# CASES / VONNISSE

# ONCE AGAIN *IUSTUS ERROR* AND SURETYSHIPS

## *Absa Bank Ltd v Trzebiatowsky* 2012 (5) SA 134 (ECP)

## 1 Introduction

In *Absa Bank Ltd v Trzebiatowsky* (2012 (5) SA 134 (ECP)) the court was faced with a defence that has become all too common within the context of suretyship agreements, namely that of *iustus error*, or rather material and reasonable mistake rendering the contract void. Traditionally the courts have been wary of releasing a signatory of a contractual document from liability in the absence of some form of misrepresentation on the part of the contract assertor, but in *Brink v Humphries & Jewell (Pty) Ltd* (2005 (2) SA 419 (SCA)) the Supreme Court of Appeal adopted a far more lenient approach, one which opened the door for potential abuse of this defence, especially it seems so where suretyships are involved. The *Trzebiatowsky* decision is relevant for confirming the more traditional approach as opposed to the one largely ushered in by *Brink* and for sensibly reflecting the issues relevant to adjudicating these cases.

## 2 Facts and decision

The relevant facts in *Trzebiatowsky* are rather typical of cases involving suretyships executed as security for the debts of juristic persons and the defence of *iustus error*. The plaintiff, Absa Bank Ltd, instituted action against five defendants, jointly and severally, for payment of an amount of R7 809 810.43, plus interest and costs, arising from a loan made to three companies to be formed for a business venture, and deeds of suretyship executed as security for repayment of the loan. Summary judgment was granted against three of the defendants but the first and second defendants, who were married to each other and directors of the three companies, were given leave to defend the bank's action. The latter defendants had signed deeds of suretyship in their personal capacities for the loan and the plaintiff sought judgment against them on the basis of the suretyships. During the course of proceedings the first defendant consented to judgment and the matter proceeded solely against the second defendant. The main thrust of her defence was that she had been unaware of what she was signing when she signed the suretyships. The plaintiff's relationship manager, she maintained,

had failed to advise her that by her signature she would bind herself personally for the debts of the companies; and if the consequences of appending her signature had been explained to her, she most certainly would not have signed the surety documents. She further denied having any knowledge of the general practice observed by banks in requiring directors of companies to furnish personal security for loans granted to companies (par 1–10). In legal terms the second defendant's defence amounted to a plea of *iustus error* (par 11).

It was, however, common cause that the plaintiff's relationship manager had pointed out that the documents in question were suretyships in favour of the plaintiff and that his assistant had pointed out where the signatures had to be appended. Furthermore, the words next to the line where the second defendant had signed, clearly indicated that she signed in her own name. Also of relevance was a clause in the suretyship agreements providing for unlimited liability and the second defendant was specifically requested to sign in full next to the particular clause in all three documents, which she did. On her version this should have caused her concern, but she apparently made no attempt to obtain clarity as to the meaning of this clause. Her explanation was simply that she had trusted the manager when requested to sign the documents (par 12).

In delivering judgment Revelas J held that, for the second defendant to be successful in her plea of *iustus error*, she had to show that she had been misled as to the nature or terms of the suretyships, or that there had been a duty on the bank to inform the defendants of the consequences of signing the documents, which the bank had failed to discharge (par 13). In the circumstances, however, there was no indication that the second defendant had been misled by the plaintiff in any manner, but rather that the maxim *caveat subscriptor* applied and trumped the plea of *iustus error*. Consequently, judgment was granted in favour of the plaintiff (par 25).

## 3 Commentary

### *3 1 General*

Although the principles of the *iustus error* doctrine are fairly clear (see Van der Merwe, Van Huyssteen, Reinecke and Lubbe *Contract: General Principles* 4ed (2012) 39–44; and Hutchison and Pretorius (eds) *The Law of Contract in South Africa* 2ed (2012) 100–103), the courts have not always been consistent in applying them, and this holds true within the context of suretyships as security for the debts of juristic persons. Within the context of signed contractual documents this doctrine provides a counterbalance to the *caveat subscriptor* rule ("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" – *Burger v Central South African Railways* 1903 TS 571 578).

Case law on mistake and suretyship reflects two disparate approaches: the more traditional approach, if it may be called that, which reflects reluctance on the part of the judiciary to entertain a plea of justifiable mistake lightly where a deed of suretyship on the face of it has been properly executed (*ie*, in

accordance with s 6 of the General Law Amendment Act 50 of 1956). And a much more lenient approach in favour of the mistaken party exemplified by the decision in *Brink v Humphries & Jewell (Pty) Ltd* (*supra*). These approaches have been discussed in detail elsewhere and do not bear repeating, save to say that generally the courts have favoured the traditional, stricter approach (see Pretorius "Mistake and Suretyship: Avoiding the Spectre of *Brink v Humphries & Jewell (Pty) Ltd*" 2009 *Obiter* 763). In fact, in the most recent Supreme Court of Appeal decision the court found that even where the mistake had been induced by the apparent fraud of a third party (and seemingly, therefore, possibly could have been excusable: compare *eg*, *Musgrove & Watson (Rhod) (Pvt) Ltd v Rotta* 1978 (2) SA 918 (R); *Musgrove & Watson (Rhodesia) Ltd v Rotta* 1978 (4) SA 656 (RA); and *Kok v Osborne* 1993 (4) SA 788 (SE)), the mistaken party was nevertheless held liable because the fraud did not emanate from the contract assertor and the latter was entitled to rely on the mistaken party's apparent assent to a suretyship evidenced by his signature (*Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA)).

In so far as *Trzebiatowsky* is concerned, it must be said that the decision seems entirely correct, but what makes this case noteworthy is the sensible manner in which the court dealt with the issues at stake, both legal and practical. Also of significance is that the court did not apply the approach adopted in *Brink*, although invoked by the second defendant, and its decision is more in tune with the traditional approach referred to above. While mistake in the context of suretyships has appeared in the law reports fairly often since the *Brink* decision the provincial courts seem rather hesitant to apply it directly, preferring to distinguish it on the facts (compare *eg*, *Langeveld v Union Finance Holdings (Pty) Ltd* 2007 (4) SA 572 (W); and *Royal Canin South Africa (Pty) Ltd v Cooper* 2008 (6) SA 644 (SE); and see further Pretorius 2009 *Obiter* 769–771). Specific aspects of *Trzebiatowsky* will further be highlighted and contrasted with the *Brink* case where appropriate.

## *3 2 Duty to speak and unexpected contractual clauses*

It is generally accepted that a positive misrepresentation renders a material mistake reasonable (see *eg*, *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D) 169D–F; and *Kok v Osborne supra* 799E–800I), but that an omission will only have the same result where the contract assertor failed to discharge a duty to speak and clear up the misapprehension of the other party in the circumstances (see *eg*, *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A); *Van Wyk v Otten* 1963 (1) SA 415 (O); and further Van der Merwe *et al Contract: General Principles* 41; Hutchison and Pretorius *The Law of Contract* 100–102; and Van Rensburg "Die Grondslag van Kontraktuele Gebondenheid" 1986 *THRHR* 448 454–456). However, in *Brink v Humphries & Jewell (Pty) Ltd* (*supra* par 3) the court confirmed that the furnishing of a document could in itself constitute a misrepresentation, apparently without the document containing a falsehood and where there was no further misleading conduct on the part of the contract assertor. Noticeably, in *Trzebiatowsky* the court preferred the more traditional exposition of the law and stated (par 13):

> "In order to succeed in the defence of *iustus error* the second defendant must show that she was misled as to the nature of the deeds of suretyship or as to the terms which they contained, or by some act or omission on the part of [the plaintiff's representative], if there was a duty on him to inform the defendants (in particular the second defendant) of the consequences of signing the personal sureties. Such duty would only arise where the document departed from prior representations as to the nature or contents thereof."

Although perhaps not a textbook exposition, it is submitted that this dictum generally encapsulates the appropriate manner in which to determine whether an error is justified. Here it deserves briefly to be mentioned that *Brink* still is problematic because it is hard to see how a document can mislead if it has not been read (*cf* Sharrock "Inappropriate Wording in a Contract: A Basis for the Defence of *Iustus Error*?" 1989 *SALJ* 458 461), as well as the fact that this case tends to excuse rather irresponsible behaviour on the part of a signatory (see Bhana and Nortjé "General Principles of Contract" 2005 *Annual Survey* 196 212; and Pretorius 2009 *Obiter* 772). It is further suggested that a document can only in itself embody a misrepresentation if it actually contains a misstatement, falsehood, or even ambiguity, much the same as if the contract assertor actually verbally misrepresented something to the contract denier. On the other hand a negative misrepresentation, as pointed out by Revelas J, occurs where there is a duty to speak on the part of the contract assertor, such as where there is a discrepancy between the prior representations of the contract assertor and a document he or she presents for signing, which has not been discharged (*Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A) 905; and *Shepherd v Farrell's Estate Agency* 1921 TPD 62 65–66). Importantly, in the latter situation, the misrepresentation still emanates from the contract assertor and not from the contractual document *per se*. The document usually merely contains the terms on which the contract assertor is actually prepared to contract, but which are at variance with his or her previous representations.

What has further more recently caused a bit of a stir is the notion that a contractual party is not required to inform the other party of terms in a proposed agreement that could reasonably be expected to form part of the contract (*Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) par 36; *Potgieter v British Airways plc* 2005 (3) SA 133 (C) 140D–F; and see further Nortjé "'Unexpected Terms' and *Caveat Subscriptor*" 2011 *SALJ* 741; and Woker "*Caveat Subscriptor*: How Careful are We Expected to be?" 2003 *SA Merc LJ* 109 115–116). Conversely, it has been said that the party who presents a contractual document for signing, containing terms which reasonably could not be expected, cannot be said to have a reasonable belief in consent if the other party signs the document without reading it (*Dlovo v Brian Porter Motors Ltd* 1994 (2) SA 518 (C) 525A–D; *Fourie v Hansen* 2001 (2) SA 823 (W) 832D–G; and Christie and Bradfield *The Law of Contract in South Africa* 6ed (2011) 185–186). In *Slip Knot Investments 777 (Pty) Ltd v Du Toit* (*supra* par 12) Malan JA expressed himself in this regard as follows:

> "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."

In applying this principle in *Afrox Healthcare Bpk v Strydom* (*supra* par 36) the court held that exclusionary clauses in standard form contracts were these

days more the rule than the exception, and consequently that such a clause in a hospital-admission form was not objectively speaking unexpected. Therefore, that there was no duty on the hospital to point out the clause to the patient (see, however, Naudé and Lubbe "Exemption Clauses – A Rethink Occasioned by *Afrox Healthcare Bpk v Strydom*" 2005 *SALJ* 441; and *cf* Pretorius "Exemption Clauses and Mistake" 2010 *THRHR* 491). Nonetheless, it is suggested that this should not be taken as an absolute rule and that the contract in question and particular circumstances of a case may prove otherwise (Hutchison and Pretorius *The Law of Contract* 102). For example, in *Mercurius Motors v Lopez* (2008 (3) SA 572 (SCA) par 33) the court found that an exemption clause in a contract of deposit that "undermines the very essence" of the contract should be brought to the attention of the depositor.

More relevant for present purposes is that in *Slip Knot Investments 777 (Pty) Ltd v Du Toit* (*supra* 78A) Malan JA concluded that personal suretyship clauses in contractual documents pertaining to a loan made to a trust were also not unexpected (see further Pretorius "Third Party Fraud Inducing Material Mistake" 2011 *PER* 187). In contradistinction, in *Brink v Humphries & Jewell (Pty) Ltd* (*supra* par 11) the court held that a one-page credit application form, on behalf of a company, that contained a personal suretyship clause was a "trap for the unwary" and that the signatory was justifiably misled by it. In other words, that the suretyship clause was unexpected (see further on the *Brink* case Bhana and Nortjé 2005 *Annual Survey* 208–214; Hutchison "'Traps for the Unwary': When Careless Errors are Excusable" in Glover (ed) *Essays in Honour of AJ Kerr* (2006) 39 47–52; Otto "Verskuilde Borgstellings in Standaardkontrakte en *Iustus Error*" 2005 *TSAR* 805 812–814; and Pretorius "*Caveat Subscriptor* and *Iustus Error*" 2006 *THRHR* 675). Previously, a similar approach was adopted in *Keens Group Co (Pty Ltd v Lötter* 1989 (1) SA 585 (C) (see further Sharrock 1989 *SALJ* 458ff for trenchant critique of this decision). There is, however, an ever increasing body of authority to the contrary, and that is that suretyship clauses in credit applications on behalf of juristic persons are indeed not unexpected and are in fact the order of the day (see *eg*, minority decision of Navsa JA in *Brink v Humphries & Jewell (Pty) Ltd supra* par 35; *Slip Knot Investments 777 (Pty) Ltd v Du Toit supra* par 12; *Roomer v Wedge Steel (Pty) Ltd* 1998 (1) SA 538 (N) 543F–G; and further Sharrock 1989 *SALJ* 463; and Otto 2005 *TSAR* 814.

In *Trzebiatowsky* the court was mindful of distinguishing *Brink* on the facts (par 24) and appropriately added its voice on the matter in the following terms (par 23):

> "In my view, it would be almost inconceivable that a bank would not require security from directors in their personal capacity in circumstances such as these. The only other surety in this case was the Trez Trust which was a dormant trust. It was also established during cross-examination of the first defendant, (who conceded the point), that there were indeed insufficient securities, bar the personal sureties of the directors, to cover the amount of financing required. The requirement of personal sureties to be given by the directors in this matter is consonant with prudent bank practice. The fourth defendant, who was also the first defendant's accountant, conceded this point in his evidence."

One can only agree; it would be imprudent for a bank not to require personal suretyships to cover a loan made to a private company for the purpose of financing a business venture. In fact, it probably would be reckless not to do so. And of course this practice would extend to any form of substantial credit granted to a juristic person. Consequently, it is suggested that generally suretyship provisions in such cases are not unexpected and are indeed the rule rather than the exception (see, however, Cilliers and Luiz "*Caveat Subscriptor* – Beware the Hidden Suretyship Clause" 1996 *THRHR* 168 174). It could hardly be argued that suretyship undermines the very essence of an agreement to advance some or other form of credit or loan to a private company. On the contrary, suretyships are part of the life blood of corporate financing and fulfil a very important role in this regard. And surely the determination of whether financing or credit is to be granted must hinge to a large extent on whether there is sufficient security to cover the debt in the case of default by the debtor (*cf* Sharrock 1989 *SALJ* 463).

Therefore, it is suggested that a mere plea of ignorance of an "unexpected" suretyship clause in such circumstances should be insufficient to sustain a defence of *iustus error* and that the usual rules of the doctrine should apply (see also interestingly Nortjé "Of Reliance, Self-reliance and *Caveat Subscriptor*" 2012 *SALJ* 132). In short, where the contract denier is responsible for his or her own mistake by simply not reading a contractual document before signing it, there is a strong case for the *caveat subscriptor* rule to prevail (compare *eg*, *Diners Club SA (Pty) Ltd v Thorburn* 1990 (2) SA 870 (C) 874–875; *Roomer v Wedge Steel (Pty) Ltd supra* 543; *Blue Chip Consultants (Pty) Ltd v Shamrock* 2002 (3) SA 231 (W) 239–241; and *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* 2000 (1) SA 167 (W) 175–176 180–181). As previously mentioned, to succeed the contract denier would have to show some legally reprehensible conduct on the part of the contract assertor that either induced or sustained the mistake in question, such as where the contract assertor was aware (or reasonably ought to have been aware) of the contract denier's misapprehension, but failed to draw the latter's attention to it (compare *eg*, *Prins v Absa Bank Ltd* 1998 (3) SA 904 (C) 910–911). And of particular significance would be the case where a contractual document presented by the contract assertor for the signature of the contract denier differed materially from what was orally agreed upon previously (compare *eg*, *Davids v Absa Bank* 2005 (3) SA 361 (C) 370–371).

### *3 3 Duty to speak, attributes and capacity of the contract denier*

In *Trzebiatowsky* Revelas J, in concluding that there had been no duty to speak on the part of the plaintiff, duly considered the fact that the second defendant was no "babe-in-the-wood" (141A) – the implication being that she was not naïve in a business sense – but in fact a company director who had the power to make independent decisions (140B). This observation alludes to further factors that could impact upon whether there is a duty to speak in the circumstances, namely the personal attributes of the mistaken party and the capacity in which he or she mainly acts (the contract of suretyship being accessory to a main obligation incurred on behalf of a juristic entity: *cf* Forsyth and Pretorius *Caney's The Law of Suretyship in South Africa* 6ed (2010) 27–

28). The courts have in the past at times been very strict in applying the *caveat subscriptor* rule, virtually irrespective of subjective factors peculiar to the signatory of a document (compare *eg*, *Bhikhagee v Southern Aviation (Pty) Ltd* 1949 (4) SA 105 (E); *Mathole v Mothle* 1951 (1) SA 256 (T); *cf Khan v Naidoo* 1989 (3) SA 724 (N); and further Hutchison in Glover (ed) *Essays in Honour of AJ Kerr* 41–42; Christie and Bradfield *The Law of Contract* 183; and Pretorius "The Basis and Underpinnings of the *Caveat Subscriptor* Rule" 2008 *THRHR* 660 667). But quite plausibly such factors may play a role in considering whether an error is reasonable or not. Potentially they can exert an influence in two ways: on the one hand where the signatory is clearly at a disadvantage for some or other personal reason, such as being of advanced age and infirm, or clearly lacking in literacy or intellect, arguably the case for a duty to enquire or speak on the part of the contract assertor should be strengthened (see Grové "Kontraktuele Gebondenheid, die Vereistes van die Goeie Trou, Redelikheid en Billikheid" 1998 *THRHR* 687 693; and compare also interestingly s 40(2) of the Consumer Protection Act 68 of 2008). A similar situation potentially presents itself where the signatory occupies a rather menial position in a company (see *eg*, *Kempston Hire (Pty) Ltd v Snyman* 1988 (4) SA 465 (T)). Admittedly, however, the courts are rather wary of permitting purely subjective factors to dilute the *caveat subscriptor* rule, probably for fear of being paternalistic (*cf Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 (2) SA 599 (SCA) 603E–F; and see, however, Barnard-Naudé "The Decision in *Hartley v Pyramid Freight (Pty) Ltd*: Justice Miscarried?" 2007 *Stell LR* 497 506–507). On the other hand, where the signatory is clearly a person with business acumen or experience (see *eg*, *Langeveld v Union Finance Holdings (Pty) Ltd supra* par 12; and *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers supra* par 4), or acts as the functionary of a juristic person or trust, the converse may be case (see *eg*, *Diners Club SA (Pty) Ltd v Thorburn supra* 875F; and *Slip Knot Investments 777 (Pty) Ltd v Du Toit supra* 78B–C).

In other words, and without attempting to formulate a hard and fast rule, in the first instance sketched above there may be factors that point to a duty to inform, whereas in the latter instance there may be factors suggesting the contrary (see further Hutchison in Glover (ed) *Essays in Honour of AJ Kerr* 46–47; Pretorius 2009 *Obiter* 772–773). The rationale behind this is simply that since the *iustus error* approach is usually regarded as an indirect application of the reliance theory (Van Rensburg 1986 *THRHR* 453; Hutchison and Pretorius *The Law of Contract* 103; and Lubbe and Murray *Farlam and Hathaway Contract: Cases, Materials and Commentary* (1988) 168), the question really seems to be whether the contract assertor is entitled to assume reasonably that the signatory has assented to the terms in question (*Slip Knot Investments 777 (Pty) Ltd v Du Toit supra* par 12; *Roomer v Wedge Steel (Pty) Ltd supra* 543B–C; and Hutchison in Glover (ed) *Essays in Honour of AJ Kerr* 43ff). And the personal attributes of the signatory and capacity in which he or she acts may play a role in determining whether there was a reasonable belief in consensus on the part of the contract assertor in the circumstances. Nonetheless, it should be noted in this regard that there is a tendency to dwell on factors that reinforce the case for applying the *caveat subscriptor* rule, rather than those that could suggest the contrary.

### *3 4 Policy considerations and underlying ideology*

Interestingly, on a policy level the suretyship cases dealing with mistake are potentially influenced by two factors that tend to favour enforceability above voidness. In the first place, where constitutive formalities are prescribed by law for the validity of certain agreements, such as suretyships (s 6 of the General Law Amendment Act 50 of 1956) and alienations of land (s 2(1) of the Alienation of Land Act 68 of 1981), the emphasis appears to be on the promotion of certainty and the limitation of disputes and fraud (see *Neethling v Klopper* 1967 (4) SA 459 (A) 464; *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 (2) SA 15 (A) 25; *Fourlamel (Pty) Ltd v Maddison* 1977 1 SA 333 (A) 342–343; Van Rensburg and Treisman *The Practitioner's Guide to the Alienaton of Land Act* 2ed (1984) 22; and Hutchison and Pretorius *The Law of Contract* 161 162). So once a contractual document *prima facie* complies with the relevant statutory prescriptions a court conceivably would be hesitant to strike down the agreement in light of the intended aim of the legislation. Secondly, the *iustus error* approach functions as a corrective to an objective basis for contractual liability or modified declaration theory (although somewhat controversial there is abundant authority to this effect: see *eg*, *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) 479; *Springvale Ltd v Edwards* 1969 (1) SA 464 (RA) 469–470; *Hlobo v Multilateral Motor Vehicle Accidents Fund* 2001 2 SA 59 (SCA) par 12–13; Van Rensburg 1986 *THRHR* 453; De Vos "Mistake in Contract" 1976 *Acta Juridica* 177 181; Farlam "The Role of Consensus in the Formation of Contracts" 1993 *Responsa Meridiana* 176 184; Kritzinger "Approach to Contract: A Reconciliation" 1983 *SALJ* 47 54ff; Hutchison and Van Heerden "Mistake in Contract: A Comedy of *(Justus)* Errors" 1987 *SALJ* 523; and Floyd and Pretorius "A Reconciliation of the Different Approaches to Contractual Liability" 1992 *THRHR* 668). In so doing this doctrine acknowledges by implication the need for legal certainty which an objective approach promotes (Lubbe and Murray *Farlam and Hathaway Contract* 181; and Pretorius 2006 *THRHR* 683). Hence, although the *iustus error* doctrine is a device for ameliorating the declaration theory in the interests of reasonableness and fairness, it is applied with caution and usually when there are clear indications of legally impermissible conduct on the part of the contract assertor (*cf National and Overseas Distributors Corporation (Pty) Ltd v Potato Board supra* 479G–H; and Christie and Bradfield *The Law of Contract* 329). Hardly surprisingly then that on balance the courts seem rather wary of relieving a surety from contractual liability on the basis of operative mistake (see further Pretorius 2009 *Obiter* 765–766 and 769–771). And quite plausibly these policy considerations, although unarticulated, may very well lie behind the fairly strict application of the *caveat subscriptor rule* in many suretyship cases.

On a deeper – but related – level an objective approach to contractual liability is fed by an ideological stream which is aptly described by Adams and Brownsword (*Understanding Contract Law* 4ed (2004) 189) as "market-individualism." According to the market-ideology branch of this stream the function of contract law is to facilitate competitive exchange by establishing the ground rules within which commerce can be conducted (see further Adams and Brownsword *Understanding Contract Law* 189–191; Atiyah *The*

*Rise and Fall of Freedom of Contract* (1979) 402–404; Cooke and Oughton *The Common Law of Obligations* 3ed (2000) 27ff; Hawthorne "The Principle of Equality in the Law of Contract" 1995 *THRHR* 157 163–166; Eiselen "Kontrakteervryheid, Kontraktuele Geregtigheid en die Ekonomiese Liberalisme" 1989 *THRHR* 516 526ff; and Pretorius 2008 *THRHR* 669). A primary value in this regard is a concern for the security of transactions, which is reflected in an objective theory of assent and attendant cautious approach to relieving a party from contractual liability for subjective mistake (Adams and Brownsword *Understanding Contract Law* 190; *cf* Smith *Atiyah's Introduction to the Law of Contract* 6ed (2005) 22; and Mason and Gageler "The Contract" in *Essays on Contract* Finn (ed) (1987) 1 4–5). Moreover, market theory tends to favour market convenience and that "the law should accommodate commercial practice, rather than the other way round" (Adams and Brownsword *Understanding Contract Law* 191). With its commitment to market dealing, market theory seeks to align legal doctrine with commercial reality, and is wary of legal rules falling out of line with commercial practice. Applied to the present situation, sound commerce favours the provision of adequate security where substantial credit is extended to a legal person and, consequently, in the application of legal rules courts should duly take cognisance of this practice and not lightly undermine it.

When one considers the *Trzebiatowsky* decision these very values seem to be reflected: due consideration of commercial practice (par 23) (bank practice requiring personal sureyships when loans are extended to juristic entities); a fairly strict application of the *caveat subscriptor* rule (par 24–25) (in line with an objective approach to contractual liability) and a concomitant cautious approach to relieving a surety on the basis of subjective mistake (par 25) (to preserve security and certainty in such transactions). It is suggested that in light of the policy considerations and ideological values potentially influencing the suretyship cases, the approach adopted in decisions such as *Trzebiatowsky* is entirely defensible.

## 4 Conclusion

One suspects that cases on suretyship and mistake will still frequently grace the law reports, the contract of suretyship often being quick to accede to, but not so hasty to honour. One can also expect that sureties invariably will invoke the *Brink* decision in an attempt to escape liability. But recent provincial cases such as *Trzebiatowsky* show a preference for the traditional, stricter application of the *caveat subscriptor* rule, and a hesitancy to uphold a plea of justifiable mistake in relation to personal suretyships executed by directors (and the like) as security for the obligations of corporate entities. At this point it can hardly be said that when credit is sought on behalf of a juristic person that a bank or other institution will not as a general rule require some form of security, and personal suretyships are probably the most convenient and prevalent form of security. In other words, personal suretyships objectively may be expected to form part and parcel of such transactions and, in accordance with the *caveat subscriptor* rule, the signatory who fails to read contractual documents containing such clauses does so at his or her own peril. The creditor is generally justified in relying on the signatory's signature as surety, just as much as it is entitled to rely on the signatory's signature as

representative of a juristic person. Furthermore, as a general premise, it virtually goes without saying that a functionary should exercise diligence and care in executing agreements on behalf of a juristic entity or face the consequences.

In *Trzebiatowsky* the court was mindful of lightly construing the suretyships in question as unexpected and misleading, and appropriately for a plea of *iustus error* to be sustained required some other form of misleading conduct on the part of the contract assertor. Such an approach affirms the principle that generally for this defence to succeed some form of misrepresentation, whether positive or negative (in the form of failure to discharge a duty to speak), on the part of the contract assertor is required. Although case law does admit of exceptions to this broad proposition, it is suggested that generally this remains the appropriate way to balance the *caveat subscriptor* rule and the *iustus error* doctrine. Perhaps even more importantly, the court practically and sensibly held that it would be inconceivable for banks not to require personal suretyships in such instances in accordance with prudent bank practice. The implication, once again, is that personal suretyships are not objectively speaking unexpected where credit is sought on behalf of a juristic entity and that banks in particular require personal suretyships as standard practice in such instances. This leaves little room for a defence of *iustus error* premised on an "unexpected" suretyship clause in a credit or loan application on behalf of a juristic entity. *Trzebiatowsky* further emphasizes the fact that the personal attributes and capacity within which the signatory of a suretyship acts can play a role. When one is dealing with a person experienced in business, who wields a certain amount of authority and power as company director, the case for relieving such a party from a suretyship agreement which they simply have not read seems to diminish considerably.

The approach in *Trzebiatowsky* is furthermore consonant with policy considerations that influence the *caveat subscriptor rule* and *iustus error* doctrine, both of which acknowledge the need for certainty and security in contractual relations. The argument for upholding an apparently validly concluded contract seems to further strengthen in cases where constitutive requirements (as with suretyship agreements) are required by law. In such matters the purpose of the legislation to promote certainty may be a further factor that subtly points toward validity in the absence of clear indications to the contrary. On a deeper level, the *Trzebiatowsky* case tends to accord with market theory, one of the ideological streams infusing the law of contract, which, amongst other things, also seeks to preserve security and certainty in market relations, and generally observes that the law should take due note of commercial reality. By taking cognisance of the practice of banks to require personal suretyships where loans are advanced to juristic entities, the court justifiably took commercial reality into account in the application of legal doctrine. Although the final word on suretyships and mistake surely has not been spoken, it is suggested that the approach in *Trzebiatowsky* is apposite for duly taking note of the relevant practical and legal issues in adjudicating such instances. Cases such as this promote certainty, while not detracting from the inherent equitableness of the *iustus error* doctrine.

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