REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 41791 / 2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

THE SPAR GROUP LIMITED Applicant

And

CAPSTONE 359 (PTY) LIMITED First Respondent

VASSILIOS LOIZOU Second Respondent

APOSTOLOS ANDREW MINA Third Respondent

SYDNEY DONALD RUSSELL SEARLE Fourth Respondent

J U D G M E N T

MASHILE, J:

[1] The Applicant launched this application against the Respondents jointly and severally the one paying the other to be absolved for an amount of R519 943.52 subsequent to the First Respondent's alleged failure to meet its obligations arising in terms of a sub-lease agreement between it and the First Respondent.

[2] The Second to Fourth Respondents are sureties having bound themselves on 20 October 2006 as sureties and co-principal debtors *in solidum* with the First Respondent for the due and punctual fulfilment and performance by the First Respondent of all its obligations to the Applicant however arising and for payment of all amounts which may become owing by the First Respondent to the Applicant.

[3] The facts that gave rise to the claim are largely common cause and they are that on 5 April 2005, the Applicant concluded a lease agreement (hereinafter "the head-lease") with Express Model Trading 455 (Pty) Ltd (hereinafter "Express Model"). The latter let to the Applicant certain commercial premises situate in Rivonia Road described as Shop 10 of the shopping centre known as 90 Degrees on Rivonia, Morningside, Sandton

(hereinafter “the premises”). The premises were to be developed as a shopping centre.

[4] The head-lease was to endure for a period of 10 years reckoned from the date of commencement of the lease being 5 April 2005. After concluding the head-lease with Express Model, the Applicant in turn entered into a sub-lease agreement (hereinafter “the sub-lease”) on 10 October 2006 with the First Respondent in respect of the same premises.

[5] In Clause 7.1 of the sub-lease, the First Respondent acknowledges that the Applicant holds the premises in terms of and subject to the provisions of the head-lease with which the First Respondent acknowledges itself to be fully acquainted and in Clause 7.2 it further acknowledges that the Applicant’s rights of occupation and therefore its own are subject to and limited by the terms and conditions of the head-lease.

[6] Clause 14.2 of the head-lease provides that in the event of the rates and taxes payable in respect of the properties and buildings containing the PREMISES being increased above the amount thereof payable in respect of the rates year which ends during the first year of this lease, the TENANT shall on demand refund to Express Model its PRO RATA SHARE of such increase. A certificate issued by the LANDLORD’S auditors as to the amount payable by the TENANT in terms of this clause shall be conclusive and binding proof of the amount so payable.

[7] Clause 9.2 of the sub-lease provides that the First Respondent is obligated to pay to the Applicant any amount which does not constitute rental but which the Applicant is in any event obliged to pay to Express Model pursuant to the head-lease… any VAT or RSC levies or any like impost that might become payable by the Applicant.

[8] In 2008 amendments to the local Government Municipal Property Rates Act No. 6 of 2004 (“hereinafter “the Property Rates Act”) were published which effectively caused properties to be valued according to their market/land value as published in the valuation role. This had the universal effect of the entire property market being affected by the changed rates through increases to the value of properties.

[9] Oblivious of the effect of the aforesaid amendments to the Property Rates Act, Express Model continued to pay rates to the municipality as though no changes had been introduced by the Property Rates Act. In terms of the head-lease, Express Model in turn levied amounts against the Applicant and the latter in turn levied these against the First Respondent.

[10] In consequence of the short payment by Express Model to the municipality, a shortfall ensued. The shortfall was the difference between what Express Model paid to the municipality and what it was suppose to have paid in terms of the amendment to the Property Rates Act. In accordance with Clause 14.2 of the head-lease, the Applicant was obliged to pay the pro-rata share of the shortfall, which in turn meant that the First Respondent had

to do the same, paying its pro-rata share of the difference to the Applicant. The Applicant calculated the pro-rata share of the shortfall of the First Respondent and arrived at the amount that it is currently claiming from the First Respondent, R519 943.52.

[11] The sole issue that falls for determination is whether or not the First Respondent is liable to pay the amount of R519 943.52 to the Applicant. Needless to state that establishment of liability to the Applicant by the First Respondent will automatically extend to the Second to Fourth Respondents by virtue of the suretyship agreement that they concluded with the Applicant. Similarly, a finding to the contrary will necessarily discharge the sureties from any obligation to pay the Applicant.

[12] The First Respondent has fervently asserted that having regard to Clauses 9.2 of the sublease agreement and Clauses 1.1.10, 14.1 and 14.2 of the head lease agreement, the Applicant's obligation to refund to Express Model and the First Respondent's obligation to make payment to the Applicant of the amount paid by the Applicant to the Landlord, arises only in the event of an increase of the rates above the amount thereof payable in respect of the rates year which ends during the first year of the head lease agreement.

[13] The First Respondent argues that it follows from the aforesaid that the Applicant must establish that the rates payable by Express Model have in fact increased above the amount thereof payable in respect of the rates year

which ends during the first year of the head lease agreement. It is not sufficient for the Applicant merely to show that it has made a payment to the Landlord.

[14] According to the First Respondent, the Applicant has failed to show that the rates payable by the Landlord have in fact increased above the amount thereof payable in respect of the rates year which ended during the first year of the head lease agreement. The First Respondent attacks Annexures CC3 and CC4 being alleged calculations of the amount that the First Respondent should pay to the Applicant as its pro-rata share of the shortfall to which I have alluded earlier in this judgment.

[15] The attack on Annexures CC3 and CC4 is firstly that the deponent to the founding affidavit is not the author of both Annexures CC3 and CC4. Both annexures in the circumstances constitute hearsay evidence and should not be admitted into evidence unless the court has considered their admissibility and resolved that they should be admitted in terms of Section 3 of the Law of Evidence Amendment Act No. 45 of 1988.

[16] Secondly, even if there admission was not an issue, to the extent that there is no calculation of the amount claimed by the Applicant on Annexure CC3 and that there is no explanation of how the amount was computed anywhere in the founding affidavit, they would be rendered inadmissible and the founding affidavit, ineludibly inadequate to sustain the Applicant's claim.

An explanation of the annexures is critical because without it neither it nor the court can make sense of them.

[17] Furthermore, while it is acknowledged that CC3 has an author, such author is not necessarily the author of CC4. To add to all this, there is no confirmatory affidavit to create a link between the annexures and the founding affidavit.

[18] The parties asked the court to make a ruling on the admissibility or inadmissibility of both annexures before the matter could proceed any further. Guided by what was held in *Howard & Decker Witkoppen Agencies and Fourways Estates (Pty) Ltd v De Sousa* 1971 (3) SA 937 TPD at 940 F-H, this court ruled that Annexures CC3 and CC4 were inadmissible. In this regard the passage of Human J quoted below could be instructive:

> "*The law in relation to proof of private documents is that the document must be identified by a witness who is either (i) the writer or signatory thereof…*
>
> *There was no admission by Plaintiff's attorney in regard to the authenticity of the document nor an admission that the contents thereof were correct. Its contents could therefore not be used either as evidence or for purpose of cross-examination.*"

See also the unreported judgment of Sutherland J in *Thomas v BD Sarens (Pty) Ltd* 2007/6636 [2012] ZA GPJHC 161 (12 September 2012).

[19] Since the outcome of this judgment will not rely or be anchored on the admissibility or inadmissibility of the annexures, it should suffice to state that the court considered the matter and pronounced that both annexures constituted hearsay. The pronouncement of course meant that the Applicant could not rely on them anymore to advance its case.

[20] The parties are agreed that a connection between the head-lease and the sub-lease exists because of Clause 7.2 of the sub-lease. It is in that clause that the First Respondent acknowledges that the Applicant's rights of occupation and therefore its own are subject to and limited by the terms and conditions of the head-lease.

[22] Once the First Respondent has acknowledged the link between the two leases, the Applicant should be at liberty to invoke Clause 14.2 of the head-lease and 9.2 of the sub-lease to which I have referred above. Clause 14.2 of the head-lease permits Express Model to recover a pro rata share of the increase from Applicant. The Applicant is by operation of the same clause also entitled to recover a pro rata share of the increase from the First respondent.

[23] Clause 9.2of the sub-lease envisages that the First Respondent is, apart from the payment of rentals, obliged to pay to the Applicant any amount

which the Applicant is in turn required to pay to Express Model pursuant to the head-lease… any VAT or RSC levies or any like impost that might become payable by the Applicant. The obvious question that arises is how must that amount be computed?

[24] To answer the question in the preceding paragraph one must look at the provisions of Clause 14.2 of the head-lease in particular, the last sentence which stipulates that A certificate issued by Express Model's auditors as to the amount payable by the Applicant in terms of this clause shall be conclusive and binding proof of the amount so payable.

[25] The provisions of Clause 14.2 of the head-lease clearly do not envision the production of a document setting out how the amount claimed has been computed. The certificate prepared by Express Model's auditors, on mere production and in the absence of manifest errors, should serve as sufficient proof of the amount owed.

[26] In the circumstances, the irrelevance of Annexures CC3 and CC4 notwithstanding their production would have been superfluous in any event if one has regard to Clause 14.2 of the head-lease. Thus, all the cases to which the First Respondent referred this court more specifically those dealing with inadequacy of papers in motion proceedings do not find application in this case. Accordingly, I do not attach any significance to them in view of that conclusion.

[27] On perusal of both leases, I found nothing supporting the First Respondent's contention that the Applicant ought to demonstrate that there has been an increase in the amount of the rates and that a mere exhibition of the amount that the Applicant has paid to Express Model is insufficient. The amount that the Applicant is claiming is 'any amount which does not constitute rental but which the Applicant is in any event obliged to pay to Express Model' and therefore falls squarely under Clause 9.2 of the sub-lease.

[28] The amount of R519 943.52 having been calculated and produced by Express Model's auditors and there being no manifest error in the calculation of that amount. It should be accepted as correct. It is the finding of this court that:

28.1 The founding affidavit of the Applicant is sufficient in that it defines the issues and the facts upon which it relies.

28.2 Clause 14.2 of the head-lease especially the part dealing with the production of a certificate produced by Express Model's auditors renders Annexures CC3 and CC4 unnecessary.

28.3 In view of the provisions of Clause 9.2 of the sub-lease, there is no support for the contention that the Applicant ought to have shown that there was increase in the property rates in order to succeed with its claim.

[29] In the result, the application succeeds and I make the following order:

1. The Respondents are to pay to the Applicant, jointly and severally the one paying the others to be absolved, the amount of R519 943.52 ;

2. Interest on the aforesaid sum of R519 943.52 at the rate of 9% per annum from date hereof to date of payment;

3. Costs of suit on an attorney and client scale.

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B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE HEARD: 04 MAY 2015

DATE OF JUDGMENT: 20 MAY 2015

COUNSEL FOR THE PLAINTIFF: Adv. A BISHOP

INSTRUCTED BY: GARLICKE & BOUSFIELD INC

Counsel for the defendant: Adv. L HOLLANDER

Instructed by: PHILLIP SILVER & ASSOCIATES INC.