

IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)



Case number: 2645/2015

Date:

DELETE WHICHEVER IS NOT APPLICABLE  
(1) REPORTABLE: YES/NO  
(2) OF INTEREST TO OTHERS JUDGES: YES/NO  
(3) REVISED ✓  
8/6/2018 DATE  
SIGNATURE

In the matter between:

JACQUES A VAN DEN BERG

APPLICANT

AND

JOHN MEYRICK WILLIAM SAYERS N.O.

FIRST RESPONDENT

TERSSA MARION SAYERS N.O.

SECOND RESPONDENT

---

JUDGMENT

---

NEUKIRCHER, J:

- [1] On 18 June 2015 Swartz J granted default judgment against the Applicant in favour of the Respondents in the amount of R719 214-54 plus interest at 9% per annum *a tempore morae* and costs.
- [2] On 15 September 2016 De Vos J rescinded that judgment and ordered the First and Second Respondents to pay the costs of the application for rescission, the one paying the other to be absolved.<sup>1</sup>
- [3] However, by the time that the latter judgment was granted, the First and Second Respondents had already caused a writ of execution to be issued and on 14 September 2015 the Sheriff executed the writ and attached an amount of R734 285-67 and paid this to the Respondents who are the Trustees of the HVD Property Trust.
- [4] Given that the judgment of Swartz J was rescinded, the *causa* for the attachment fell away and the original summons issued by the Respondents (who are Plaintiffs in the main action) now stands. One would imagine that restitution would therefore take place and the R734 285-67 attached by the Sheriff would have been refunded to Applicant pending the finalisation of the action.

---

<sup>1</sup> It bears mentioning that the opposed application for rescission was argued on 25 July 2016. The application for rescission was served on 22 September 2015.

- [5] However this is not what occurred. All attempts to elicit payment from the Respondents failed and the applicants thus issued this application on 6 November 2016 to enforce payment pending resolution of the action.
- [6] This application was met by a counter-application in which the Respondents demand payment of the amount of R729 219-24 plus interest and costs from the Applicant.
- [7] The *causa* set out in the counter-application before me is the very *causa* pleaded in the pending action which is the following:
- 7.1 the HVD Property Trust entered into a written 5 year lease with a company known as Copperzone 124 (Pty) Ltd ("Copperzone");
  - 7.2 that lease terminated on 30 November 2013;
  - 7.3 this written lease is common cause between the parties;
  - 7.4 on 1 December 2008 the Applicant stood surety for the debts of Copperzone. The suretyship is also common cause between the parties;
  - 7.5 subsequent to the termination of the written lease, the parties entered into an oral lease for the period 1 December 2013 until 28 February 2015;
  - 7.6 the Applicant failed to meet its obligations under the oral lease which was then cancelled by the Respondents and it vacated the premises on 30 April 2014; and

7.7 the amount claimed constitutes arrear rentals, electricity and water for the periods of February, March and April 2014, as well as damages suffered by the Trust.

[8] The Applicant not only denies the existence of any oral lease, he denies that the suretyship extends past the termination of the written lease on 30 November 2013.

[9] In his heads of argument, Mr Milne for the Applicant has argued that the present counter-application is based upon facts similar to those set out in the Respondents Particulars of Claim and he takes the point of *lis pendens*.

[10] It is clear from the application that the Respondents will serve a Notice of Amendment to the to the Particulars of Claim and in fact, the Respondent's take issue with the Applicant for having brought this application at all. They state that he should have filed a plea, and if necessary, a counterclaim.

[11] In the bigger scheme of things I find it unnecessary to deal with the issue of *lis pendens* or the issues that have arisen on the papers themselves for the reason that will appear later.

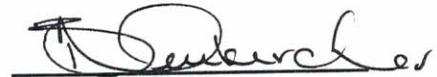
[12] In **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd** 1949(3) SA 1155 (T) Murray AJP reiterated that, except in interlocutory



matters, it is undesirable to attempt to settle disputes of fact solely on the probabilities, disclosed in contradictory affidavits.

- [13] The fact of the matter is that the facts pleaded by the Respondents coupled with the denial of the Applicant of the oral lease and the issues surrounding the duration and interpretation of the suretyship are of such a nature that it would be appropriate were a trial Court to hear proper evidence – one assumes that is why summons was issued out by Respondents in 2015 and not motion proceedings in the first place i.e. that they foresaw a dispute of fact.
- [14] This being said, I also intend to safeguard the funds attached by Respondent pending the finalisation of the litigation in this matter by ordering that the sum attached be paid into the Respondent's attorneys interest-bearing Trust account in terms of Section 78(2A) of the Attorneys Act 53 of 1979.
- [15] Thus the order I make is the following:
- 15.1 this matter is referred to trial;**
  - 15.2 the Applicant's Notice of Motion shall stand as a simple summons;**
  - 15.3 the Applicant shall deliver a Declaration within 20 days of date of this order;**
  - 15.4 the Rules of Court relating to pleading and the conduct of trials shall thereafter be applicable;**

- 15.5 the Respondents shall pay the sum of R734 285-67 into an interest bearing trust account in terms of s 78(2A) of the Attorneys Act 53 of 1979, to be held by their attorney of record, until such time as the matter is finalised; and
- 15.6 the costs of the present application and counter-application are reserved for determination by the trial Court hearing the matter.

A handwritten signature in dark ink, appearing to read 'B Neukircher', is written over a horizontal line.

**B NEUKIRCHER**

**ACTING JUDGE OF THE HIGH COURT**

DATE OF HEARING: 5 JUNE 2018

DATE OF JUDGMENT: 12 JUNE 2018

ATTORNEY FOR APPLICANT: SCHWARZ-NORTH INC

ADVOCATE FOR APPLICANT: ADV D MILNE

ATTORNEY FOR RESPONDENTS: DARRYL FURMAN & ASS

ADVOCATE FOR RESPONDENTS: ADV L HOLLANDER