IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

CASE NO.: 2014/2017

In the matter between

ORYX PROPERTIES LIMITED **APPLICANT**

and

UKUVULA INVESTMENT HOLDINGS (PTY) LTD **RESPONDENT**

JUDGMENT

JAJI AJ

[1] The matter came before me as an application for summary judgment. The applicant prayed for judgment against respondent in the following terms:

(a) Payment of the amount of R4 233 288.66 (excluding VAT), calculated as follows:

(i) R63 334.25 (excluding VAT), being arrear rates owing as at 1 April 2013;

(ii) R554 012.09 (Excluding VAT), being arrear monthly rentals and rates for the period 1 May 2013 to 31 January 2014;

(iii) R901 026.58 (excluding VAT) being arrear monthly rentals and rates for the period 1 February 2014 to 31 October 2014;

(iv) R453 030.32 (Excluding VAT),being damages for the period of 1 November 2014 to 31 December 2014;

(v) R170 265.84 (excluding VAT), being damages for the month of January 2016;

(vi) R1 314 849.69 (excluding VAT), being damages for the period 1 February 21016 to 31 December 2016;

(vii) R119 531.74 (excluding VAT), being damages for the month of January 2017;

(viii) R657 238.15(excluding VAT) being damages for the period 7 February 2017 to 30 June 2017.

(b) Interest on the above amounts in terms of clause 14.4 of the agreement;

(c) Taxed or agreed attorneys and own client legal costs.

[2] The respondent opposed the application and raised various defences viz:-

(i) deponent not authorized to bring the application;

(ii) applicant's particulars of claim do not make out a cause of action;

(iii) the claim for damages do not constitute liquidated amounts;

(iv) bona fide defence in that various amounts claimed appear to have prescribed.

[3] <u>BACKGROUND</u>

(i) The plaintiff sued the defendant for the various amount due by the principal debtor (Cordustex). Cordustex failed to maintain regular payments to plaintiff in respect of rentals and other amounts;

(ii) Cordustex was placed under business rescue until the company (Cordustex) was placed under a provisional order of Liquidation.

(iii) There were outstanding amounts due by Cordustex to the applicant as per the application. Letter of demand was given to the principal debtor (Cordustex) and notice of termination was also given in 2014 (October) month.

(iv) Subsequent to termination of agreement, the property remained unlet, monthly rentals and rates payable remained unpaid until such time plaintiff entered into agreement with BPD after ejecting the respondent.

(v) On the 25 September 2009, the respondent entered into a deed of suretyship in favour of the plaintiff for the obligations Cordustex (principal debtor) in terms of the agreement.

(vi) In terms of the agreement the respondent bound itself as surety and co-principal debtor, jointly and severally in solidium to the plaintiff for the due and proper fulfillment of the obligations of Cordustex to the plaintiff in terms of the agreement (See page 19 of the particulars of claim.)

[4] (i) The applicant contended that the respondent has simply raised technical defences. There was no defence raised on the merits. It averred that there was no dispute raised by defendant regarding the fact that the principal debtor had occupied the premises in question for extended periods of time without paying the agreed rates or rental in full and accumulated substantial arrears in respect of rates and rentals.

(ii) In its head of argument and opening remarks, applicant submitted that the respondent was not persisting with two of its grounds for opposition, that is, the lack of authority to bring the application and the claim for prescription. The other two grounds for opposition still stand ,that is, no cause of action, claim excepiable and claim for damages not liquidated claim and not easily calculable.

[5] (i) The applicant submitted that the plaintiff in concluding the lease with the principal debtor acted “as a trustee for company to be formed:. The plaintiff concluded the agreement as stipulans and principal debtor as promittens. It referred to the matter of (Mc Cullogh vs Fernwood Estate Ltd 1920 AD 204 at 207). It contended that prior to the acceptance by the beneficiary or third party, the principal debtor was contractually bound to the plaintiff for the benefit of the third party. It submitted that the existence of the obligation between principal debtor and plaintiff entail that the plaintiff would have necessary authority to enforce the agreement and ask for specific performance; applicant quoted the following authorities :- (**Ackerman, NO vs Burland and Milunsky, 1944 (WLD) 172 at 175** (trustee in so called company to be formed acts as principal); **Semer v Retief and Berman 1948(1) SA 182 (C)** (the trustee will in his personal capacity have rights and be subject to obligations in regard to that contract**) Bagradi v Cavendish Transport Co (Pty) Ltd 1957 (1) SA 663 (d)** (a person who contract as trustee for company to be formed contracts as a principal); **Gardner v Richardt 1974 (3) SA 768 (c)** (the question whether and the circumstances under which a person contracting as trustee for a company in the course of formation has the right to sue for specific performance, must be answered by reference to the terms of the particular contract under consideration).

(ii) The authority as a matter of construction or interpretation of the main lease and the suretyship herein, to plaintiff’s particulars of claim as a whole, including all the relevant extraneous facts contained in annexures hereto.

The particulars of claim show:-

(i) Cordustex accepted that plaintiff would became future landlord, unless it nominated another party;

(ii) Premises were transferred to plaintiff by Cordustex on 2 February 2010;

(iii) the defendant (principal debtor) effected all its rental payment to plaintiff in terms of the lease agreement;

(iv) Plaintiff ,all material times and to full knowledge of Cordustex, was the landlord of the premises;

(v) the surety (respondent was at all material times, fully aware of the state of affairs regarding the property;

(vi) Importantly ,Yerolemou, signed the lease on behalf of the principal debtor as well as the deed of suretyship on behalf of respondent.

(vii) Yerolemou was a director of Cordustex and is director of the respondent (surety).

[6] (i) The plaintiff submitted that as a general rule, is that a claim for a liquidated amount in money, *inter alia,* if the ascertainment of the amount is a matter of simple calculation.

(ii) The claims are based on the deed of suretyship, pursuant to the respondent bounding itself as surety and co-principal debtor to the plaintiff for the obligations of Cordustex in terms of the written agreement of lease.

(iii) Lease were for ten years, Cordustex paid to the plaintiff rentals and fallen in arrears and plaintiff cancelled. The liquidity of arrear rates and rentals could not be disputed. Calculation of damages set out in paragraph 19-21 of the particulars of claim on pages 15-18. Accordingly, plaintiff insisted that the lease, surety and lease addendum, all being liquid documents were attached to particulars of claim and as submitted that the plaintiff's claims are for liquidated amount in money.

[7] The respondent submitted as follows:

(i)The plaintiff does not refer to any facts which supports its conclusion that the lease upon which it relies gave rise to (stipulation alteri)

(ii)No circumstances is specifically pleaded save where plaintiff relied upon an existence of a resolution by principal debtor to sell the property to plaintiff or its nominee.

(iii)It contended that in order to establish a course of action, plaintiff is obliged to plead every fact which it would be necessary for plaintiff to prove, if traversed, in order to support its right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved (Mckenzie v Famers Co-operative Meat Industries Ltd (1922)AD 16 at 22.

(iv) It contended in its heads of argument that plaintiff has pleaded no factors to support a conclusion that the lease upon which it relies constituted a *stipulation altreri.* Nor has it pleaded facts to support a conclusion by a court in due course that it is apparent from the terms of the contract that the parties thereto intended that the plaintiff would be entitled to pursue specific performance thereof or to exercise the rights of lessee . It claimed that the plaintiff has not made out a cause of action constituted *a bona fide* defence.

(v) Regarding the defence that claims in respect of damages are not liquidated amounts. The plaintiff did not plead reasonable steps it took to mitigate its damages. The respondent contended that on the face of it the claim is readily calculable, it took no account of whether the plaintiff adequately mitigated its loss. It submitted that for summary judgment for damages, plaintiff should have done so. In the circumstances, it submitted that the amounts it claim for damages cannot be said to be liquidated amount.

[8] **THE LAW**

In a summary judgment application:

(i) Summons must disclose: locus standi, jurisdiction of court, element s required for cause of action and proper service;

(ii) Affidavit: deponent to allege that he/she has personal knowledge of the facts ,that is, it must be made by the applicant himself or by a person which has direct and personal knowledge of the facts (**see Shacklton v Credit Management (Pty) Ltd v Microzone Trading as 88CC and Another 2010 (5) SA112 (KZP)**. The deponent swears positively to the fact verifying the cause of action and the amounts claimed. Verifying an allegation and the cause of action and amount claimed complies with Rule 32 (2). If summary judgment is opposed, defendant's defence, in affidavit must comply with the two requirements:

(a) it must disclose fully the nature and ground of the defence and the material facts relied upon and,

(b) defence so disclosed, if proven must be bona fide and good in law.

Unless a plaintiff presents a clear case on technically correct papers in strict compliance with Rule 32, summary judgment must be refused. If the claim is founded on liquid document, copy must be attached to the application, unless previously attached on summons, not necessary to attach in the application. The test applicable for summary judgment is trite and established, namely, whether the defendant's affidavit discloses a defense at law, which, if established at the trial, will be a complete answer to plaintiff's case the so called *bona fide* defence. So, affidavit resisting summary judgment application must disclose a *bona fide* defence and should comply with judicial pronouncement with regard to the knowledge of the facts by the deponent.

(iii) **RULE 32**

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…….bona fide defence to the action, such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts

relied upon. (See **Jacobson Van der Berg SA (Pty) Ltd v Triston Yatchtring Suplies 1074 (2) SA 584(O) at 585.**

"Rule 32 (3)(b) requires the opposing affidavit to disclose fully the nature and grounds of the defence and the material facts relied upon, so that the court is satisfied that the defendant has a *bona fide* defence, not merely that he "appears" to have a *bona fide* defence. Every cause of action has a peculiar characteristic as to its background, time value, make-up knowledge, conduct and attitude of the parties and so forth and every defence thereto must have corresponding features of its own". The court declined in the matter to exercise its discretion in favour of the respondent and granted summary judgment. Respondent having failed to allege a proper defence in terms of Rule 32 (3)(b).

Tesuen CC and Another v South African Bank and Another 2000 (1) SA 268 (SCA). Where a defence is based on facts (that is, where defendant disputing facts alleged by plaintiff in summons or raising new facts in defence) the court is not to determine the balance of probabilities, it will only determine:

(a) whether defendant fully disclosed nature and grounds of defence and material facts upon which founded and

(b) whether, on facts disclosed defendant having bona fide defence good in law. The word "fully" requiring the defendant to disclose defence and material facts upon which it is based with sufficient particularity and completeness to enable the court to divide whether the affidavit discloses *bona fide* defence.

In the case at hand, respondent did not dispute the terms of the contract. Principal debtor was on arrears for rentals and rates, notified, contract cancelled and ejectment took place, new tenant found and the respondent sued as surety. There is no defence raised relating to the above. The respondent's opposing affidavit falls short of what is required by Rule 32 (3) to enable court to assess the defendant's *bona fides*.

In **Muller and Others v Botswana Development Corporation Ltd 2003 (1) SA 621 (SCA),** it was held in summary judgment application that the issue was not whether the defence raised was likely to succeed or fail but merely whether it was bona fide. Therefore the opposing affidavit had to disclose fully the nature and grounds of defence and the material facts relied upon.

Maharaj v Barclays National Bank Ltd 1976(1) SA 418 (A) at 426. If the defence is based on facts, all the court enquired into is:

(a) whether the defendant has fully disclosed the nature and grounds of this defence and the material facts upon which is founded, and

(b) whether on the facts so disclosed the defendant appears to have, as either the whole or part of the claim, a defence which is both *bona fide* and good in law. If, satisfied on these, the court must refuse summary judgment.

(iv) **CAUSE OF ACTION**

In application proceedings the applicant must make its case in the founding affidavit and not thereafter. The founding affidavit embodies both pleadings and evidence. Documentary evidence may be attached in support of allegations in the founding affidavit, but an applicant may not justify its case by relying on facts which emerged from annexures which had not been attached.

In actions, the principle is the same and applies. In a combined summons the cause of action must appear from the particulars of claim, in a simple summons from the body of the summons.

(a) What facts constitute a cause of action is a matter of substantive law and will depend on the nature of the relief. For instance, in a claim sounding in money based on a loan agreement, it will be sufficient to allege in a simple summons that the claim is in respect of “monies lent and advanced by the plaintiff to the defendant (place and date)….”and that…the sum of (amount claimed) was payable on demand or on a date

which had lapsed) and not withstanding demand (placing in mora) the defendant had failed to pay the said sum which is now due, owing and payable…."Obviously, in application proceedings, sufficient evidence must be disclosed to establish the facts which constitute the cause of action. Also, in a combined summons the provisions of Rule 18 must be complied with in regard to the formulation of the cause of action.

(v) Technicalities and dilatory defences

(a) (See **Ncoweni v Bezuidehout 1927 (CPD) 130.)** Gardiner JP remarked at 130 that "The rules of procedure of this court are devised for the purposes of administering justice and not hampering it, and where the rules are deficient, I shall so far as I can in granting orders which would help to further the administration of justice."

In **Re-Publikanse Publikaseer (Edms) Bpk v Afrikaanse Pers Publication1927 (1) SA 773 (A**) at paragraph 42 "substance should be put ahead of form and where parties entered into an agreement and agree on terms and one suddenly perform a volte-faux and demand strict adherence with that self same rule borders on the ludicrous".

In Rex (Respondent) v Hepworth (Appellant) 1928 (AD) 265 at page 277. "A criminal trial (same with civil trial and applications. I wish to believe) is not a game where one is entitled to claim the benefits of any omission or mistake made by the other side, and a judge (I believe the magistrate as a judicial officer, it applies to him/her as well) position is not merely that of an umpire to see that rules of game are observed by both parties. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognized rules of procedure but to see that justice is done."

(b) Even if the respondent was correct which is denied by applicant, Levenson AJ (as he then was) in **Brenners Service Station and Garage**

(Pty) Ltd vs Mine and Another 1983 (4) SA 233 (W) at 237G-H, remarked as follows:

> "I think it emerges from the passage quoted-that in appropriate cases, the court is entitled to refuse to take heed of a technical irregularity in a procedure which does not cause prejudice to the opposite party". The remark was previously echoed by G Schriever J in **Trans-African Insurance Co Ltd vs Maluleka 1956 (2) SA 273 (A) at 278F-G** stating that "Technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice to interfere with the expeditious and if possible inexpensive decision of cases on their real merits."

From the above cases, even if the respondent was correct regarding his opposition and defences, it would not come to his assistance. He has not dealt with merits or subsistence of the application. He took issue with form instead of substance.

Regarding the interpretation of documents, Wallis JA set out the proper approach to their interpretation, "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attended upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in 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 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.

The facts of the case at hand-regarding what was the intention of parties is answered by the courts as per Wallis JA judgment. The respondent knew that applicant would carry on acting as a principal. It knew that the principal debtor owed rent and arrears pursuant to a lease agreement. It is clear that parties in the case at hand signed the contract with the intention to be bound by its terms. The facts themselves indicated that parties regarded the agreement as binding form inception. The applicant complied with its obligations and principal debtor complied by paying rent until it fell into arrears.

"All that needs to be added is that it can be accepted that the way in which the parties to a contract carried out their agreement may be considered as part of the contextual setting to ascertain the meaning of a disputed term. (See **Rene Investment Trust v Commissioner South African Revenue Services 2003 ZA SCA 60, 2003(6) SA 32G (SCA) paragraph 27**. As per the above matter, the written document, whether intended by parties to be binding , conduct of parties post signature showing that they intended to be bound and that their agreement was not subject to another formal agreement being concluded (See **Unica Iron and Steel vs Mirchandani 2015 ZASCA (150) 1 October 2015.**

Liquidated amount

Griesel J in **Tredores vs Kellerman 2010(1) SA 166 (CPD) at 18** "a liquidated amount of money is an amount which is either agreed

upon or which is capable of speedy and prompt ascertainment of the amount in issue is a matter of calculation". The court granted summary judgment in conceded amount and in respect of which no evidence of payment had been placed before court. In the case at hand, the amounts claimed by applicant are not disputed. The rent was as per the agreement, arrears on rented and rates are easily calculable. The extent of arrears and interests is easily ascertainable. The issue of mitigation has no relevance as to whether the damages have been mitigated or not. In any event the applicant mitigated by ejecting the principal debtor and got a new tenant. The applicant submitted that its claim is for liquidated amount in money, whatever the cause of action.

The respondent on 25 September 2008 entered into Deed of Surety in favour of the plaintiff for obligations of Cordustex.in terms of the agreement. Most importantly the respondent bound itself as surety and co-principal debtor, jointly and severally in solidium to the plaintiff for due and proper fulfillment of the obligation of Cordustex. Surety shall remain in force as a continuing covering security until such time as Cordustex's (principal debtor) obligations towards the plaintiff in terms of the agreement have been duly and properly fulfilled. It is common cause that the principal debtor's obligations have not been fulfilled.

Applicant contended that there was no defence raised on merits. There is no dispute regarding the fact that the principal debtor had occupied the premises in question for extended period of time without paying the agreed rates or rentals in full, in the circumstances accumulated substantial arrears in respect of such rates. There was no doubt on the speedy ascertainment of the damages and respondent failed to contest that fact and applicant submitted that court is entitled to accept the claim as being one for

liquidated amount in money for purpose of summary judgment. Respondent could not show why the applicant's claim is not capable of easy and promptly ascertainment. Most interesting, corroborating the applicant contention, the respondent at page 26 of its heads of argument state "whilst the claim in the face of it, is readily calculable it takes no account of whether plaintiff mitigated or not"

The agreement between the parties regulated their conduct and obligations in the event .of breach. Applicant acted as per the agreement (demand, summons, ejectment and getting new tenant). In light of all available evidence, plaintiff has to succeed. The application for summary judgment is accordingly granted.

[9] Order:

(1) Application for summary judgment is granted as per following prayers of the application:

1. Payment of the amount of R4 233 288.00 (excluding VAT), calculated as follows:

1.1 R63 334.25 (excluding VAT), being arrears rates owing as at 1 April 2013;

1.2 R554 012.09 (excluding VAT), being arrear monthly rentals and rates for the period 1 MAY 2013 TO 31 January 2014;

1.3 R901 026.58 (excluding VAT), being arrear monthly rentals and rates for the period of 1 February 2014 to 31 October 2014;

1.4 R453 030.32 (excluding VAT), being damages for the period 1 November 2014 to 31 December 2014;

1.5 R170 265.84(excluding VAT), being damages from the month of January 2016;

1.6 R1 314 849.69 (excluding VAT), being damages for the period 1 February 2016 to 31 December 2016;

1.7 R119 531.74 (excluding VAT), being damages for the month of January 2017;

1.8 R657 238.15 (excluding VAT), being damages for the period 1 February 2017 to 30 June 2017;

(2) Interest on the above amounts in terms of clause 14.4 of the Agreement;

(3) Prayer (3) amended by deleting “own” client. (Taxed and agreed attorney and client cost.

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N. P. JAJI

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant	**:**	**ADV HUISAMEN SC**
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DAED HEARD	**;**	**1 August 2017**
Delivered on	**:**	**3 October 2017**