts and were therefore bound as surety and co-principal debtor with Bonolo Farms for its indebtedness to Rustia Feed.

Accordingly, the Tshepes had failed to show that there were special circumstances which merited a further appeal to the SCA. Hence, the application for special leave to appeal to the SCA was dismissed with costs.

The dissenting judgment would have granted special leave to appeal and thereafter upheld the appeal with costs. Unlike the majority, it held the view that not only did special circumstances which justify a further appeal to the SCA exist but also that the appeal itself ought to be allowed.

It held, that the suretyship was embodied obscurely in the credit application form. It did not stand out but was part and parcel of the terms contained in the application form intended to be completed on behalf of Bonolo Farms as the applicant for credit. The form itself did not proclaim in its heading that it is both an application form for credit and a deed of suretyship. On a conspectus of the evidence the Tshepes established on a balance of probabilities that they were unaware of it. The conduct of Mr Ottermann, in furnishing the credit application form to Mr Tshepe without explaining its full import, was misleading and resulted in a fundamental mistake on the part of the Tshepes. The suretyship portion of the credit application form was therefore void from the onset.

It held further that the reference to 'the applicant' in clause 7 of the credit application could only have been a reference to Bonolo Farms as the applicant for credit facilities. Thus, on a close scrutiny of clause 7, any claim that Rustia Feed may have had against the applicant could only be a claim against Bonolo Farms as the applicant. Consequently, the Tshepes, qua sureties, did not consent to the jurisdiction of the magistrates' court as envisaged in s 45(1) of the Act. Rustia Feed's action should have been dismissed for want of jurisdiction.

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