REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

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

18 April 2018
DATE

Molopa
SIGNATURE

18/4/18

CASE NO: A768/2015

In the matter between:

DANTON PUB CC	**1ST Appellant**
DANILE JOHANNES BREDENKAMP HAMMAN	**2ND Appellant**
JOHAN ANTON SWANEPOEL	**3RD Appellant**
MARTHINUS CORNELIUS HUMAN	**4TH Appellant**

and

LYNWOOD FORUM	**Respondent**

JUDGMENT

MOLOPA-SETHOSA J

[1] This is an appeal against the judgment and order by Collis AJ [as she then was] on 23 May 2014, in which the court a quo granted Summary Judgement against the appellants, ordering them to pay a total amount of R514 287.42 plus interest and costs to the respondent. The appeal is with leave of the court a quo.

[2] The plaintiff's claim consists of 2 claims, supported by annexures consisting of a rental agreement and deeds of suretyships. The aggregate of these claims excluding interest amounts to R514 287.42.

BACKGROUND

[3] On 11 October 2011 the respondent issued summons against the appellants for an order in the following terms:

> " a. Payment in the amount of R45 398.42 (Forty Five Thousand Three Hundred Ninety Eight Rand and Forty Two Cents), for the deposit still due and outstanding;
>
> b. Payment in the amount of R468 897.86 (Four Hundred Sixty Eight Thousand Eight Hundred Ninety Seven Rand and Eighty Six Cents) for the outstanding rental for the period 1 January 2012 to 1 October 2013.
> c. Interest on the aforesaid amounts at 15.5% per anum (*sic*), calculated from date of service of summons to date of payment.
>
> d. Cost of the action on an Attorney and Client scale.

e. Further and/or alternative relief."

[4] The claims are based on a lease agreement between the first appellant and the respondent. The respondent's cause of action was for arrear rentals in the amount of R468 897.86, as well as outstanding deposit in the amount of R45 398.42. The second, third and fourth appellants are alleged to be sureties and co-principal debtors for the indebtedness of the principal debtor [the first appellant] in each of the claims.

[5] Pursuant to the summons being served on the appellants, the appellants gave notice of their intention to defend the action, whereupon the respondent launched summary judgment proceedings against the first second third and fourth appellants.

Defences raised in the opposing affidavit

[6] In its affidavit resisting summary judgement, it was contended on behalf of the appellants that the agreement attached to the respondent's summons, on which the cause of action was based, is not the agreement entered into between the parties. The appellants submitted that pages 7 and 35 of the said agreement were altered without the consent of the appellants. The appellants contended in the opposing affidavit that the respondent's attorney acknowledged to the second appellant that page 7 of the schedule to the lease agreement was altered.

The appellants consequently submitted that the alleged deposit of R175 677. 62 was not agreed upon, and that the parties had agreed that the first appellant would pay a deposit in the amount of R135 000.00,

which amount the appellants submitted, was in fact paid to the respondent.

[7] In regard to the claim for the arrear rental, the appellants submitted that rent was calculated on an incorrect basis seeing that pages 7 and 35 of the said agreement were altered by the respondent. Further that the claim of the respondent is not a liquid or liquidated claim since there was a dispute in the amount to be paid, in the light of the fact that the agreement had allegedly been amended by the respondent without the consent of the appellants.

[8] As to the suretyship, on which the respondent based its claim against the second third and fourth appellants, it was contended in the opposing affidavit that since the respondent could not prove its claim against the principal debtor [the first appellant]; it can also not prove its claim against the sureties.

[9] The appellants furthermore submitted that they had a counterclaim against the respondent, due to the disconnection of the electricity by the respondent. Further that air conditioners had at various times not been in a working condition, which made it unbearable for the patrons of the first respondent, and that they/the appellants suffered various losses in that regard.

[10] The learned Judge a *quo* however found that the appellants failed to disclose a bona fide defence and subsequently granted summary judgment for the aforesaid amount of R514 287.42 plus interest on 23 May 2014.

[11] The learned Judge a *quo* found that the lease agreement relied upon by the respondent, attached to the summons, does not differ from the lease agreement signed by the parties, further that the omission of one signature (in annexure A to the opposing affidavit) is not material in showing that the terms of the lease agreement were different to those as alleged by the respondent [plaintiff].

[12] The learned Judge a *quo* further found that the outstanding amount claimed by the respondent was capable of speedy and prompt ascertainment, and that therefore the plaintiff's claim was based on a liquidated amount in money.

GROUNDS FOR THE APPEAL

[13] The appellants contend that the learned Judge *a quo* erred in finding that lease agreement does not differ from the lease agreement signed by the parties.

The appellants submitted that the learned Judge *a quo* erred in that she did not take note of the fact that the agreement attached to the summons differs from the agreement signed by all parties. The appellants furthermore submitted that the learned Judge *a quo* did not take note of the fact that the amounts paid as a deposit differed from the amount stated in the attached contract but correlated with the amount in the agreement that was signed by all parties.

[14] The appellants thus contend that the court *a quo* should have found that the agreement annexed to the particulars of claim was amended and was not the real agreement signed by all parties; and that pages 7 and 35

of the agreement were not signed together with the rest of the agreement and constituted an amendment to the agreement concluded by the parties.

[15] The appellants submitted that the learned Judge *a quo* erred due to the fact that she did not take into account that the amounts of rent payable by the appellants were also amended and reflected in the amended agreement;

The appellants further contend that the court *a quo* erred in finding that the respondent had a liquidated claim for an amount easily ascertainable due to the dispute in amounts of rent to be paid in the light of the fact that the agreement had clearly been amended and evidence would need to be led on such facts.

LEGAL PRINCIPLES

[16] In terms of rule 32(2), the defendant has two options open to him/her upon receipt of an application for summary judgment:

> [16.1] Give security to the plaintiff to the satisfaction of the registrar for any judgment including costs, which may be given;
>
> [16.2] satisfy the court by affidavit or, with the leave of the court, by oral evidence, that the defendant has a *bona fide* defence to the action;

[17] In order to prove a *bona fide* defence the following onus is on the defendant:

The affidavit or oral evidence must disclose fully the nature and grounds of the defence and the material facts relied upon for the defence.

The defendant however does not have to set out his defence in the same detail or provide evidence as will be required at trial. At summary judgment stage the onus on the defendant is not to satisfy the court that his defence will probably succeed, but merely that the facts provided by him constitute a possible defence to the plaintiff's claim; in other words, at summary judgment stage, the court is not interested in whether the plaintiff's or defendant's version of events is more probable. As long as the defendant's version, if proved true, would amount to a valid defence to the claim, it qualifies as a *bona fide* defence; *Refer* Maharaj v Barclays National Bank Ltd *1976 (1) SA 418 (A)*.

[18] The appellants consequently contended that they did in fact disclose a version, which if proven as the truth, would amount to a valid defence to the respondent's claim.

[19] The question is whether or not, on the facts set out in the papers, there are triable issues.

Navsa JA stated the following in Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture *[2009] 3 All SA 407 (SCA)*

> *"The rationale for summary judgment proceedings is impeccable.* The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary *judgment proceedings can hardly continue to be described as*

extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In Maharaj [supra] at 425G-426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings." **My underlining.**

Summary judgment, which deprives a defendant of the opportunity to raise its defence in trial proceedings, should be granted only exceptionally. Summary judgment is a drastic procedure. The rule 32 procedure is not intended to shut out a defendant who can show that there is a triable issue applicable to the claim as a whole from laying his defence before the court. The remedy provided by the rule has for many years been regarded as an extraordinary and a very stringent one in that it closes the doors of the court to the defendant and permits a judgement to be given without a trial.

[20] In the matter at hand herein, on the face of it, looking at the papers before court, it does appear that pages 7 of the said schedule to the agreement was altered. The appellants contend that this was done without the consent of the appellants. Pages 7 and 35 to the agreement annexed to the particulars of claim have not been initialed by all the parties who signed the agreement, as with the rest of the pages/document].

[21] In paragraph 5 of the particulars of claim the respondent/plaintiff alleges that the lease agreement between the respondent and the first appellant was concluded on 27 June 2011. However, on page 7 of the schedule to the lease agreement a date 7/9/11 is inscripted next to clause 18.3. This date is not dealt with in the particulars of claim. At the bottom of page 7 there is only one person's initials, as opposed to six initials on other pages of the agreement annexed to the particulars of claim, save for page 35 as well, which also has no other initials at the bottom of the page. It does appear that various amendments to the agreement have been effected which for now remain unexplained and may well raise questions of what the true agreement between the parties was.

[22] As already set out above, the appellants submitted that the alleged deposit of R175 677. 62 was not agreed upon and that the deposit agreed upon was R135 000.00, which amount the appellants submitted, was in fact paid to the respondent. It happens many a times that parties pay a full deposit prior to occupation of the property; it is not clear on the papers why the respondent would only claim the alleged balance of the deposit two (2) years after the first appellant had taken occupation; this in the light of the appellants' contention that the deposit was fully paid prior to occupation of the property.

[23] With regard the alleged arrear rental claimed by the respondent, the appellants submitted that rent was calculated on an incorrect basis seeing that pages 7 and 35 of the said agreement were altered by the respondent. The amount claimed by the respondent cannot, in my considered view, be

said to be a liquidated amount in money since there is a dispute pertaining to the amount of rent payable by the first appellant.

[24] In so far as suretyship is concerned, the liability of the sureties [second third and fourth appellants emanates from a deed of suretyship which the second third fourth appellants signed in favour of the respondent for the payment of debts and obligations of the first appellant [the principal debtor] to the respondent, therefore if the respondent could not prove its claim against the principal debtor [the first appellant] it can also not prove its claim against the sureties.

[25] Given the drastic nature of the summary judgement proceedings, and the limitation placed on a plaintiff seeking summary judgement as to what may be contained in the supporting affidavit to the summary judgement application, there was no evidence before the learned judge *a quo* about what the respondent's attorney may or may not have said to the second appellant with regards the altered pages of the schedule to the lease agreement, which are contentious herein. Further there is no explanation and/or allegation dealing with the date of 7/9/11 inscripted next to clause 18.3 at pagge7 of the schedule to the lease agreement.

[26] Against this background it is understandable that the appellants plead in their notice of appeal that the learned Judge *a quo* erred in finding that lease agreement attached to the summons does not differ from the lease agreement signed by the parties, i.e. that the learned Judge did not take note of the fact that the agreement attached to the summons differs from the agreement signed by all parties.

[27] In all these circumstances, it seems to me that the issues raised by the appellants in their opposing affidavit are triable issues which would be tested at trial, and summary judgement ought not to have been granted under the circumstances. The learned Judge *a quo* ought to have allowed the appellants to present these issues to a trial court by giving the appellants leave to defend.

[28] In the circumstances, I am of the view that a proper case was made out by the appellants for the appeal to be upheld.

[29] In the result I propose the following order:

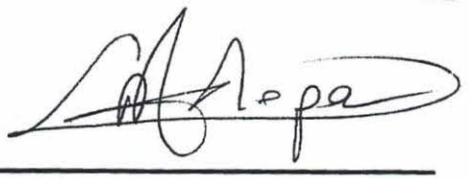
1) The appeal is upheld with costs.

2) the order of Collis AJ is set aside and replaced with the following order:

"2.1 The application for summary judgement is dismissed.

2.2 The defendants are granted leave to defend the action

2.3 Costs of the summary judgement application will be costs in the cause."



L M MOLOPA-SETHOSA

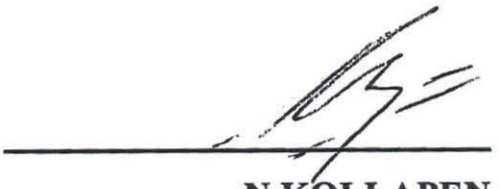
JUDGE OF THE HIGH COURT

I agree

T J RAULINGA

JUDGE OF THE HIGH COURT

I agree



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JUDGE OF THE HIGH COURT