Signing of documents – beware!

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Commercial relationships are normally defined and governed by the terms of an agreement reached between the parties.

All too often parties simply sign documents believing them to record that which the parties agreed upon verbally – only to find out later that this is not always the case. The common law principle of *caveat scriptor* means "let the signer beware", a rule that has been applied as meaning that a party who signs an agreement is bound by the terms and conditions of the agreement and cannot allege that this is not what he agreed to. It is the responsibility of the signatory to be *au fait* with the terms of agreement.

However, in some cases a court will come to the assistance of a party who disputes that he is bound by the terms of the agreement he signed, as is illustrated by the recent case of *Leo Superkos CC v Bester case (CIVAPPMG11/2016) [2016] ZANWHC 65* which deals with the liability of a Defendant sued for an outstanding balance on an application for credit, which incorporated an undertaking to be bound as a co-principal debtor.

The defence raised by the Respondent was that the Plaintiff Appellant *"failed to direct his attention to the contents of clause 16.6 of the agreement"* and that the *"credit agreement as well as the surety agreement are null and void"* as it was not brought to the attention of the Defendant at the time the agreement was signed. The Defendant alleged that the document was only for review and that he had no knowledge that he was binding himself as surety. He did not intend to bind himself as a surety.

The Court referred to the decision of *Brink v Humphries & Jewel (Pty) Ltd 2005 (2) SA 419 (SCA)* where it was noted that the *caveat subscriptor* rule relied upon by the Plaintiff is the doctrine of quasi–mutual assent, which was summarised in the case of *George v Fairmead (Pty) Ltd* as follows:

"has the first party – the one trying to resile – been to blame in the sense that by his conduct has the other party, as a reasonable man, been led 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".

The Court consequently will approach the matter from the perspective of whether there was a misrepresentation which induced the first party to sign and whether a reasonable person in the shoes of the other party would have considered that the first party was binding himself to the terms of the document. The court referred with approval to the case of *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis 1992 (3) SA 234 (A)* where the issue was found to be whether a *"reasonable man may have been misled".*

Applying these principles to the merits of the case the Court dismissed the Appeal and confirmed the finding of the trial court, that the suretyship was *void ab initio.*

The provisions of Consumer Protection Act No. 68 of 2008 ("CPA") may also assist a defendant who finds himself in a similar predicament of having not fully appreciated the import of what he signed assent to. The Act was enacted *"to promote a fair, accessible and sustainable marketplace for consumer products and services..."* and provides consumers some protection from the consequences of contractually assumed obligations.

Unlike the common law doctrine of *caveat scriptor* where the responsibility to familiarise oneself with the terms and conditions of an agreement rests upon the signatory, the CPA places a statutory obligation on the supplier to comply with the certain pertinent obligations, such as the requirement that an agreement that is being

presented to the consumer be in writing, and in plain and understandable language.

The CPA, at present does not find application in the financial sector, as this sector is being overseen by the Financial Services Board ("FSB") and the relevant legislation, such as the FAIS Act, the Treating Customers Fairly ("TCF") Principles and the Policyholder Protection Rules has superseded it.

However, the consumer may not be worse off in terms of this legislation, and the same principles apply in relation to contracts relating to financial services.

In the financial sector, especially in the short–term insurance industry, the insured also has many options open to him to seek redress in contractual disputes with insurers through various complaint and alternative dispute forums, which will seek to achieve a fair outcome rather than strictly enforce contractually assumed obligations. Consumers are entitled to approach bodies such as the Ombudsman for Short–Term Insurance, the FSB or the FAIS Ombudsman, on any insurance related complaints.

These established forums apply the various principles aimed at promoting confidence in the insurance sector and consumer protection, through the application of TCF principles in addition to the law.

Today the emphasis is on citizens being treated fairly and reasonably in their dealings with each other rather than the law requiring slavish adherence to rigid rules, which can catch out the unwary or ill informed.

Whilst the law of contract still requires persons to comply with the obligations they have voluntarily assumed, even if onerous and one sided, the courts will come to the assistance of those who have been misled, or taken advantage of, by unscrupulous individuals.

> *If you can't explain it simply, you don't understand it well enough.*
> – A. Einstein.