

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 2478/2011

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

21 OCTOBER 2016


FHD VAN OOSTEN

In the matter between

**MOMENTUM PROPERTY INVESTMENTS
(PTY) LTD**

PLAINTIFF

and

**AMADWALA TRADING 591 CC
T/A WIMPY
KEVIN BERTRAM JAMES**

**FIRST DEFENDANT
SECOND DEFENDANT**

Practice – Exception – against plaintiff's replication - on ground of failure to disclose a cause of action - excipients failing to show that the allegations contained in the particulars of claim read with the replication, upon every reasonable interpretation, fails to disclose a cause of action - exception against replication only procedurally improper - exception dismissed with costs

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] This is an exception noted by the defendants against the plaintiff's replication on the ground that it fails to disclose a cause of action. It is not in dispute that the first defendant was a tenant of the plaintiff of certain business premises situated in Blackheath. In the action the plaintiff sues the first defendant and the second defendant as its surety and co-principal debtor, for payment of arrear rentals and ancillary charges for the period from August 2007 to August 2012. The essential dispute between the parties for the purpose of adjudicating the exception, concerns the underlying agreement in terms of which the lease existed: the plaintiff relies on a written agreement of lease having been concluded (the lease agreement) while the defendants deny that the lease agreement was concluded. In a replication to the defendants' plea the plaintiff introduced and further relies on a letter addressed to, received, signed and returned by the second defendant (the letter) prior to the alleged entering into of the lease agreement in support of the conclusion that the lease agreement was concluded. The exception as I have mentioned, is raised to the replication and in essence, requires a determination of the propriety of the exception procedure adopted by the defendants.

Factual background

[2] It is necessary for a proper understanding of the issue between the parties to refer to and place the facts in their proper sequence. The letter is dated 13 July 2007 and it appears that the defendants by then were already in occupation of the leased premises. The letter (written by RMB Properties, 'as intermediary between the parties for the purposes of facilitating an agreement of lease') records the terms and conditions 'for a proposed agreement of lease' in respect of the premises. Those comprise a description of the parties to the lease and the premises, the commencement date of the lease, the period of the lease, the rental, deposit, rates and taxes and other charges payable, as well as a suretyship clause. It is further stated that, once accepted by the plaintiff, the letter would contain 'the essential elements' of the lease agreement and further that the remaining conditions of the lease will be in accordance with the plaintiff's standard lease agreement. It is specifically stated that the letter records 'the basis upon which the tenant is prepared to enter into an agreement of lease'; once signed by the defendant it will constitute an irrevocable offer by the tenant to enter into an agreement of lease with the landlord on the terms and conditions contained herein'; 'should the landlord confirm

its acceptance in writing, the essential elements of the lease will have been agreed and the parties agree to be bound accordingly' and 'the only valid form of acceptance and/or communication of acceptance by the landlord of the offer will be in writing'.

[3] The first defendant signed the letter and thereby offered 'to enter into an agreement of lease on the terms and conditions set out herein' to which was added in manuscript, a clause that the period from 1 to 31 August would be rent-free and that the tenant would be entitled to rent-free days in respect of its inability to trade resulting from delays caused by building operations.

[4] The plaintiff's claim as pleaded in the particulars of claim is premised on the lease agreement, which the plaintiff alleges was concluded 'during or about August/September 2007, alternatively the 15th October 2008'. *Ex facie* the lease agreement, it was signed by the second defendant on behalf of the first defendant on 10 October 2008 and by the plaintiff, only some two years later, on 15 October 2010. The particulars reflected in the schedule to the lease agreement differ in some respects from the particulars contained in the letter.

[5] In the defendants' plea and by way of an alternative to the denial that the lease agreement was concluded, reference is made to a written offer made by the first defendant on 10 October 2008, to conclude a lease agreement on the basis as set out in the lease agreement, which remained open for acceptance by the plaintiff for a reasonable period, which had elapsed six months after 10 October 2008. A further alternative is pleaded to the effect that the plaintiff falsely represented to the first defendant that it would conclude the lease agreement forthwith, alternatively within a reasonable time. It is in regard to these allegations that the plaintiff introduced the letter in the replication which prompted the plaintiff to file a replication alleging that the plaintiff confirmed its acceptance of the first defendant's offer in writing by sending a draft standard lease agreement to the first defendant, whereupon the lease agreement was concluded.

[6] The complaint raised in the exception is that the plaintiff's allegation that the sending of the draft standard lease agreement constituted acceptance in writing of the first respondent's offer, fails to disclose a cause of action.

Discussion

[7] An exception to a replication on the ground that it discloses no cause of action is not only unusual but also hardly conceivable. A replication is not required to disclose a cause of action, it constitutes, where necessary, an answer to the defendant's plea. To allow an exception to a replication on the ground that it fails to disclose a cause of action would offend the well-entrenched principles relating to exceptions: firstly, the summarily disposal of the matter on the acceptance of the correctness of the pleaded facts, without having to toil through lengthy litigation is envisaged (see *Gallagher Group Ltd v IO Tech Manufacturing (Pty) Ltd* 2014 (2) SA 157 (GNP) 161C-D) and secondly, in order to succeed, the excipient must show that upon every reasonable interpretation of the pleading, no cause of action is disclosed (*First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA) para [6]; *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) 199B).

[8] Applied to the present matter the defendants must persuade me that the allegations contained in the particulars of claim read with the replication, upon every reasonable interpretation, fails to disclose a cause of action. In my view the plaintiff's case is squarely premised on the lease agreement: as much is clear from the particulars of claim. The stirring of the tranquil pool was caused by the defendants' plea and the replication in response thereto if anything, simply muddled the waters. In essence the plaintiff in the replication sought to give some legal effect to the letter which by implication was referred to in the plea. I am unable to find any departure from the cause of action relied on in the particulars of claim. The consideration of the superfluity of the allegations contained in the replication or whether the plaintiff in disguise has attempted to introduce an alternative cause of action, need not detain me any further. The plaintiff's cause of action, as I have alluded to, remained the conclusion of the lease agreement. The *facta probantia* necessary to prove the lease agreement may well include the letter and the subsequent conduct of the parties in regard thereto as referred to in the replication, but that does not render the particulars of claim read with the replication excipiable.

[9] The exception was noted against the replication only. Counsel for the defendants fairly and correctly conceded that this procedure cannot be countenanced. The complaint raised in the exception may well have been addressed in a rule 30

the replication aside as an irregular step in respect of which entirely different considerations apply, but I do not consider it necessary to express any final views on this aspect.

[10] For all these reasons I conclude that the exception is unfounded and it accordingly falls to be dismissed.

Order

[11] In the result I make the following order:

1. The defendants' exception to the plaintiff's replication is dismissed.
2. The defendants shall pay the costs of the exception.



FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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ADV AJ LAMPLOUGH

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ADV J HEHER

(HEADS OF ARGUMENT PREPARED BY ADV T OHANNESSIAN SC)

DEFENDANTS' ATTORNEYS

ELLIS COLL ATTORNEYS

DATE OF HEARING
DATE OF JUDGMENT

17 OCTOBER 2016
21 OCTOBER 2016