THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 90/2020

In the matter between:

ELIAS THAPELO TSHEPE **FIRST APPLICANT**

VICTORIA TSHEPE **SECOND APPLICANT**

and

RUSTIA FEED (PTY) LTD **RESPONDENT**

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

Coram: PETSE DP, MBHA and ZONDI JJA and KGOELE and PHATSHOANE AJJA

Heard: 17 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 23 June 2021.

Summary: **Contract – suretyship clause embodied in credit agreement –** application for special leave to appeal to the SCA in terms of s 17(2)*(d)* of the Superior

Courts Act 10 of 2013 – Jurisdiction – whether the applicants validly consented in their personal capacity to the increased monetary jurisdiction of the magistrates' court in terms of s 45 of the Magistrates' Courts Act 32 of 1944 – whether the respondent had a duty to draw the applicants' attention to the existence of the suretyship clause – whether the applicants were, on the basis of *iustus error*, not bound by the terms of the suretyship as embodied in the credit application – the applicants validly consented to the increased monetary jurisdiction of the magistrates' court - the duty to inform the applicants of the existence of the suretyship clause did not arise - *iustus error* defence not sustainable on the facts – no prospects of success on appeal – the application dismissed.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Matlapeng AJ with Gura J concurring, sitting as court of appeal):

1 The application for condonation of the late filing of the application for special leave to appeal is granted with no order as to costs.

2 The application for special leave to appeal is dismissed with costs.

JUDGMENT

Phatshoane AJA (Mbha and Zondi JJA and Kgoele AJA concurring):

[1] This is an application for special leave to appeal against the decision of the North West Division of the High Court, Mahikeng (the high court), dismissing with costs the appeal of the applicants, Mr Elias Thapelo Tshepe and Ms Sonia Victoria Tshepe (the Tshepes), against the judgment of the magistrates' court for the district of Rustenburg granted in favour of the respondent, Rustia Feed (Pty) Ltd (Rustia Feed). The application was referred for oral argument in terms of s 17(2)*(d)* of the Superior Act 10 of 2013 and, if granted, the determination of the appeal itself. The Tshepes must show, in addition to the ordinary requirement of reasonable prospects of success, that there are special circumstances which merit a further appeal to this Court.

[2] The application for special leave is accompanied by an application seeking condonation for its late filing. It is trite that condonation cannot be had for the mere asking. A party seeking the court's indulgence must establish good cause. The judgment of the high court was handed down on 15 November 2019. The application for special leave ought to have been filed with the registrar by no later than 13 December 2019 that is, within one month of the decision sought to be appealed

against.[1] It was however lodged on 06 February 2020, some 22 days out of the time allowed by the rules.[2] The Tshepes' correspondent firm of attorneys received the judgment on the date that it was handed down and timeously transmitted it by e-mail to the Tshepes' attorneys. However, due to power outages and intermittent server shutdowns, which affected transmission of e-mails via the internet, the Tshepes' attorneys had been unaware that the judgment was delivered until 13 January 2020, when their repaired server was installed. The period of delay is not inordinate and, in my view, has been sufficiently explained. In the circumstances, the interests of justice dictate that condonation should be granted, more so that no prejudice has been occasioned to Rustia Feed.

[3] At stake in this appeal is the question whether the parties to the present litigation validly consented to the increased monetary jurisdiction of the magistrates' court in terms of s 45(1) of the Magistrates' Courts Act 32 of 1944 (the Act). The other area of the dispute concerns the validity of a deed of suretyship concluded by the Tshepes in terms of which they allegedly bound themselves as sureties and co-principal debtors *in solidum* with Bonolo Farms (Pty) Ltd (Bonolo Farms), the principal debtor, in favour of Rustia Feed, a feed miller that supplies wide ranging animal feed. The Tshepes contend that they are entitled to resile from the deed on the basis of *iustus error*.

[4] Mr Tshepe is a chemical engineer with a Master's degree in business leadership whereas Ms Tshepe is a former primary school educator with a diploma in teaching. They are married to each other in community of property. In April 2003, they signed an undated standard credit application form, which embodied the suretyship clause, supplied by Rustia Feed, for the purchase and supply of chicken feed in their capacity as the representatives of Bonolo Farms. The question is whether they also assented to this form in their personal capacity as sureties. The salient clauses of the credit application are couched in these terms:

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[1] See s 16(1)*(b)* read with s 17(3) of the Superior Courts Act 10 of 2013. If the last day of the month falls on a day other than a business day, as in this case, the application must be filed with the registrar on the preceding business day.

[2] The period between 16 December and 15 January (both dates inclusive) constitutes *dies non*; See Rule 1(2) of Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa as promulgated in Government Notice R1523 of 27 November 1998.

'1 I/We the undersigned E.T. Tshepe, V Tshepe
confirm the correctness of the information set out in paragraphs 1-13 hereof.

. . .

3 Guarantee that in the event of the APPLICANT being a company, partnership or close corporation I am authorised to bind the company, partnership or close corporation herein.

4 Guarantee that in the event of the APPLICANT being a company, partnership or close corporation that the amount will be settled according to [the] terms hereof and in default of any payment by the company, partnership or close corporation I bind myself as surety and co-principal debtor in solidum with the company, partnership or close corporation in favour of the supplier.

. . .

7 Agree to the jurisdiction of any magistrates' court which has jurisdiction in terms of section 28 of the Magistrates' Court Act 32 of 1944 as amended to settle any claim, resulting from supplying goods, which the supplier may lay against the applicant at any time, and which would normally be outside the jurisdiction of the magistrates' court because of the amount of money involved in the claim. Nevertheless the supplier has the right to instigate any such legal procedure in any other competent court which would otherwise have jurisdiction.

. . .

13 Acknowledge that on his acceptance by the supplier an agreement, embodying the terms set out in these paragraphs, will come into existence.'

[5] The entire credit application, incorporating the suretyship, comprises only two pages. The first page is a credit application form. It is headed 'RUSTIA FEED PTY LTD' and directly under this caption the words 'APPLICATION FOR CREDIT' appear. Mr Paul Edmond Ottermann (Mr Ottermann), a director of Rustia Feed, inserted the name of the principal debtor 'Bonolo Farms (Pty) Ltd' in the credit form in manuscript. According to Mr Ottermann, Mr Tshepe did not have the full particulars of Bonolo Farms with him at that stage. Therefore, he handed over the credit application form to him to complete at home and, once completed, to return it. The second page of the credit application is divided into two parts and embodies the conditions of sale consisting of some 13 perspicuous clauses.

[6] Two to three days later, Mr Tshepe returned the credit application form to Mr Ottermann. The particulars of Bonolo Farms and those of its two listed directors, the Tshepes, were recorded in manuscript on the first page of the credit application. Although Mr Tshepe had signed the agreement, Ms Tshepe had not done so. As a result, Mr Ottermann requested him to ask Ms Tshepe to sign the credit agreement which he once more took home. His wife returned the form a few days later bearing both Tshepes' signatures and the word 'Director' adjacent thereto. Below their signatures the following text appears: 'ACCEPTED BY: RUSTIA FEED (PTY) LTD'. Rustia Feed did not sign the credit agreement because it had, upon its receipt, been forwarded to its administration for purposes of opening a trading account for Bonolo Farms. Mr Ottermann's evidence on how the credit agreement came into being was not challenged during cross-examination neither was there any different version put to him nor that the Tshepes had not read the agreement.

[7] The Tshepes' version on how they concluded the credit agreement differs in some respects from the evidence presented by Mr Ottermann. I shall, in due course, deal with the divergence. It suffices for now to state that Mr Tshepe, on the one hand, claimed that Bonolo Farms did not need any credit facilities at that stage but merely wished to open a trading account with Rustia Feed. He contends that Mr Ottermann did not draw his attention to the deed of suretyship which was embodied in the credit application form. He was still new in business and at a loss to conceive what a deed of suretyship looked like. He merely completed his particulars on the form and appended his signature. Ms Tshepe, on the other hand, said that Rustia Feed summoned her to sign the credit application form because she was married to Mr Tshepe in community of property. When they signed the credit application form, it did not strike the Tshepes that they bound themselves as sureties.

[8] Rustia Feed subsequently complied with its contractual obligation in that it delivered chicken feed to Bonolo Farms from approximately June 2003 to February 2004. Bonolo Farms failed to effect timeous payments of the amounts that, from time to time, became due and payable to Rustia Feed in terms of the credit agreement and fell into arrears. During June 2005, Rustia Feed instituted action against Bonolo Farms in the North Gauteng High Court, Pretoria, for the payment of R700 275.23, inclusive of interest, for goods sold and delivered. In the course of this litigation, the parties

referred their dispute to arbitration which culminated in an arbitration award being made on 21 January 2010 in favour of Rustia Feed against Bonolo Farms for the payment of R992 403 plus interest. On 25 February 2011, the North Gauteng High Court made this arbitration award an order of court. Rustia Feed demanded payment from Bonolo Farms in satisfaction of the court order however, Bonolo Farms failed to meet the demand. Hence Rustia Feed turned to the Tshepes for payment.

[9] On 03 April 2011, Rustia Feed issued summons against the Tshepes in the magistrates' court, Rustenburg, founded upon the deed of suretyship executed in April 2003. Rustia Feed alleged in the summons that the Tshepes had agreed to be bound as sureties and co-principal debtors *in solidium* with Bonolo Farms and that they had consented to the jurisdiction of the magistrates' court.

[10] The Tshepes defended the action. To paraphrase their plea: they claimed, *inter alia*, that Rustia Feed did not countersign the credit application to signify its acceptance of the terms, consequently, the deed of suretyship never came into existence; 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 impugned document embodied the deed of suretyship because its heading or the foot of its page bore no indication that they bound themselves as sureties; that they would not have given their assent had they been aware of the caveat and never intended to personally bind themselves for Bonolo Farm's obligations towards Rustia Feed; that they appended their signatures to the conditions of sale on behalf of Bonolo Farms whilst labouring under a misapprehension, which had been caused by Rustia Feed, as to the real effect of the document; and lastly, that Rustia Feed knew of their ignorance and were therefore misled.

[11] The magistrate remarked, in *obiter*, that the action had been entertained in the magistrates' court because its jurisdiction was founded upon the credit agreement. The Tshepes' defence did not find favour with her. She held that failure by Rustia Feed to countersign the credit application did not entail that the agreement was void because this was not an *essentialia* of the deed. She further found that Rustia Feed performed in terms of the agreement which triggered the Tshepes' reciprocal obligation to make payment. She extensively dealt with material contradictions

apparent from Mr Tshepe's evidence, in respect of the events leading up to the signing of the credit application, and rejected his evidence as false. She noted that Mr Tshepe was a well-versed entrepreneur and was therefore unpersuaded that he had not read the agreement which he kept for days before returning it to Rustia Feed. Accordingly, she held that Mr Tshepe had not been misled into signing the credit application. In respect of Ms Tshepe, the magistrate reasoned that, she was bound by the terms of the deed by virtue of her matrimonial regime. Consequently, she entered judgment against the Tshepes in favour of Rustia Feed for the payment of R992 403 plus interest.

[12] Aggrieved by this outcome, the Tshepes appealed to the high court. The questions which arose for consideration in the high court were, mainly, whether the magistrates' court lacked monetary jurisdiction to adjudicate the action and whether the defence of *iustus error* availed the Tshepes in respect of the deed of suretyship. The high court found against the Tshepes on both questions. Before us it was contended, on behalf of the Tshepes, that special circumstances existed that warranted the grant of special leave to appeal to this Court against the decision of the high court essentially on two grounds. First, it was contended that the Tshepes had not consented in writing to the monetary jurisdiction of the magistrates' court in terms of s 45(1) of the Act. Second, that the Tshepes were, on the basis of *iustus error*, not bound by the terms of the suretyship as embodied in the credit application.

The jurisdiction of the magistrates' court.

[13] The monetary jurisdiction of the magistrates' court was R100 000 at the time the summons was issued against the Tshepes. This notwithstanding, parties could in terms of s 45(1) of the Act consent in writing to jurisdiction where the amount claimed was in excess of R100 000 subject to the limitation imposed by s 46 of the Act in respect of the subject-matter. Section 45(1), prior to its substitution by s 3 of the Courts of Law Amendment Act 7 of 2017, provided:

'**45 Jurisdiction by consent of parties**

(1) Subject to the provisions of section *forty-six*, the court shall have jurisdiction to determine any action or proceeding otherwise beyond the jurisdiction, if the parties consent in writing thereto: Provided that no court other than a court having jurisdiction under section *twenty-eight* shall, except where such consent is given specifically with reference to particular

proceedings already instituted or about to be instituted in such court, have jurisdiction in any such matter.'

[14] The Tshepes argued that they appended their signatures to the credit application in their capacity as the representatives of Bonolo Farms and not in their personal capacity. They further argued that clause 7 of the credit agreement expressly restricts consent to jurisdiction solely to claims against Bonolo Farm, as the applicant under the credit agreement, and not to the ostensible sureties. That they did not pertinently raise the jurisdictional point in their plea, it was argued, did not bestow jurisdiction on a 'creature of statute'. Nor did their alleged acquiescence or waiver have the effect of conferring jurisdiction on the magistrates' court. Thus, absent their written consent in terms of s 45(1) of the Act, the magistrates' court lacked jurisdiction to entertain the action.

[15] In *Makhanya v University of Zululand*[3] this Court held:

'Jurisdictional challenges will be raised either by an exception or by a special plea, depending on the grounds upon which the challenge arises. There will be some cases in which the jurisdiction of a court is dependent upon the existence of a particular fact (often called a 'jurisdictional fact'). Where the existence of that fact is challenged it will usually be in a special plea, and the matter will proceed to a factual enquiry confined to that issue. In other cases the existence or otherwise of jurisdiction to consider the case will appear from the particulars of claim and in those cases the challenge will be raised by an exception. In such cases a court that considers the challenge might not even be aware of whether or not the plaintiff intends raising any defence at all to the claim. But in both cases the issue must necessarily be disposed of first, because upon it depends the power of the court to make any further orders.'

[16] The contentions advanced by the Tshepes cannot be sustained as they submitted to the jurisdiction of the magistrates' court without demur. Neither did they contest the jurisdiction of that court in their plea. On the contrary, their erstwhile counsel in the trial court, conveyed to the trial magistrate that they were before the magistrates' court on the basis of s 45 of the Act because the parties had agreed to the jurisdiction in the deed of suretyship. Jurisdiction was called into question for the

[3] *Makhanya v University of Zululand* [2009] ZASCA 69; [2009] 4 All SA 146 (SCA); 2010 (1) SA 62 (SCA) para 29.

first time on appeal before the high court. Needless to say, failure by a defendant to take objection *in initio litis* cannot amount to a consent to increased monetary jurisdiction under s 45(1), which requires such consent to be in writing.[4]

[17] The Tshepes obfuscated their defences, although not pertinently raised in their plea, it was canvassed before us that the credit application did not show that the signatories signed in two capacities, that is, in their representative and personal capacity as sureties. Though this argument is raised in the Tshepes' application for special leave to demonstrate that they had been misled, the purported absence of the Tshepes' signature, in their personal capacity, is also relevant under this head and need not detain us. A person signing a document in a representative capacity may nevertheless in the same document expressly undertake some form of personal liability. When the signature comes at the end of a document you apply it to everything referred to throughout the contract.[5] By signing their respective names at the end of the credit application and its conditions of sale the Tshepes entered into two distinct agreements, one in which the creditor extended the credit facilities to the principal debtor, Bonolo Farms, and a suretyship agreement between the creditor and the sureties. The particulars of each agreement are to be found in the entire document.[6]

[18] It is inconsequential that adjacent to their signatures the word “Director” appears in manuscript. As it turned out, during the trial, albeit Ms Tshepe is listed as a director/member of Bonolo Farms on the credit application form, she was not. Her evidence was that she put the word “Director” in manuscript adjacent to her signature because she was told to do so by an employee of Rustia Feed. Insofar as she was not a director she could only have appended her signature to the credit agreement in her personal capacity thereby giving her assent to the deed of suretyship. To hold that the Tshepes did not sign the agreement as sureties would be to elevate form over substance. The conclusion is irresistible that they signed the credit agreement in their representative capacity on behalf of Bonolo Farms and in their personal capacity as sureties.

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[4] *Grand Wholesalers v Ladysmith Metal Industry* 1985 (4) SA 100 (N) at 102G–I.
[5] *Steenkamp v Webster* 1955 (1) SA 524 (A) at 530-531; *Sneech v Hill Kaplan Scott and Partners* 1981 (3) SA 332 (A).
[6] See also *Sneech v Hill Kaplan Scott and Partners* fn 5 above.

[19] In terms of clause 1 read with clause 7 of the credit agreement the Tshepes expressly agreed to the jurisdiction of any magistrates' court which would be seized, in terms of s 28 of the Act, '*to settle any claim, resulting from supplying goods, which the supplier may lay against the applicant at any time.'* (My emphasis.). They now contend that the words '*which the supplier may lay against the applicant'* limited consent to Bonolo Farms. Stated differently, the submission is that the word '*applicant'* was intended to exclude the consent of the Tshepes, in their personal capacity, to the magistrate court's jurisdiction. In *Natal Joint Municipal Pension Fund v Endumeni Municipality,*[7] in summarising the current state of our law with regard to the interpretation of documents, this court said:

'Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'

[20] The restrictive consideration of the words without regard to context has to be avoided.[8] The process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The process no longer occurs in stages but is 'essentially one unitary exercise'.[9]

[21] Clause 1 of the condition of sale stipulates that 'I/ we the undersigned ET Tshepe, V Tshepe, confirm the correctness of the information set out in paragraphs 1 to 13.' The 13 paragraphs have, as it were, an effect or a bearing on either of the two separate agreements. The suretyship clause precedes clause 7. The words 'to settle any claim' as appearing in clause 7 do not exclude the creditor's claim against the sureties. Seen in this context, consent to jurisdiction cannot be said to have applied

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[7] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.
[8] *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowner Association* [2018] ZASCA 176; [2019] 1 All SA 291 (SCA); 2019 (3) SA 398 (SCA) para 61.
[9] *Bothma- Batho Transport (Edms) Bpk v S Bothma & Seun Transport* [2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA) para 12.

exclusively to one agreement. In my view, the use of the word 'applicant' in clause 7 appears to be a patent error and ought not to be applied in a regimented fashion. There is no rational basis upon which the sureties could be said to have been jettisoned from the application of clause 7. Rustia Feed was alive that it was extending credit facilities to a juristic person and in order to protect its interest it would make sense for it to require its representatives to provide an undertaking by way of a deed of suretyship that its debt would be paid and that it would be entitled to enforce the credit agreement in the magistrates' court. In my view, the consent to jurisdiction applied to Bonolo Farms as well as to the Tshepes in their personal capacity. Such a construction of the clause is compatible with the agreement read as a whole.

[22] In developing their argument the Tshepes contended that the lack of written consent by Rustia Feed itself, through its failure to sign the credit application and to make the necessary jurisdictional averments in its particulars of claim, was fatal to the magistrate's assumption of jurisdiction. This argument is put paid to by the clear language of s 45 of the Act. Properly construed, the section does not provide that the written consent be encapsulated in a separate written agreement executed by both parties. The *dictum* of the Full Bench in *David v Naggyah and Another,*[10] referred to by the high court in its judgment, commend itself to me. It was there held:

' . . . [I]t has been contended that to confer jurisdiction in terms of sec. 45 of the present Act it is necessary for there to be put before the court a formal agreement executed by both parties. But that is not what sec 45 requires. It merely states that the parties must consent in writing; each party may separately consent and there need be nothing in the form of an agreement between them; it is not even required that any such consent need be signed by either party. There must be a writing or writings which constitute proof that each of the parties has consented to the jurisdiction. The consent cannot be a matter of mere legal inference from acts or conduct.'

[23] Generally, a contract is founded on consensus. However, contractual liability can also be incurred in circumstances where there is no real agreement between the parties but one of them is reasonably entitled to assume from the words or conduct of the other that they were in agreement.[11] In this case actual consensus cannot be said

[10] *David v Naggyah and Another* 1961 (3) SA 4 (N); [1961] 3 All SA 211 (N) at 214.
[11] See *Be Bop A Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* [2008] 1 All SA 529 (SCA); 2008 (3) SA 327 (SCA) para 10.

to have been lacking. There was a written offer by the creditor; which contained consent to jurisdiction and had been accepted by principal debtor and the sureties. Apart from this, Rustia Feed averred in the particulars of claim, that the magistrates' court had jurisdiction because the Tshepes had consented thereto notwithstanding that the amount claimed exceeded the court's jurisdiction. Consistent with its consent, Rustia Feed prayed for judgment against the Tshepes for the payment of the amount which is in excess of the court's jurisdiction. All of this, in my view, adequately established Rustia Feed's written consent. In any event, it would be illogical for a creditor, which had settled the terms of the agreement, to require consent to jurisdiction from the sureties when it had no intention to submit itself to the same jurisdiction.

[24] The ineluctable conclusion is that the magistrate was seized with jurisdiction. In light of this, it is not necessary to deal with the residual question whether the Tshepes waived their right to object to the monetary jurisdiction or ought to be estopped. It is now left to consider whether the defence of *iustus error* was available to the Tshepes.

***Iustus error* defence**

[25] The gist of the Tshepes' argument is that they were blissfully ignorant vicenarians and newcomers to the business world. *Ex facie* the credit application, they contended that, no reference was made to the existence of the suretyship. Rustia Feed therefore misled them. They further argued that the suretyship clause is inconspicuously recorded in fine print and anything but eye-catching. Mr Ottermann, it was submitted, failed to draw their attention to the suretyship clause and they would not have bound themselves had they been alerted to it. They did not expect that the deed of suretyship would be embodied in the credit application and did not notice it. Their mistake, they claimed, which had been induced by Rustia Feed, would have misled any reasonable person similarly circumstanced.

[26] As support for their argument that they were misled the Tshepes relied on the decision of this Court in *Brink v Humphries and Jewell (Pty) Ltd.*[12] In deciding whether a misrepresentation was made, all the relevant circumstances must be taken into

[12] *Brink v Humphries and Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA).

account and each case will depend on its own facts.[13] The decisive question in a case such as the present was laid down in *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis*[14] 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 last party misled thereby? . . . The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled? *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 (1) SA 978 (A) at 984D - H, 985G - H.'

[27] There is nothing in the evidence presented by Rustia Feed which posits that its account, on how the credit agreement was executed, was untruthful. Mr Ottermann readily conceded that he could not recall whether he drew the Tshepes' attention to the suretyship clause. His evidence to the effect that he gave Mr Tshepe the credit application form to take home and return it signed, was not challenged in cross- examination. On the contrary, it was placed on record that his version on this score was consistent with the Tshepes'.

[28] Quite remarkably, the Tshepes gave an antithetical account. In particular, Mr Tshepe's version on how he came to execute the deed bristles with discrepancies which bring his credibility into question. He disavowed numerous aspects of his evidence-in-chief during cross-examination and vacillated between different versions. He prevaricated when confronted with direct questions on how the deed was executed and went off on a tangent in respect of issues that are not relevant to the case. To demonstrate these glaring incongruities a few examples are uppermost:

(a) He denied that Bonolo Farms ever purchased feed from Rustia Feed on credit or knew that Bonolo Farms applied for credit. This was at odds with the plea and at least two affidavits that he deposed to attesting to the contrary.[15] He was confronted with

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[13] Ibid para 3.

[14] *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) at 119.

[15] The opposing affidavit in the summary judgment proceedings in previous action in the high court, North Gauteng, and the opposing affidavit also in the summary judgment proceedings in the magistrates' court do not form part of the record but were read into the record during the trial.

these affidavits but claimed not to have 'checked thoroughly' the contents or not to have read them.
(b) He claimed not to have noticed that the impugned document was headed 'APPLICATION FOR CREDIT' because the words were written in small print. However, as his evidence progressed he intimated that when he signed the document he noticed that this was a credit application form.
(c) Under cross-examination he intimated that Mr Ottermann gave him a form to complete and return it once he was 'done'. He immediately made an about turn and stated that he completed the form in the presence of Mr Ottermann and gave it back to him. At a certain stage he intimated that while he was at home he enquired from his wife whether it was her handwriting on the form. With the difficulty of being unable to extricate himself from these inconsistencies he said the interrogation was based on a copy he took home.
Mr Tshepe was clearly mendacious and an unreliable witness as correctly found by the trial court and the high court.

[29] The credit application and its accompanying conditions of sale are not of a complex or intricate nature. As the record would reflect, during the trial, it took counsel for Rustia Feed less than three minutes to go-over the conditions of sale with Mr Tshepe. There is nothing inconspicuous about the deed of suretyship. This is so because it is written in the same text as the remainder of the conditions of sale. As the high court observed: 'It is not written in a small print and skulking furtively at the back pages.' There was no pressure exerted upon the Tshepes to sign. There is also no evidence to suggest that they were required to sign the document in haste and under duress. They had ample opportunity to study the concise document and could not have overlooked the suretyship clause.

[30] Around 2003, Mr Tshepe was an executive director of Invest North West; a senior advisor to the Premier of the North West Province on mining and investments and a non-executive director of the Royal Bafokeng Economic Board. In my view, it is 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. After all, he was the controlling mind of Bonolo Farms and could not have expected that his company would incur a huge

liability without any form of security. Ms Tshepe intimated that she did not read the credit agreement but her husband was satisfied that she could sign it because he had already done so. If she was misled she has her husband to blame. The striking feature of her evidence was that her husband could not have signed the agreement without reading it.

[31] Having perused the credit agreement it was open to the Tshepes to delete the suretyship clause if they were not amenable to its terms or to make an appropriate endorsement at the foot of the document to signify their protestation.[16] This they did not do. Whether Mr Ottermann brought the suretyship clause to their attention or not is of no consequence regard being had to the simplicity of the credit agreement. In my view, the duty to inform them did not arise. In *Slip Knot Investments 777 (Pty) Ltd v Du Toit*[17] it was held:

'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.'

[32] Given the plain language employed through-out the credit agreement, I am of the view that it was not essential that the suretyship clause be as prominent as the Tshepes sought to importune. There is no evidence of any suppression of facts on the part of Rustia Feed or any other form of misrepresentation to the Tshepes. The Tshepes failed to discharge the onus that Rustia Feed knew or ought to have reasonably known of their mistake. Rustia Feed was entitled to rely on their signatures

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[16] *Steenkamp v Webster* fn 5 at 529G-H.
[17] *Slip Knot Investments 777 (Pty) Ltd v Du Toit* [2011] ZASCA 34; 2011 (4) SA 72 (SCA) para 12.

as sureties as it did on their signatures as the representatives of Bonolo Farms. They signed the deed of suretyship as a manifestation of their assent to it. They are therefore bound as surety and co-principal debtor with Bonolo Farms for its indebtedness to Rustia Feed under the credit agreement. Their *iustus error* defence is not sustainable on the facts.

[33] The Tshepes have failed to show that there are reasonable prospects of success as well as special circumstances which merit a further appeal to this Court. They have already had the benefits of the two courts and in our opinion the appeal does not raise a substantial point of law. In the circumstances the application for special leave should fail.

[34] Rustia Feed does not persist with costs in respect of the application for condonation. As to the costs of the application for special leave, there is no reason why they should not follow the result. I make the following order:

1 The application for condonation of the late filing of the application for special leave to appeal is granted with no order as to costs.
2 The application for special leave to appeal is dismissed with costs.

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M V PHATSHOANE

ACTING JUDGE OF APPEAL

Petse DP (dissenting):

[35] I have had the advantage of reading the judgment written by my colleague Phatshoane AJA in this matter. Regrettably, I am not able to agree with the conclusion at which she has arrived. In my view special leave to appeal should be granted and thereafter the appeal itself upheld. The reasons underlying our differences will be set

out below. Briefly stated, I disagree with her conclusion that the applicants, in signing the credit application form which incorporated a suretyship in its terms and conditions, were under no illusion as to the precise nature of the document that they signed. We therefore differ fundamentally on our assessment of the evidence adduced at the trial and the application of the law to the facts.

[36] The background facts have been canvassed in the judgment of my colleague. It will therefore not be necessary for me to repeat them in this judgment, save to the extent necessary for present purposes. By way of prelude, it bears mentioning that in *Brink v Humphries & Jewell (Pty) Ltd (Brink)* [2005] 2 All SA 343 (SCA); 2005 (2) SA 419 (SCA),[18] Cloete JA alluded to the fact that there are numerous reported cases that have dealt with problems associated with credit application forms in which is embodied a personal suretyship by the individual(s) who signs the form on behalf of the applicant. The present case is one such case.

[37] As pointed out in the majority judgment, two issues arise in this litigation. First, the question is whether the two applicants who are married to each other in community of property and who signed the credit application form on behalf of the applicant for credit, ie Bonolo Farms, consented in their personal capacities to the increased monetary jurisdiction of the magistrates' court as contemplated in s 45(1) of the Act. Second, whether the Tshepes[19] are bound as sureties and co-principal debtors jointly with Bonolo Farms by reason of having appended their signatures to the credit application form.

[38] The Tshepes seek to avoid liability, in their personal capacities, to the respondent by invoking the defence of justifiable mistake. On the other hand, the respondent seeks to hold the Tshepes bound by the agreement on the simple basis that they signed the document incorporating the terms of the contract, thereby, in effect, relying on the *caveat subsriptor* rule. This rule is well-established in our law. More than a century ago it was described by Innes CJ in *Burger v Central South African Railways* 1903 TS 571 at 578 thus:

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[18] *Brink v Humphries & Jewell (Pty) Ltd* [2005] 2 All SA 343 (SCA); 2005 (2) SA 419 (SCA).

[19] My colleague has, in her judgment, defined the two applicants who are husband and wife as the Tshepes. I, too, adopt that appellation for the sake of convenience.

'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. There are, of course, grounds upon which he may repudiate a document to which he had put his hand. But no such grounds have been shown to exist in the present case. Consider the circumstances under which this note was signed. Neither fraud nor misrepresentation has been alleged; nothing was said by any railway official which misled the signatory; the language of the document was one which the consignor did not choose to read what he was signing, and after he signed did not know the particulars of the regulations by which he had agreed to abide. For the Court to hold upon these facts that the appellant is legally justified in repudiating his signature would be a decision involving far-reaching consequences, and it would be a decision unsupported by any principle of our law. The mistake or error of the signatory in the present case was not such *justus error* as would entitle him to claim a *restitution in integrum*, or as could be successfully pleaded as a defence to an action founded upon the written contract, and therefore it cannot be used for the purpose of attacking that contract when the railway seeks to rely upon it.'[20]

[39] The principles that find application insofar as the *caveat subscribtor* rule is concerned are well-established in our law. In *Brink*[21] it was stated that the *locus classicus* on this aspect was a passage in *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A), in which the following was said at 470 B-E:

'When can an *error* be said to be *justus* for the purpose of entitling a man to repudiate his apparent assent 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 has led the other party, as a reasonable man, to believe that he was binding himself? (*vide Logan v Beit*, 7 S.C. 197; *I. Pieters & Company v Salomon*, 1911 AD 121 esp. at pp. 130, 137; *van Ryn Wine and Spirit Company v Chandos Bar,* 1928 T.P.D. 417, esp. at pp. 422, 423, 424; *Hodgson Bros v South African Railway*s, 1928 CPD 257 at p. 261). 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.'

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[20] This passage was cited with approval in *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 470 B-E.

[21] *Brink* fn 1 above.

[40] This Court in *Brink* went on to reiterate, relying on *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* [1986] 1 All SA 384 (A); 1986 (1) SA 303 (A) at 316 I-J, that even an innocent misrepresentation by the other party suffices. In addition, it was pointedly noted that:

'… it would be unconscionable for a person to enforce the terms of a document where he misled the signatory, whether intentionally or not. In the absence of a contractual term precluding reliance on the representation in question,[22] a misrepresentation, when material, would entitle the signatory to rescind the contract on the grounds of misrepresentation.'[23]

Accordingly, the law strikes a balance between the interests of both contracting parties by, on the one hand, holding that a person who signs a document is bound by the words which appear above his or her signature, whilst, on the other, it protects a person who, in signing the document, was labouring under a justifiable misapprehension attributable to the party seeking to enforce the contract, as to the nature and effect of the document concerned.

[41] It is necessary to emphasise that in determining whether a misrepresentation asserted by a party relying thereon was made, regard would have to be had to all the circumstances and peculiar facts of each case. Where a party seeking to enforce a contract has itself furnished the other party with a document that is misleading in its terms, this in itself would be sufficient, without more, to constitute a misrepresentation.[24]

[42] It is as well to remember that when Mr Tshepe signed the credit application form he was representing Bonolo Farms. Thus, it cannot be said that at that stage he could reasonably have expected to find a term in the application form binding himself as surety for Bonolo Farms' obligations should the credit facilities for which the company applied be granted. If this was the consequence that Rustia Feed desired, it should, to my mind, have specifically drawn Mr Tshepe's attention to the suretyship clause. There is no evidence that Rustia Feed's representative did so. It can therefore hardly be said that Rustia Feed discharged its onus that the Tshepes were made aware that by signing the document titled 'APPLICATION FOR CREDIT' they were

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[22] For which see, for example, *Trollip v Jordaan* 1961 (1) SA 238 (A).
[23] *Brink* fn 1 above at 421F-G.
[24] See in this regard *Keens Group Co (Pty) Ltd v Lötter* [1989] 1 All SA 49 (C); 1989 (1) SA 585 (C) at 591 A-D.

also undertaking personal suretyship obligations in circumstances where they were not informed that by merely appending their signature to the document they would be undertaking such obligations.

[43] Despite the criticism levelled against the Tshepes as to their perceived dismal performance when they testified, the following aspects present no controversy whatsoever. First, as the majority judgment correctly observed, Rustia Feed's representative, Mr Ottermann, had no recollection whether he at any stage drew Mr Tshepe's attention to the fact that the credit application form embodied a suretyship by whoever signed it on behalf of Bonolo Farms, who was the party actually applying for credit facilities from Rustia Feed. That Mr Ottermann gave the credit application form to Mr Tshepe for the latter to fill in the particulars of Bonolo Farms, who returned the form later, cannot justifiably be a basis for concluding that Mr Tshepe as a matter of fact read the form before signing it simply because Mr Tshepe is a graduate and had, at one time, been the executive director of Invest North West, senior advisor to the Premier of North West and a non-executive director of the Royal Bafokeng Economic Board. Whilst these factors could justify a finding that Mr Tshepe was literate and even sophisticated they cannot, on their own, be a basis for the finding that he, as a fact, read the credit application form before signing it. Nor could the fact that counsel for Rustia Feed took 'less than three minutes' to read the content of the credit form, as the majority judgment holds, redound to the benefit of Rustia Feed or be a basis that is tenable for inferring that Mr Tshepe read the credit form before appending his signature thereon. The fact that there was 'no pressure exerted upon the Tshepes to sign' and that there 'is no evidence to suggest that they were required to sign the document in haste and under duress' is, in the context of the facts of this case, a neutral factor.

[44] What is beyond question though is the fact that it was Bonolo Farms that sought credit from Rustia Feed. And to that end, it was required to complete a credit application form which unbeknown to the Tshepes embodied a suretyship in the terms[25] of sale on page 2 thereof, which is the critical page that is in typescript,

[25] The document itself speaks of conditions of sale which is a mischaracterisation for, in truth, these are contractual terms and not conditions in the sense in which the word 'condition' is understood in the law of contract.

whereas the first page of the form had blank spaces designed to record the personal details of the applicant for credit, whoever was such an applicant. Another factor which is not without significance and appears to have been overlooked in my colleague's judgment is that the Tshepes testified as to events that had occurred some 12 years previously. It is therefore hardly surprising that at times they had memory lapses.

[45] Insofar as Mrs Tshepe is concerned, the majority judgment accepts her denial that she had not read the credit form before she signed it. She signed because, as she testified, Mr Tshepe told her to sign as he had already done so. The majority judgment places much store on this aspect of her evidence to underpin the finding that if she was misled at all, she was misled by her husband and not by Rustia Feed. The majority judgment also relies on what Mrs Tshepe said in her testimony that Mr Tshepe 'could not have signed the agreement without reading it.' This was nothing more than an assumption on her part as it is manifest from the tenor of her evidence that she had no personal knowledge that her husband had as a matter of fact read the credit form before signing it.

[46] The statement in the majority judgment at para 31 that '[h]aving perused the credit agreement it was open to the Tshepes to delete the suretyship clause if they were not amenable to its terms or make appropriate endorsement. . .' is, with respect, based on a flawed premise. It presupposes that the Tshepes had actually read the credit form when, in actual fact, there was no evidence on a balance of probabilities presented by Rustia Feed, who bore the onus to justify a finding on this aspect in its favour. It would have been a simple matter for Mr Ottermann to pertinently draw Mr Tshepe's attention to the fact that the credit form embodied within its terms a suretyship, which was a prerequisite for the approval of Bonolo Farms' application for credit. What was required of the Tshepes was to establish on a balance of probabilities that they were not aware of the suretyship embodied obscurely in the credit application form. In my view, on a conspectus of the evidence, considered in its totality, they discharged the onus resting on them notwithstanding the shortcomings in their evidence. That our law permits a party to set up its own mistake under certain

circumstances in order to escape liability under a contract brooks no argument to the contrary.[26] This matter, in my view, is such a case.

[47] For the Tshepes to escape the consequences of having signed the credit form in the terms in which it was presented, it is necessary to find that not only were they induced by Rustia Feed to sign but that a reasonable person in their position would have been misled. This is an objective enquiry which is designed to prevent abuse of the defence of justifiable mistake.

[48] A close examination of the credit application form reveals the following features.
1 The form itself comprises two pages. Notably, the first page is, apart from the name of the respondent, typed in block letters and the caption 'APPLICATION FOR CREDIT'[27] made up of four sections. These are: (a) the type of the business, (which is a reference to an applicant for credit) whether the applicant is (i) sole owner; (ii) partnership; (iii) company; or (iv) close corporation; (b) whether the applicant is a sole owner or partnership, which was left blank presumably because the applicant was a company; (c) if a company or close corporation, the particulars of the entity concerned and those of the persons who are directors or members, as the case may be, are required (this section was completed); and (d) lastly trade references. This portion too was left blank.
2 The second page is titled 'CONDITIONS OF SALE' and contains 13 clauses in all. Clause 1 contains these typed words: 'I/We the undersigned' and has three blank spaces for the person(s) signing the form to insert his or her or their name(s).
3 Clause 4 reads:
'Guarantee that in the event of the APPLICANT being a company, partnership or closed corporation that the amount will be settled according to terms hereof and in default of any payment by the company, partnership or closed corporation I bind myself as surety and co-principal debtor in solidum with the company, partnership or closed corporation in favour of the supplier.'
4 Clause 7 reads:

[26] See in this regard: *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) at 479G.
[27] Block letters are from the form itself.

'Agree to the jurisdiction of any Magistrates Court which has jurisdiction in terms of section 28 of the Magistrates Court Act 32 of 1944 as, amended to settle any claim, resulting from supplying goods, which the supplier may lay against the applicant at any time, and which would normally be outside the jurisdiction of the Magistrates court because of the amount of money involved in the claim. Nevertheless the supplier has the right to instigate any such legal procedure in any other competent court which would otherwise have the jurisdiction.'

Immediately after clause 13, provision is made for the signatories to append their signatures and indicate the capacity in which the signatory signs. The Tshepes signed at the end of the credit form indicating that they both signed in their representative capacity as directors of Bonolo Farms.

[49] It goes without saying that if the signatory does not read the credit form before appending his or her signature, he or she would not have been aware of its terms. Similarly, had their attention been pertinently drawn to the existence of the suretyship located in this clause, it would hardly lie in the mouths of the Tshepes to complain about the suretyship. In addition, the suretyship clause does not stand out in its present setting but is, at a glance, part and parcel of the rest of the terms contained in the application form intended to be completed on behalf of Bonolo Farms as the applicant for credit.

[50] As in *Brink*, the prominent heading of the document proclaims that it is an application for credit. Significantly, nowhere does it proclaim in the heading that it is both an application form for credit and also one for a personal suretyship. Had it done so, there is every reason to believe that by such a simple device the type of difficulties that arose in this case would have been averted. Further, where the signatories appended their signatures, the typed words in block letters namely 'APPLICANT'S SIGNATURE' creates the impression that the signatory signs on behalf of the applicant who, in this case, happened to be Bonolo Farms, the company of which Mr Tshepe was the director. There is no clear indication or even an allusion for that matter that the signatory signed the credit form in dual capacities as, in the first place, a representative of the applicant ie Bonolo Farms and, secondly, as a surety.

[51] Accordingly, the cumulative effect of all the shortcomings inherent in the credit application form ineluctably lead to one conclusion that it was misleading in material

respects. That the form was, as it happened in *Brink*, 'a trap for the unwary' was further exacerbated by the fact that the attention of the Tshepes was not pertinently drawn to the fact that the credit form embodied a suretyship and therefore they were expected to sign in dual capacities.

[52] In these circumstances, the conduct of Rustia Feed's representative in furnishing the credit application form to Mr Tshepe without explaining to the latter its full import had a potential to mislead and indeed was misleading and therefore resulted in a fundamental mistake on the part of the Tshepes. This is all the more so because the document was presented, not as a contract, but as an application form for credit, when in truth it embodied contractual terms. Thus, it does not avail Rustia Feed to contend that the Tshepes had ample opportunity to carefully scrutinize the credit form when they had it in their possession for some three days. It follows that the suretyship portion of the credit application form was void from the onset.

[53] I deal next with the issue of whether the Magistrates' Court for the district of Rustenburg, in which the Tshepes were sued, had the requisite jurisdiction to entertain the claim. The Tshepes were sued for the payment of the sum of R992 403, which is self-evidently way beyond the monetary jurisdiction of a magistrates' court, which was R100 000 at the time. In suing out of the magistrates' court, Rustia Feed asserted in its particulars of claim that the Tshepes had 'agreed to the jurisdiction of the magistrates' court notwithstanding the fact that the amount of the claim [exceeded] the court's jurisdiction'. The foundation for this assertion was self-evidently clause 7 of the terms of sale embodied in the credit application form. For convenience, it is necessary to quote clause 7 again. It reads:

'Agree to the jurisdiction of any Magistrates Court which has jurisdiction in terms of section 28 of the Magistrates Court Act 32 of 1944 as, amended to settle any claim, resulting from supplying goods, which the supplier may lay against the applicant at any time, and which would normally be outside the jurisdiction of the Magistrates court because of the amount of money involved in the claim. Nevertheless the supplier has the right to instigate any such legal procedure in any other competent court which would otherwise have the jurisdiction.'

[54] Reduced to its bare essentials, clause 7 in essence provides that Rustia Fees may, if it so elects, sue in any magistrates' court having jurisdiction in terms of s 28 of

the Act for any claim arising from a sale of goods that it may have against the applicant at any time, which otherwise falls outside of the jurisdiction of the magistrates' court by reason of the amount of money involved. The reference to 'the applicant' in clause 7 is significant. It is important because it can only be a reference to Bonolo Farms for the simple and obvious reason that the applicant here, according to the credit application form, was none other than Bonolo Farms. This is made plain by the credit application form itself on the first page thereof, where the trade name of the applicant is indicated to be Bonolo Farms (Pty) Ltd being a company and not a sole owner (meaning a person) or a partnership or a close corporation. The first page of the credit form also reflects the company registration number of Bonolo Farms.

[55] Thus, applying the ordinary rules of interpretation of documents the logical point of departure is the language of clause 7 itself, considered in the context of the document read as a whole. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA); [2012] 2 All SA 262 (SCA) the current state of the law in relation to the interpretation of documents was explained as follows at para 18:

'Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'

[56] On a close scrutiny of clause 7, and applying the well-established principles of interpretation of documents, any claim that Rustia Feed may have against the applicant arising from a supply of goods can only be a claim against Bonolo Farms as the applicant referred to in this clause and no one else, even if it were accepted that the suretyship embodied in the credit form was valid and of full force and effect. The inevitable consequence of this is that the Tshepes *qua* sureties did not consent to the jurisdiction of the magistrates' court as required by s 45(1) of the Act. In their plea the Tshepes denied that they had consented to the jurisdiction of the magistrates' court. Thus, absent any form of written consent by them *qua* sureties as envisaged in s 45(1)

of the Act, the Rustenburg Magistrates' Court lacked jurisdiction to entertain Rustia Feed's claim against the Tshepes. In these circumstances, Rustia Feed's action should have been dismissed for want of jurisdiction. In any event, if the suretyship is, for the reasons stated above, of no force and effect, as I have already found, the alleged consent to the jurisdiction of the magistrates' court insofar as it relates to the Tshepes will likewise be rendered ineffectual.

[57] It remains briefly to say something about the threshold for special leave. It is trite that the existence of reasonable prospects of success is not sufficient for this Court to grant special leave. Something more in the nature of exceptional circumstances is required to be established. In *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 564H-565E, the requirements for special leave were said to be in existence where: (a) the envisaged appeal raises a substantial point of law; or (b) the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or (c) the matter is of very great importance to the parties or to the public. This is of course not an exhaustive list.[28]

[58] Taking a broad overview of everything and the substantial amount involved, I am of the view that not only do special circumstances, which justify a further appeal to this Court, exist but also that the appeal itself ought to be allowed. In light of the aforegoing reasons, I would have granted special leave to appeal and thereafter uphold the appeal with costs. As this is a minority judgment it is not necessary to formulate the order that I would have granted with precision.

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X M PETSE

DEPUTY PRESIDENT

SUPREME COURT OF APPEAL

[28] See also: *Director of Public Prosecutions: Gauteng Division, Pretoria v Moabi* [2017] ZASCA 85; 2017 (2) SACR 384 (SCA) para 21; *Cook v Morrison* [2019] ZASCA 8; [2019] 3 All SA 673 (SCA) 2019 (5) SA 51 (SCA) para 8.

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