FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO: 103

PARTIES:
ERIC ROWLAND NAUDE **APPELLANT**

and

DANIEL JOUBERT **RESPONDENT**

Registrar CASE NO: **CA280/2006**

Magistrate:

Supreme Court of Appeal/Constitutional Court: **ECD**

DATE HEARD: **2/2/07**
DATE DELIVERED: **5/2/07**

JUDGE(S): **PLASKET J**
EBRAHIM J

LEGAL REPRESENTATIVES -
Appearances:

- for the State/Plaintiff(s)/Applicant(s)/Appellant(s): **PE Jooste**
- for the accused/defendant(s)/respondent(s): **HJ Benade**

Instructing attorneys:

- Plaintiff(s)/Applicant(s)/Appellant(s): **Netteltons**
- Respondent(s)/Defendant(s): **Neville Borman & Botha**

CASE INFORMATION -

- *Nature of proceedings* : **Civil Appeal**
- *Topic*:

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)

CASE NO: CA280/2006

DATE HEARD: 2/2/07

DATE DELIVERED: 5/2/07

NOT REPORTABLE

In the matter between:

ERIC ROWLAND NAUDE **APPELLANT**

and

DANIEL JOUBERT **RESPONDENT**

Lease – Whether a lease agreement entered into between the appellant and the respondent had been cancelled by agreement – Held that the agreement had been cancelled by agreement when: with the knowledge of the appellant, the respondent sold the business that was conducted in the leased premises to one E; the appellant, with the knowledge of the respondent, then entered into an oral lease agreement with E in respect of the premises; and the appellant prevailed upon the respondent to sign a deed of suretyship in which he stood surety for E's debts in favour of the appellant, particularly those arising from the lease agreement entered into by the appellant and E – The appeal against the court below's dismissal of the appellant's claim was dismissed with costs.

JUDGMENT

PLASKET J

[1] The appellant – the plaintiff in the court below – instituted an action against the respondent – the defendant in the court below – in the Magistrate's Court, Humansdorp for payment of a total amount of R183 456.00, being five separate rental payments in respect of the use and enjoyment of premises situated at 23 Diaz Road, Jeffrey's Bay, premises in which a restaurant business was conducted. The magistrate dismissed the action with costs and the appellant has appealed against that decision.

[2] In his particulars of claim the appellant alleged that he and the respondent entered into a written lease agreement in respect of the premises mentioned above. The agreement was entered into in July 2000 and was to endure for a period of five years. He claimed that the respondent had breached the agreement by failing to pay rent, in accordance with the terms of the agreement, for a period from February 2002 to 18 November 2002.

[3] In his plea, the respondent admitted that the lease agreement had been entered into and admitted its terms. He denied that he had breached the contract. The basis of his denial of liability is to be found in the following paragraph of his plea:

> 'Verweerder pleit dat eiser die huurkontrak op of ongeveer Julie/Augustus 2001 gekanselleer het, besit geneem het van die huurperseel, ĥ mondelinge, alternatiewelik, skriftelike huurkontrak aangegaan het met ĥ nuwe huurder te wete Mnr C Esterhuizen en aan daardie persoon vrye en ongestoorde besit van die huurperseel verskaf het. Verweerder pleit verder dat eiser die keuse tot kansellasie van voormelde huurooreenkoms tussen die partye tot hierdie geding uitgeoefen het en derhalwe nie geregtig is om die onderhawige eis vir spesifieke nakoming in te stel nie.'

[4] In his judgment, the magistrate found *inter alia* that: the written lease agreement had been entered into by the appellant and respondent on 13 July 2000; the appellant had entered into an oral agreement of lease with one Charl Esterhuizen on 1 August 2001 in terms of which Esterhuizen hired the same premises form the appellant that had been the subject matter of the written lease; in July or August 2001, the respondent bound himself to the appellant as surety and co-principal debtor for Esterhuizen's debts 'more particularly' those arising from 'the agreement of lease entered into by and between the said creditor [the appellant] and the debtor [Esterhuizen]' (to quote the deed of suretyship); the deed of suretyship served as written confirmation of the cancellation of the contractual relationship between the appellant and respondent that had been created by their lease agreement; Esterhuizen thus became the new lessee of the premises and the only liability that the respondent could incur was as surety and co-principal debtor; the deed of suretyship had the effect of terminating the lease agreement between the appellant and the respondent; and the appellant's only recourse against the respondent was on the basis of the deed of suretyship in the event of Esterhuizen defaulting on his obligations in terms of the oral agreement. He concluded from these facts that the appellant's claim could not succeed and that it had to be dismissed with costs.

[5] His reasons for this decision, based on the facts found proved, were set out as follows:

> '1. Die huurkontrak gedateer 13 Julie 2000 is gemenesaak.
> 2. Net so is die borgakte wat as addendum tot die huurkontrak gemerk is gemenesaak.
> 3. Voorts bevestig die eiser in sy besonderhede van vordering in saak nommer 3451/01 en later ook in sy funderende eedsverklaring in ḥ aansoek om summiere vonnis in dieselfde saak dat daar 'n mondelinge huurooreenkoms tussen hom en Esterhuizen was.
> 4. Hierdie mondelinge ooreenkoms is dan ook die onderliggende rede vir die verlening van die borgstelling vervat in die addendum tot die inisiële huurkontrak.

5. Wat egter opval is die eiser se absolute ontkenning van hierdie mondelinge ooreenkoms tussen hom en Esterhuizen en die deurlopende bewering dat hy in terme van die inisiële huurkontrak van die verweerder eis, welke kontrak soos reeds hierbo bevind getermineer is.
6. Die eiser se getuienis omtrent die verhouding tussen hom en die verweerder word teen die agtergrond van sy leuenagtigheid as ħ geheel verwerp.
7. Die weergawes van sowel die verweerder as die van Esterhuizen is in lyn met die waarskynlikhede soos dit blyk uit die getuienis en dokumentêre bewyse ingehandig.
8. Gevolglik bevind die hof op ħ oorwig van waarskynlikhede dat die eiser nie sy eis bewys nie en word die eiser se eis met koste van die hand gewys welke koste koste van ħ advokaat teen ħ verhoogde skaal insluit.'

[6] It will be noted that the magistrate made a strong credibility finding against the appellant, in effect discrediting his denial of the existence of the oral agreement with Esterhuizen as a pack of lies. In my view this conclusion is fully justified: the record of the appellant's cross-examination reveals him not only to be untruthful but also evasive, bombastic and disingenuous.

[7] When he was asked whether he knew Esterhuizen, he answered: 'I know of him. I know who he is, but I don't know him.' When asked whether he had ever talked to him, his answer was: 'Very briefly'. He was asked when he had talked to Esterhuizen and said: 'Just in court (indistinctive) greeting, just in passing general, passing – *nothing to do with business or negotiations at any stage.*' (Emphasis added.)

[8] When it was put to him that Esterhuizen would say that they had a contract and had discussed rental, the appellant said he did not remember any such discussions with Esterhuizen. He conceded that he knew that the respondent had sold the restaurant business to Esterhuizen, probably in July or August 2001, and that the respondent, in August 2001, had signed the deed of suretyship to stand good for Esterhuizen's debts, a concession which, on its own, tends to discredit his assertion that he had never had business dealings with Esterhuizen. When it was put to him that the deed of suretyship related to

an agreement between him and Esterhuizen he stated: ‘There never existed an agreement between Charl Esterhuizen and myself.’

[9] He conceded that, from August 2001 the respondent was no longer in Jeffrey’s Bay and that the rent for the premises was paid thereafter by either Esterhuizen or his father (who, he said, paid the money to his attorney). It was then put to him that there had been an oral lease agreement between him and Esterhuizen. His answer was: ‘No, there was never any verbal agreement between myself and Charl Esterhuizen.’ He went further and said that he had, in fact, told the respondent unambiguously that ‘I will not enter into any agreement with Charl Esterhuizen’. This occurred, he said, when the respondent wanted to sell the restaurant business to Esterhuizen.

[10] When it was put to the appellant that he had issued summons against Esterhuizen, he answered: ‘Mr Joubert was not there. That is possible, yes. He was conducting his business in the premises as a subtenant of Mr Joubert or as a … purchasing (sic)’. When it was put to him, however, that the particulars of claim in that matter alleged that he and Esterhuizen had entered into a lease agreement, he said this allegation was a mistake. He then said: ‘I deny that there was such an agreement. The attorney must have done that on his own.’

[11] Then he was taken to an affidavit, to which he deposed, made in support of an application for summary judgment in that matter. In it, he confirmed ‘the claim as set out in the particulars of claim of the summons’. It was put to him that this meant that he had confirmed that there was an oral lease agreement with Esterhuizen, to which he responded: ‘It does not say that to my knowledge.’

[12] The appellant was taken to Esterhuizen’s answering affidavit in the summary judgment application. In it he admitted that he leased the premises

in terms of an oral lease agreement (as alleged in the particulars of claim) and that the rental was 'dieselfde bedrag wat die vorige huurder betaal het en is ook onderhewig aan eskalasie wat die vorige huurder betaal het'. When it was put to the appellant for comment that this paragraph meant that Esterhuizen was stating that he had an oral agreement with him, the appellant said: 'With me personally? Does it say there? My name is not there. My name is not there.'

[13] The magistrate, having rejected the evidence of the appellant as false, found that the versions of the respondent and Esterhuizen were in line with the probabilities, with regard to both the evidence and documents that were handed in. This conclusion, in my view, is entirely justified on the record.

[14] The respondent's evidence was that he had entered into the written lease agreement with the appellant with the purpose of running a restaurant business from the premises. In June 2001 he sold the business to Esterhuizen. The appellant was aware of the fact that Esterhuizen was to take over the business because he had been told of this long-standing plan by the respondent and had no objection to it. Indeed, the idea was that, when Estehuizen took over the business, he would step into the respondent's shoes, as it were, as lessee – as the respondent put it, 'dat, Charl wel by hom dan gaan huur'.

[15] He explained how the deed of suretyship came into existence. On the day before he was to leave the country to move to England – on 13 August 2001 – he went to the appellant's house to bid them farewell. When he arrived, the deed of suretyship was presented to him for signature by the appellant and his wife. Its purpose was to make him liable as surety in the event of Esterhuizen failing to pay rent for the premises. The respondent was asked how he viewed the deed of suretyship. He said he regarded it as confirmation that 'ek is nie meer aanspreeklik vir my huurkontrak nie, want anderste maak

dit geen sin om dit te teken nie' and that he had stood surety 'vir Mnr Charl Esterhuizen as hy nie sy huur betaal nie'. He concluded his evidence in chief by confirming that he was aware that the appellant and Esterhuizen had made arrangements concerning their relationship although he was not directly involved in those arrangements.

[16] When he was cross-examined, the respondent was asked what had been contemplated by him and Esterhuizen, concerning the hiring of the premises, when they agreed on the purchase and sale of the restaurant business. His answer was that Esterhuizen 'sal aangaan met die huurkontrak en hy sal dan 'n nuwe huurkontrak by Mr Naude kry om dan aan te gaan met sy besigheid'. He asserted that his lease agreement with the appellant had been terminated by him signing the deed of suretyship because this act meant that 'ek is nie aanspreeklik vir die huur nie.' He denied that he had sub-let the premises to Esterhuizen. (It must be noted, the agreement prohibits sub-letting without the prior written consent of the lessor and there was no evidence that such consent had ever been sought or granted.) When the respondent was re-examined he confirmed that he was aware that an oral lease agreement had been reached concerning the premises between the appellant and Esterhuizen. He knew this to be the case because Esterhuizen had told him of it.

[17] Esterhuizen gave evidence in support of the respondent's defence. He testified that he had worked with the respondent in the latter's restaurant business and that their plan was that, having learnt the ropes, he would buy the business from the respondent. He stated that the appellant knew throughout that this was planned, because it had been discussed with him. Esterhuizen confirmed that he bought the business in June or July 2001.

[18] From then on, he said, he hired the premises from the appellant in terms of an oral lease agreement. The agreement was that he would hire the

premises on a month to month basis at a monthly rental of R16 800.00 until a final agreement was drafted and accepted. For the rest, it was agreed that the terms would be the same as those contained in the written lease agreement between the appellant and the respondent. It was envisaged that when the appellant's attorney returned to the country form overseas, he would draft a more permanent agreement.

[19] Esterhuizen confirmed that the appellant had issued summons against him in respect of rent for the premises. He also confirmed receipt of a letter from the appellant's attorneys which made reference to this agreement and stated that he was 'liable to pay the due rental on or [before] the first day of each month in cash or by a bank guaranteed cheque'. With reference to the particulars of claim in the action brought against him by the appellant, he confirmed the appellant's averments in that case that the oral lease agreement was entered into on or about 1 August 2001 in respect of the letting and hiring of the premises situated at Ground Floor, 23 Diaz Road, Jeffrey's Bay and that the monthly rental was R16 800.00. (This is, in any event, confirmed by Esterhuizen's affidavit made in answer to the appellant's application for summary judgment.) Finally, in his evidence in chief, Esterhuizen stated that the written agreement to replace the oral agreement was never concluded because, following the issue of summons against him, his relationship with the appellant deteriorated.

[20] When Esterhuizen was cross-examined it was put to him that when he bought the restaurant business, he knew that the lease agreement between the appellant and the respondent still had a long time to run. To this he said: 'Ons het gaan praat met Mnr Naude en hy het gesê hy sal vir my ŉ nuwe ooreenkoms aangaan en dat Danie sal nie meer van belang gaan wees nie.' When it was put to him that what must have happened was that he simply took the place of the respondent in the lease agreement, he said that this was not the arrangement and that the arrangement was that a new lease

agreement would be entered into between him and the appellant. He conceded that what was envisaged was a written lease agreement but he denied that until that happened he simply paid the rent on behalf of the respondent. He re-iterated that the relationship between him and the appellant was governed by an oral agreement pending their agreement on more permanent terms to be contained in a written agreement. He was also emphatic in stating that he was not a sub-tenant of the respondent when this was put to him.

[21] It is apparent from the judgment of the magistrate that he rejected as untruthful the evidence of the appellant that the written lease agreement between him and the respondent still subsisted and that he had never entered into a subsequent oral lease agreement with Esterhuizen. He accepted the evidence of the respondent and Esterhuizen that the written lease agreement was terminated and in its place an oral lease agreement on much the same terms came into existence between the appellant and Esterhuizen.

[22] These being factual findings, a court of appeal's powers of interference with the magistrate's judgment are limited. That this is so and why it is so is crisply stated by Jones J in *Meintjies v Esterhuizen and another* ECD 8 November 2003 (case no. 777/02) unreported, para 4:

> 'A court may make incorrect findings of fact because the trial judge misdirects himself in a material respect and in a manner which prevents him from applying his mind properly to the issues before him. Or, the court's finding of fact may be incorrect simply because the trial judge made a mistake by not evaluating the evidence properly. In either event the incorrect decision should not be allowed to stand. But it is less difficult for an appellant to persuade a court of appeal to interfere with a decision because of a misdirection in the sense set out above than in a case where the trial judge is thought to be mistaken. A trial judge who has not disqualified himself by misdirection is in a better position than a court of appeal to make a correct determination of the

> facts because, being steeped in the atmosphere of the trial, he has had the opportunity of seeing, hearing and appraising the witnesses. He is best able to assess the credibility of the witnesses and the reliability and honesty of their versions. This advantage is not necessarily confined to the fact-finding process, but may extend also to the correct inferences to be drawn from the facts. The result is that the trial judge's findings of fact are presumed to be correct, and it is "only in exceptional cases" that a court of appeal will interfere with this evaluation of oral testimony. It will only do so when, after making due allowance for the trial judge's advantages, it is quite satisfied that the evidence taken as a whole cannot support his conclusions.'

[23] The magistrate's rejection of the appellant's evidence appears to me to be fully justified. As I have indicated above – and illustrated with examples from his evidence -- the appellant was a most unimpressive witness. His efforts to distance himself from the oral lease agreement with Esterhuizen led him to downplay the fact that he knew Esterhuizen, to deny the very existence of the agreement with Esterhuizen, an agreement that he had sued Esterhuizen on, and compelled him to make less than convincing efforts to explain away the contents of the particulars of claim, which he had confirmed in his application for summary judgment.

[24] I can also find no fault with the conclusion of the magistrate that the evidence of the respondent and Esterhuizen should be preferred on the basis of their version being more probable that the appellant's. Indeed, their version is logical as it explains how the letting and hiring of the premises was to continue in the light of the sale to Esterhuizen of the restaurant business by the respondent and the fact that the respondent was leaving the country. It also explains the deed of suretyship that the respondent signed: he was required to stand good for Esterhuizen's debts, particularly those that could arise from the lease agreement between the appellant and Esterhuizen. If Esterhuizen was a sub-tenant – and there is no evidence to support this contention – then a deed of suretyship would not have been necessary: the respondent would have remained liable to pay the rent to the appellant. (See

Hutchinson, Van Heerden, Visser and Van Der Merwe *Wille's Principles of South African Law* (8 ed) Cape Town, Juta and Co: 1991, 550.)

[25] I can, furthermore, see no reason why the deed of suretyship should be interpreted to refer only to the proposed written agreement of lease between the appellant and Esterhuizen. It is expressly stated to apply in respect of money 'owing by or claimable from the debtor to or by the said creditor from any cause of debt whatsoever and more particularly arising from the agreement of lease entered into by and between the said creditor and debtor …'. It will be noted that the words 'entered into' are used, denoting an existing agreement. If the intention had been for the deed of suretyship to be accessory to the written agreement of lease that still had to be negotiated, it would surely have used a phase such as 'to be entered into'.

[26] The import of the acceptance of the evidence of the respondent and Esterhuizen is that the written lease agreement on which the appellant sued was cancelled by agreement when the respondent sold the restaurant business – with the appellant's knowledge – to Esterhuizen, entered into an oral lease agreement with him in respect of the premises in which the restaurant business operated – with the knowledge of the respondent -- and then persuaded the respondent to sign the deed of suretyship in which he stood surety for Esterhuizen's debts, in particular those arising from the agreement of lease entered into between the appellant and Esterhuizen. This series of transactions commenced in June or July 2001 and were concluded on or about 13 August 2001. Taken together, they establish, at the very least, the inescapable inference that the appellant and the respondent agreed tacitly to end their relationship as lessor and lessee. (See *Haba Syndicate v Harvey and Wade* 1910 AD 124.) It will be recalled that the appellant sued the respondent for rent for the period from the beginning of February 2002 until 18 November 2002. At that stage, the written lease agreement was no longer in existence and hence the appellant has failed to establish a cause of action.

[27] It is necessary to say a word or two more about the deed of suretyship and clause 20 of the written agreement of lease. The deed of suretyship, while not being the instrument by which cancellation of the written lease agreement was effected, nonetheless serves as evidence to confirm that the agreement between the appellant and the respondent had been superseded by a new agreement of lease between the appellant and Esterhuizen. Clause 20 of the written lease agreement provided that its terms could not be 'varied, modified or amended or amplified in any way, save and except in writing signed by both parties thereto'. This clause does not relate to cancellation by agreement which, in my view, requires no formalities of this nature. As a matter of fact, the conduct of the parties, as described above, evidenced an unequivocal intention on their part to cancel the written lease agreement so that a new lease could be entered into in which Esterhuizen would be the lessee.

[28] In the result, there is no basis for interference with the magistrate's dismissal, with costs, of the appellant's action against the respondent. The appeal is accordingly dismissed with costs.

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C. PLASKET
JUDGE OF THE HIGH COURT

I agree.

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Y. EBRAHIM
JUDGE OF THE HIGH COURT