

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG DIVISION, PRETORIA

CASE NO: 2013/65945

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
<u>23/05/2014</u>	
DATE	SIGNATURE

23/5/2014

In the matter between:

LYNNWOOD FORUM (PTY) LTD

PLAINTIFF

and

**DANTON PUB CC
DANIEL JOHANNES BREDEKAMP HAMMAN
JOHAN ANTON SWANEPOEL
MARTINUS CORNELIUS HUMAN**

**FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT
FOURTH DEFENDANT**

J U D G M E N T

COLLIS AJ:

INTRODUCTION

[1] The Plaintiff issued summons against the First, Second, Third and Fourth defendants suing them jointly and severally, the one paying the other to be absolved for:

- (a) Payment in the amount of R45 389.42, for the deposit still due and outstanding;
- (b) Payment in the amount of R468 897.86 for the outstanding rental for the period 1 January 2012 to 1 October 2013;
- (c) Interest on the aforesaid amounts at 15.5% per annum calculated from date of service of summons, to date of payment.
- (d) Costs of the action on a scale as between Attorney and Client.

[2] Pursuant to the summons being served on the defendants, the defendants entered an appearance to defend the action, whereupon the plaintiff applied for summary judgment within the ambit of Rule 32 of the Uniform Rules of Court.

BACKGROUND

[3] The plaintiff is the registered owner of fixed commercial property. On 27 June 2011, it entered into a lease agreement¹ with the first defendant for a period of 5 years commencing on 1 October 2011. The first defendant took occupation on 1 October 2011. In terms of the lease so concluded the first defendant was required to pay a deposit and thereafter rental as set out in the lease agreement. On 27 June 2011 the second, third and fourth defendants executed deeds of suretyship² in favour of the plaintiff wherein they bound themselves jointly and severally as sureties and co-principal debtors with the first defendant and in respect of the first defendant's liability towards the plaintiff. Plaintiff alleges that the first defendant failed to pay the full deposit as required in terms

¹ See in this regard Annexure "L 2"

² See in this regard Annexure "L 3"

of the lease agreement and further that the first defendant as from January 2012 fell into arrears with his rental payments.

- [4] The defendants opposed the application for summary judgment and in their affidavit resisting summary judgment had raised two defences. Firstly, they denied the correctness of page 7 of the lease agreement annexed to the particulars of claim. The plaintiff relies on this document to proof the rental amount (Clause 18) and the initial rental deposit (Clause 19). Secondly, the defendants set out that they intend instituting a counterclaim against the plaintiff in relation to the discontinuation of electricity supply to the leased premises and failure of working air conditioners of the leased premises.

FIRST ISSUE

- [5] The second defendant has attached annexure A and B to his opposing affidavit, in substantiation of the defendants' defence disputing the correctness of page 7 of the lease agreement. According to the defendants, page 7 of the lease agreement may have been altered and therefore not reliable.
- [6] *Ex facie* the two documents, the terms of the lease agreement recorded therein, are exactly the same. The only difference is that in Annexure A two signatures were appended next to the deleted clause 18.3, whereas in Annexure B three signatures were appended next to the deleted clause 18.3.
- [7] The dispute between the parties is for the shortfall of the deposit and the outstanding arrear rental. The terms that pertain to this dispute are contained

in clauses 18 and 19 of the lease agreement. The documents relied upon by the defendants to dispute the reliability of page 7 of the lease agreement show that the rental amount and the deposit amount are those as particularised in the plaintiff's claim. Thus, these documents support the version of the plaintiff insofar as the rental amounts and deposit amounts are concerned.

[8] In view of the fact that the material terms of the lease agreement as recorded in annexures A and B are exactly the same; I conclude that in these circumstances the omission of one signature (in annexure A) is not material in showing that the terms of the lease agreement were different to those as alleged by the plaintiff.

[9] In further substantiation of their defence, the second defendant denies at paragraph 2.11 of the opposing affidavit that he had the authority to sign on behalf of the other defendants. I surmise that the second defendant's denial of authority relates to the signing of the lease agreement. It is apparent that the plaintiff's claims against the second, third and fourth defendants were by virtue of the suretyship agreements concluded between the plaintiff and them. The suretyship agreements are separate and distinct agreements and the underlying *causa* to prove the indebtedness of the second, third and fourth defendants. Therefore, and as a result I cannot but conclude that the identity and authority of the signatory to the lease agreement is of no consequence.

[10] The defendants further argue that the plaintiff's claim is not a liquidated claim.

By this I take is meant, that the claim is not one for a liquidated amount in money.

[11] A liquidated amount in money is an amount which is either agreed upon or which is capable of speedy and prompt ascertainment.³ In *Botha v Swanson & Company (Pty) Ltd* 1968 (2) PH F85 (C) Corbett J put the test as follows: "*A claim cannot be regarded as one for a liquidated amount in money unless it is based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a mere matter of calculation.*"

[12] The lease agreement concluded between the parties being the underlying *causa* upon which the plaintiff's claim is based, clearly stipulates the period of the lease, the rental amounts to be paid in terms of the lease and who in terms of the lease agreement was liable for such payments.

[13] Furthermore, in paragraph 9 of its particulars of claim the plaintiff sets out how the outstanding amount sued for was calculated.

[14] The outstanding amount, as claimed by the plaintiff is therefore capable of speedy and prompt ascertainment and as a result I find the criticism that the plaintiff's claim is not one based on a liquidated amount in money, to be without merit and substance.

³ *Lester Investments (Pty) Ltd v Narshi* 1951 (2) SA 464 (C)

SECOND ISSUE

[15] The second issue raised as a defence is a counterclaim which the first defendant intends instituting against the plaintiff. The counterclaim allegedly relates to the discontinuation of electricity supply and faulty air conditioners on the leased premises which resulted in various losses for the first defendant.⁴ In addition thereto, the first defendant contends that it had received penalties and fines imposed by the City of Tshwane Municipality resulting in damages suffered by it.

[16] The first defendant in its opposing affidavit fails to stipulate what amount its counterclaim will constitute and in addition thereto, it is vague as to the particularities of its intended counterclaim.

[17] In the decision *Bank of Lisbon v Botes*⁵ Nestadt J remarked as follows:

"It will be seen that the affidavit purports to disclose three defences. One is that the defendant has a counterclaim. This is dealt with in the second last paragraph of the affidavit. There is, however, nowhere to be found any mention of how much this counterclaim is. There is not even an allegation that the counterclaim is in an amount in excess of the plaintiff's claim. In these circumstances it seems to me that I must hold, as I do, that this part of the affidavit discloses no defence. It is of course clear that a counterclaim, if properly set out, can constitute a defence to an application for summary judgment. It must, however, as I have indicated, be properly set out. As a minimum requirement it must, I think, be quantified and, if it is to constitute a

⁴ See in this regard Opposing Affidavit para 4.1 to 4.4

⁵ 1978 (4) All SA 79 (W)

complete defence, the quantum thereof must be in an amount at least equal to the plaintiff's claim."

[18] In *Traut v Du Toit*⁶ it was held that: "*where the total failure of the defendant to set out his counterclaim fully makes it impossible for the Court to say that the counterclaim can disclose a bona fide defence, the Court will grant summary judgment against the defendant. By reason of complete non-quantification of the defendant's counterclaim that principle in my view applies to the present matter.*"

[19] In the absence of the defendant setting out its counterclaim fully and with sufficient particularity, I cannot find that such intended counterclaim discloses a *bona fide* defence.

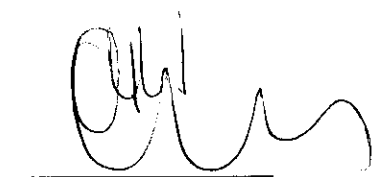
[20] Uniform Rules of Court, Rule 32(3) (b) sets out that a defendant shall on affidavit "*disclose*" fully the nature and the grounds of the defence and the material facts relied upon therefor. This I find, the opposing affidavit fails to disclose.

ORDER

[21] In the result summary judgment is granted in favour of the plaintiff against the first, second, third and fourth defendants jointly and severally the one paying the other to be absolved for:

⁶ 1966 (1) SA 69 (O)

- (a) Payment in the amount of R45 389, 42 (Forty Five Thousand Three Hundred and Ninety Eight Rand and Forty Two Cents);
- (b) Payment in the amount of R468 897, 86 (Four Hundred and Sixty Eight Thousand Eight Hundred and Ninety Seven Rand and Eighty Six Cents);
- (c) Interest on the aforesaid amounts at the rate of 15% per annum calculated from 4 November 2013, to date of final payment;
- (d) Costs of suit on a scale as between Attorney and Client.



C. J. COLLIS

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

APPEARANCES

FOR PLAINTIFF: ADV K JORDT

INSTRUCTED BY: LACANTE HENN INCORPORATED

FOR DEFENDANT: ADV J.C VAN EEDEN

INSTRUCTED BY: KEMP DE BEER & GOOSEN ATTORNEYS

DATE OF HEARING: 05 MAY 2014

DATE OF JUDGMENT: 23 MAY 2014