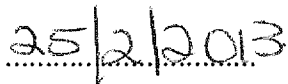


REPUBLIC OF SOUTH AFRICA



IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

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

CASE NO: 2009/49949

In the matter between:

BEAUX LANE (SA) PROPERTIES (PTY) LIMITED

Respondent / Plaintiff

and

SNOWY OWL PROPERTIES 310 (PTY) LTD
(REGISTRATION NUMBER: 2003/020639/07)

First Applicant/ First
Defendant

STEPHAN LOTHAR KUHN
(IDENTITY NUMBER:

Second Applicant/ Second
Defendant

JUDGMENT

WEINER J:**INTRODUCTION**

[1] The plaintiff issued summons against the defendants in November 2009.

The claim arose against the first defendant from the breach of an agreement of lease and against the second defendant from a deed of suretyship.

[2] The defendants entered a special plea, a plea and a conditional counterclaim in March 2010. A plea and replication by plaintiff was filed also in March 2010. The original special plea was disposed of prior to the trial of the matter which was set down for October 2012.

[3] On the 12 and 15 October 2012, the defendants filed two Notices of intention to Amend the plea.

[4] The present application in terms of Rule 28 (4) relates to the Notice of Intention to Amend dated 15 October 2012 (*“the amendment”*).

[5] In terms of the amendment, the defendants sought to insert a further special plea. In effect, they now claim that the wrong defendants are before Court in the trial matter.

[6] The defendants rely on the following as the basis for this amendment:

- 6.1. The correct tenant of the leased property was Busicor 0055 CC ("Busicor"). There was an existing lease agreement entered into on or about 16 September 2008 between the plaintiff and Busicor; (*the Busicor lease agreement*)
- 6.2. The lease agreement concluded in January 2009, (*the January lease agreement*) annexed to the particulars of claim, upon which the plaintiff relies, is not the operative agreement between the landlord and tenant;
- 6.3. There is no contractual nexus between the plaintiff and the first defendant;
- 6.4. The plaintiff therefore has no claim against the defendants.

[7] In placing before the court the factual analysis behind the amendment, the defendants submit the following:

- 7.1. the plaintiff claims that an agreement of lease was entered into during January 2009;
- 7.2. the plaintiff alleges that first defendant took occupation of the property during October 2008. The defendant queries what governed the occupation of the premises from October 2008 until January 2009;

7.3. the claim of the plaintiff is based upon the January lease agreement entered into between the plaintiff and the first defendant; and a written suretyship agreement entered into between the plaintiff and the second defendant dated 10 November 2008.

7.4. the plaintiff has failed in its opposition to the amendment to deal with what governed the relationship between the parties during the period October 2008 and January 2009. In dealing with the Busicor lease agreement, the plaintiff referred to the evidence of a property manager of Eris, the managing agent on behalf of the plaintiff. No confirmatory affidavit of such manager was attached.

7.5. There is a signature on the Busicor lease agreement, purporting to be that of the landlord (the plaintiff). However, the plaintiff failed to deal with whether or not, it signed the Busicor lease agreement, and if so, what the consequences of that are.

[8] The material relevant clauses regarding the Busicor lease agreement entered into between the plaintiff and Busicor, are the following:

8.1. the agreement was an Offer to Lease entered into between Busicor CC (*"the tenant"*) and the plaintiff (*"the landlord"*);

- 8.2. the landlord was represented by an authorised representative from Renprop (Pty) Ltd and the agreement was signed by both the tenant and the landlord, the latter on 16 September 2008;
- 8.3. the lease period was five years commencing on 1 October 2008 with the occupation date being 20 September 2008;
- 8.4. the occupation of the premises would take place once the deposit had been paid and a lease agreement had been entered into;
- 8.5. there was no prohibition on sub-letting;
- 8.6. there was a "Non-Variation" clause providing that "*No agreement to vary, add or cancel this agreement shall be of any force and effect unless reduced to writing and signed by the parties or on behalf on the parties to this agreement*". It is common cause that there was no variation of the lease agreement on or before the occupation date, 20 September 2008;
- 8.7. there was an "Expiration of Offer" clause containing the following:
 - 8.7.1. the offer was a firm and binding, irrevocable offer which would remain binding only if accepted by noon on 16 September 2008 (this occurred);

8.7.2. on the acceptance of the offer, the offer would constitute a binding agreement between the parties;

8.7.3. the tenant and landlord would sign a lease agreement containing provisions usually applicable to leases within a reasonable period after acceptance of the offer but prior to the occupation of the premises (20 September 2008); [emphasis added]

8.7.4. in the event that the parties could not agree on the terms of the lease agreement on or before 20 September 2008, the Busicor lease agreement would remain in force and occupation would be regulated by such lease agreement.

[9] The January lease agreement was signed on 10 November 2008 by the tenant and by the landlord on 19 January 2009. This was after the 20 September deadline and therefore not in terms of the requirement in the Busicor lease agreement, which became the operative agreement on 20 September 2008 for a period of 5 years, coming to an end on or about 20 September 2013.

[10] The defendant submits that the plaintiff has not put forward any acceptable version to gainsay the fact that the Busicor lease agreement governed the relationship between landlord and tenant. As such, it is

common cause that the Busicor lease agreement was concluded between the plaintiff and Busicor.

[11] The defendants accordingly sought to amend their Plea by incorporating the existence of the Busicor lease agreement. They allege that the present first defendant, Snowy Owl, took possession of the leased property, through a sub-lease.

[12] The plaintiff, in objecting to the amendment, did so, *inter alia*, on the basis that it amounted to a withdrawal of an admission. They refer to several instances in the plea and summary judgment affidavit in which allegations are made that can only be seen as an admission of the existence of the January lease agreement. These include:

12.1. The first defendant made certain payments to the plaintiff in respect of rental and related costs in terms of the January lease agreement;

12.2. The first defendant (not Busicor) paid a deposit of R197 869,780;

12.3. The first defendant required an accounting and debatement process between "plaintiff and first defendant". This suggests a legal relationship between the plaintiff and first defendant;

12.4. the first defendant disputes that the January lease agreement has

been terminated. It pleads that the first defendant remains in occupation of the premises in terms of an agreement between *"the plaintiff and the first defendant"*;

12.5. in terms of Clause 10 of the January lease agreement, permission was granted by the plaintiff to the first defendant on 25 November 2009 to sublease the premises to a Bosch Auto Repair Centre;

12.6. The second defendant signed a resolution on behalf of the first defendant to lease the premises in the name of the first defendant as well as a debit authority on behalf of the first defendant;

12.7. The second defendant also signed an unlimited suretyship agreement binding himself as surety and co-principal debtor for the performance of the obligations of the first defendant in terms of the Lease Agreement;

12.8. FICA documents were submitted in respect of the first defendant and not Busicor.

[13] Relying upon those allegations, the plaintiff submits that the proposed amendment amounts to the withdrawal of an admission that the first defendant concluded the lease agreement with the plaintiff as landlord.

[14] The defendants however contend that the January lease agreement was always in dispute. Therefore they deny that an admission is to be withdrawn. Although, the basis of the defendant's disputes related to the lack of consensus on, inter alia, the extent of the premises, its counsel submits that there was a general denial of the January 2009 lease throughout the pleadings and summary judgment affidavit. The defendant alleged that consensus was not reached between the parties rendering the January lease agreement unenforceable. As a consequence of the denial of the January lease agreement, a conditional counterclaim was instituted, conditional upon a finding that the January lease agreement was indeed valid and binding.

[15] The defendants submit therefore that the amendment is not inconsistent with the defence previously averred and is not a withdrawal of an admission.

[16] It is correct that an amendment amounting to a withdrawal of an admission is usually more difficult to achieve. It requires a full explanation to convince the court of the *bona fides* thereof as it is more likely to prejudice the other party. However, if on an investigation of the case, the facts show that the admission was wrongly made, there is no absolute bar to the amendment being sought and granted. Accordingly, even if the allegations in the plea and summary judgment affidavit amount to admissions, but it appears that because the defendants were not in possession of the relevant document, incorrect admissions were made,

same would not necessarily bar the amendment. As long as same is adequately explained, is *bona fide*, and raises a triable issue and the plaintiff is not unduly prejudiced, the amendment can be granted.¹

[17] The defendant claims that it was only when the Busicor lease agreement was discovered shortly prior to the October trial date that same clarified the picture.

[18] In deciding whether or not to allow an amendment the Court must exercise a judicial discretion regarding what is right, just, equitable and reasonable. The purpose of allowing an amendment is to "*obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done.*"²

[19] The defendants submit that the only issue is whether the plaintiff will suffer prejudice which cannot be cured by an order for costs. As a consequence, the practical approach is that "*amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleadings which is sought to amend was filed*"³. This Court is therefore

¹ *Bellairs v Hodnett & Another* 1978 (1) SA 1109 (A) 1150F–H; *Group Five Building (EC) (Pty) Ltd and Another v The Minister of Public Works* [1997] JOL 241 SE at page 26; *Dali and Others v Government of the Republic of South Africa and Another* [2000] 3 All SA 206 A at paragraphs [21] and [22]

² *Cross v Ferreira* 1950 (3) SA 443 (C) at 447

³ *Moolman v Moolman Estate* 1927 CPD at paragraphs 27-29.

not required to adjudicate upon the merits of the amendment. This would be considered by a court hearing the trial. Issues such as the plaintiff's case on the merits being adversely affected do not amount to prejudice.⁴

[20] The plaintiff further objects to the amendment on the basis of the timing thereof. At the time of the filing of the affidavit resisting Summary Judgement in January 2010 as well as the initial plea, special plea and the conditional counterclaim in March 2010, the defendants state that they did not have a copy of the Busicor lease agreement. It was only furnished to them as a consequence of the request for documents from the plaintiff's Discovery Affidavit. It was made available on 10 September 2012. The defendant sought the amendment shortly after it received the document. The plaintiff disputes these contentions, relying upon the following:

- 20.1. there was early discovery of the Busicor document;
- 20.2. due to the involvement of the second defendant in both entities there is no reason why he would not have been aware of the Busicor lease agreement;
- 20.3. the lateness of the amendment causes prejudice. It comes three years after initiation of litigation. If it is found that Busicor was the tenant, the plaintiff may be met with a defence of prescription.

⁴ *GMF Kontrakteurs (Edms) Bpk v Pretoria City Council* 1978(2)T 219 at 222G

[21] The defendants contend that where a new ground for a defence comes to the defendant's knowledge for the first time after the filing of its plea, he will be allowed to amend his plea provided that the application was bona fide and not prejudicial to the opponent.⁵

[22] defendants submit that a *bona fide* and triable issue exists between the parties on the issue as to which agreement governs the relationship between the parties. The plaintiff may need to join Busicor and seek consequential amendments as a result thereof, but this does not detract from the defendants' case on the amendment.

[23] The defendants further contend that the plaintiff cannot claim prejudice when it, at all times knew of the Busicor lease agreement and was in possession thereof. It elected to issue a summons against the current Defendants based upon the January lease agreement, without disclosing the existence and import of the Busicor agreement. It appears to be common cause that the Busicor lease agreement has not been cancelled.

[24] The defendants argue that the January lease agreement was signed on behalf of Snowy Owl on 10 November 2008 and on behalf of the plaintiff on 19 January 2009 in circumstances where the Busicor lease agreement was operative and had not been cancelled. The January lease agreement could not be regarded as a new lease agreement as it was not between the same parties and it was not agreed between the parties that such

⁵ See fn 1 *supra*

agreement would come into operation between different parties at a time when the Busicor lease agreement was operative.

[25] It appears to me that the proposed amendment does raise a triable issue, both on the facts and on the law. Whether the probabilities are against such version is a matter for the trial court. It has not been shown that the amendment is not *bona fide*. The prejudice suffered by the plaintiff at this stage can be cured by a costs order. The court needs also to take cognisance of the fact that the defendant failed to deal with the background to the January lease agreement by referring to the Busicor lease agreement. The court cannot decide at this stage, but the prejudice to the defendant may well be self-created.

[26] In regard to costs, it does not appear that the plaintiff's opposition was unreasonable. The defendants seek an indulgence and should pay the costs thereof.

In the result the following order is made:

1. The defendants are granted leave to amend their plea in terms of paragraphs 1 to 11 of the Applicants' notice in terms of Rule 28 dated 15 October 2012;
2. The defendants are to pay the costs of the amendment, jointly and severally.



SE WEINER

JUDGE OF THE HIGH COURT

Counsel for the Plaintiff:

Adv. H. Louw

Applicant's Attorneys:

Matthew Kerr-Phillips

Counsel for the Defendant:

Adv. G. Young

Defendant's Attorneys:

Marcou Gluch Attorneys

Date of Hearing:

13 February 2013

Date of Judgment:

25 February 2013