REPUBLIC OF SOUTH AFRICA

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

APPEAL CASE NO: A5039/2015
CASE NO: *A QUO* 41791/2013

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

....
DATE SIGNATURE

In the matter between:

CAPSTONE 359 (PTY) LIMITED	First Appellant
VASSILIOS LOIZOU	Second Appellant
APOSTOLOS ANDREW MINA	Third Appellant
SYDNEY DONALD RUSSELL SEARLE	Fourth Appellant
And	
THE SPAR GROUP LIMITED	Respondent
In re:	
THE SPAR GROUP LIMITED	Applicant
And	
CAPSTONE 359 (PTY) LIMITED	First Respondent
VASSILIOS LOIZOU	Second Respondent
APOSTOLOS ANDREW MINA	Third Respondent
SYDNEY DONALD RUSSEL SEARLE	Fourth Respondent

Coram: Tsoka J, Makume J and Wepener J

Heard: 24 August 2016

Delivered: 26 August 2016

Summary: Lease: obligation of sub-lessee to pay increase in rates based on terms of sublease itself.

O R D E R

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Mashile J sitting as court of first instance).

1. The appeal is dismissed with costs.

J U D G M E N T

Wepener J (Tsoka, Makume JJ concurring)

[1] This appeal concerns the first appellant's (Capstone's) liability to pay increased rates to its landlord, the respondent (Spar), due to an increase of rates imposed by a local authority. The second, third and fourth appellants are sureties for the first appellant and there is nothing that turns on that fact as their suretyships are not disputed. If the appellant is liable to the respondent the liability of the second, third and fourth appellants follows.

[2] Spar was the lessee of a shop in a shopping centre known as 90 Degrees on Rivonia, Morningside. The premises were rented from a third party lessor, Express Model Trading 455 (Pty) Limited (Express Model) in terms of a written deed of lease. Capstone, in turn, sublet the premises from Spar in terms of a written lease agreement. It is common cause that Spar's obligation to pay rates to Express Model arose out of the written head lease which provides as follows:

‘14. RATES

14.1 The LANDLORD shall pay the rates levied in respect of the PROPERTY which incorporates the PREMISES.

14.2 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 in respect of the rates year which ends during the first year of the lease, the TENANT shall on demand refund to the LANDLORD 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. The base rates and taxes payable shall be the 2005 rates and taxes year.’

[3] Capstone’s obligation to pay rental to Spar, in turn, arose out of the written sublease which provides as follows:

‘9 RENTAL

9.1 The terms relating to the determination of the rental payable by SPAR pursuant to the HEAD LEASE shall apply, mutatis mutandis, to this sublease, the object being that the SUB-TENANT shall be obliged to pay to SPAR whatever amount is payable by SPAR to the LANDLORD in terms of the HEAD LEASE . …

9.2 The SUB-TENANT shall also pay to SPAR any amount which does not constitute rental but which SPAR is, in any event, obliged to pay to the LANDLORD pursuant to the HEAD LEASE. In addition, the SUB-TENANT shall refund to SPAR, on demand, any VAT or RSC levies or any other like impost (which may be the subject of future legislation) that might become payable by SPAR on the income received by it pursuant to this sublease. The object in this regard is to ensure that SPAR is not out of pocket in any way pursuant to it remaining as an intermediary between the LANDLORD and the SUB-TENANT and the SUB-TENANT hereby indemnifies SPAR and holds it harmless against any such out of pocket expense which SPAR incurs in consequence of it remaining as an intermediary between the LANDLORD and the SUB-TENANT.’

[4] The effect hereof is that Capstone had to pay to Spar the amount that Spar would pay to Express Model those amounts which do not constitute rental in the strict sense of the word.

[5] Spar instituted proceedings against Capstone and the sureties to recover an amount of R519 943,52 being an amount which it alleged it was obliged to pay to Express Model being increased rates and consequently such an amount was due by Capstone to Spar. Capstone resisted this claim. It alleged and submitted in the court below and in this Court that Spar failed to prove the quantum and its obligation to pay the additional rates.

[6] Spar further alleged that:

'In 2008 amendments to the Local Government Municipal Property Rates Act 6 of 2004 ("the Municipal Property Rates Act") were published which effectively caused properties to be valued according to their market/land value as published in the valuation roll. This had the universal effect of the entire property market being affected by the changed rates through increases to the value of properties.'

To this allegation Capstone responded as follows:

'20.1 I am advised that the Local Government: Municipal Property Rates Act 6 of 2004 ("the Municipal Property Rates Act") was amended on 13 October 2008 by virtue of the Local Government Laws Amendment Act 19 of 2008 and on 1 July 2009 by virtue of the Local Government: Municipal Property Rates Amendment Act 19 of 2009.

20.2 It is not disputed that pursuant to the amendments to the Municipal Property Rates Act the evaluation of immovable properties was effected, whereby the values of immobile properties increased or decreased.

20.3 Save as stated in paragraphs 20.1 and 20.2 above, the allegations contained herein are denied.'

[7] The bare denial does not in my view dispute the allegation that there was indeed an increase in the value of property when the Property Rates Act came into operation.

[8] Spar further alleged that it had to pay the increased amount to Express Model and thus claimed the additional amount from Capstone. Spar said:

'The landlord in terms of the head-lease had paid rates to the municipality without being aware of the changes as amended and it also in turn levied amounts against the Applicant and the Applicant in turn levied these against the First Respondent. As a result of the difference owed to the Municipality, the Applicant in accordance with Section 14.2 of the head-lease agreement was obliged to pay the pro-rata share of

the difference which in turn meant that the Respondent must pay its pro-rata share of the difference.'

To this Capstone answered:

'21.1 I refer to what I have stated in this regard in clause 14.1 and 14.2 of the head-lease agreement.

21.2 It is not disputed that annexure CC3 of the applicant's founding affidavit is a copy of a purported letter from Balme Van Niekerk and Tugman (Pty) Limited to the deponent to the applicant's founding affidavit.

21.3 Save as stated in paragraphs 21.1 and 21.2 above, the allegations contained herein are denied.'

In addition Spar averred as follows:

'The amount of R519 943,52 is the amount actually disbursed by the applicant in respect of an increase in rates to the landlord and in terms of the relevant provisions of the sublease and suretyship referred to hereinabove and the respondents are liable to refund the said amount to the applicant. …'

The answer to this allegation was as follows:

'24.4 The amount claimed was not paid into the trust account of the respondents' attorney or into the trust account of the applicant's attorneys. In regard to the amount claimed not being paid into the trust account of the applicant's attorneys, the agreement was to the effect that the amount claimed would be paid into the trust account of the applicant's attorneys whereupon the applicant would consent to the sale by the respondent of the supermarket business conducted from the premises being the subject of the head-lease agreement and sublease agreement. However prior to payment being made the applicant consented to the sale and the need for payment thus fell away.

24.5 Save as stated in 24.1 to 24.4 above, the allegations herein are denied.'

[9] The claim by Spar is consequently one for the payment of additional rates. There was an issue made of the fact that the contents of an annexure to the founding affidavits which calculated the amount due constituted hearsay evidence. Nothing turns on this if regard is had to the express words of the deponent to the founding affidavit in paragraph 31. The bare denial by

Capstone does not meet the requirements of a real, genuine and *bona fide* dispute to exist.[1]

[10] In the circumstances Spar had shown both that there was an increase in the rates payable and that it had paid it. The result was that Capstone's concomitant liability was established.

[11] The only further question which, in terms of clause 9.2 of the sublease agreement is to be determined, is whether Spar had paid an additional amount to Express Model and whether it demanded payment from Capstone.

[12] The first question has already been answered in the affirmative. The demand for the payment was sent to Capstone and its liability arose when that demand was made.

[13] Capstone argued that certain clauses of the head lease agreement as read with clause 9.2 of its sublease resulted in an *onus* resting on Spar to show that the rates payable by Express Model in fact increased. The reasoning is wrong. There is no privity of contract between Capstone and Express Model. The terms of the agreement between Express Model and Spar has no bearing on the agreement between Capstone and Spar unless specifically incorporated, which it was not.

[14] In all the circumstances Spar paid amounts which it was obliged to pay to Express Model and pursuant to clause 9.2 of the sublease Capstone became obliged to refund Spar.

[15] In all the circumstances the judgment of the court *a quo* is to be upheld and the appeal falls to be dismissed with costs.

---

[1] See *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) para [13].

_____

Wepener J

I agree:

_____

Tsoka J

I agree:

_____

Makume J

Counsel for the Appellant: L. Hollander

Attorneys for the Appellant: Phillip Silver Swartz Inc.

Counsel for the Respondent: A. Bishop

Attorneys for the Respondent: Garlicke and Bousfield