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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case number: 10433/2019

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

.....
DATE

.....
SIGNATURE

In the matter between:

PETERSEN, ISAK SMOLLY (ID NO: [...]) N.O
In his capacity as trustee of MERGENCE AFRICA
PROPERTY INVESTMENT TRUST (IT NO. 11263/2006)

First Plaintiff/ Applicant

ASMAL, RIDWAAN (ID NO: [...]) N.O
In his capacity as trustee of MERGENCE AFRICA
PROPERTY INVESTMENT TRUST (IT NO. 11263/2006)

Second Plaintiff/ Applicant

AZIZOLLAHOFF, BRIAN HILTON (ID NO: [...])
In his capacity as trustee of MERGENCE AFRICA
PROPERTY INVESTMENT TRUST (IT NO. 11263/2006)

Third Plaintiff/ Applicant

JUNKOON, JUJDEESHIN (ID NO: [...])4
In his capacity as trustee of MERGENCE AFRICA
PROPERTY INVESTMENT TRUST (IT NO. 11263/2006)

Fourth Plaintiff/ Applicant

and

XOULIOS TAKE AWAYS CC
(REG NO. 2011/042210/23)

First Defendant/Respondent

MARIA EFSTATHIOU CHARALAMBOUS
(ID NO: [...])

Second Defendant/Respondent

JUDGMENT

GOODMAN, AJ:

Introduction

1. This is an opposed application for summary judgment. The plaintiffs seek an order for payment of an amount of R113 806.59, plus interest calculated at the prevailing prime rate plus 2% per annum, compounded monthly, against the first defendant, the principal debtor, and the second defendant, its surety. That debt arises from outstanding rental and rates owing by the first defendant in respect of its occupation of certain property under a lease agreement concluded with the plaintiffs.
2. The plaintiffs initially also sought an order for the ejectment of the first defendant from the property. They did not persist with that relief because the first defendant has now moved out. However, they stand by a claim for damages arising from the early termination of the lease agreement between the plaintiffs and the first defendant. Because those damages are not for a liquidated amount, the plaintiffs ask that the defendants be granted leave to defend that claim. This application is consequently confined to the outstanding rental and rates ("the arrears claim").

The pleaded basis for the arrears claim

3. In laying the basis for the principal debt, the particulars of claim pertinently plead that:
 - 3.1. The plaintiffs and the first defendant, represented by the second defendant, entered into a five-year written lease agreement in respect of the property on or about 14 March 2017. A copy of the lease agreement (albeit missing one page) is attached.
 - 3.2. In terms of the lease, the first defendant was obliged to pay, monthly and in advance:
 - 3.2.1. basic monthly rental of R22 311,34 (excluding VAT) for the period from 1 October 2018 to 30 September 2019;

- 3.2.2. a contribution toward rates, taxes, electricity and water consumption charges, and pro rata sanitation and refuse removal charges; and
- 3.2.3. other associated charges.
- 3.3. If the first defendant failed to make payment of any amount payable under the lease, the Trust would be entitled to recover interest at a the prime overdraft rate per annum, plus 2% per annum compounded monthly in arrears, until payment was made in full.
- 3.4. In breach of the requirements of the the lease, the first defendant failed to pay the monthly rental, rates and associated charges from December 2018 up to and including March 2019, and was consequently indebted to the plaintiffs in an amount of R113 806,59. A reconciliation of that amount is attached to the particulars of claim.
- 4. The particulars of claim also aver that, in August 2016, the second defendant signed a deed of suretyship, in terms of which she bound herself jointly and severally as surety and co-principal debtor for the first defendant's debts to the plaintiffs. A copy of the deed of suretyship is annexed to the particulars of claim.
- 5. The affidavit in support of the claim for summary judgment is signed and deposed to by Ms Vanessa Jones. She states that she has positive knowledge of the facts giving rise to the plaintiffs' cause of action and verifies the arrears claim.

The defendants' defences

- 6. The first and second defendants together oppose the grant of summary judgment on three grounds.
 - 6.1. First, they allege that the wrong defendant has been cited and the plaintiffs' claim is consequently not competent.
 - 6.2. Second, they claim that the requirements of Rule 32(2) are not met because Ms Jones has not shown she has sufficient personal knowledge to verify the plaintiffs' cause of action. That, they say, is because she has failed to attach a resolution authorising her to act as the plaintiffs' managing agent.
 - 6.3. Third, they complain that the basis on which rates are charged is not disclosed in the lease agreement attached to the particulars of claim, and that the

defendants are consequently unable to check, and potentially dispute, the rates charged to them and the amount owing under the lease agreement.

7. If I find that any of these grounds disclose a *bona fide* defence to the arrears claim, then both the first and second defendant are entitled to leave to defend that claim.
8. If I reject those defences, the second defendant raises additional defences in respect of the suretyship agreement. She claims that the suretyship is incomplete and falls short of the statutory requirements, that her initials have been forged on four of its six pages and that, in any event, she signed it in error and without intending to bind herself as the first defendant's surety. On each of these grounds, she claims that the suretyship is invalid and that she is entitled to leave to defend the arrears claim, even if summary judgment is granted against the first defendant.
9. I consider each of the defences raised, in turn.

The citation of the first defendant

10. The defendant cited in these proceedings is Xoulios Take Aways CC. The lease agreement was signed by Imbabala Investments 20 CC. The defendants point to the difference in names to claim that Xoulios Take Aways has been misjoined, and that the arrears claim is advanced against the wrong party.
11. But despite the different nomenclature, Xoulios Take Aways and Imbabala Investments 20 are clearly the same entity. They are registered under the same registration number 2011/042210/23, and the CIPC registration documents attached to the particulars of claim show that Imbabala Investments 20 CC underwent a name change in 2012 and is currently called Xoulios Take Aways CC.
12. The misjoinder point consequently does not raise a *bona fide* defence.

The verification of the arrears claim

13. The attack on Ms Jones' state of knowledge is similarly misplaced. Ms Jones explains, in her affidavit, the basis on which she has personal knowledge of the claim. She expressly avers that:
 - 13.1. Dipula Income Fund Ltd is the plaintiffs' authorised managing agent;
 - 13.2. she is a portfolio manager of Dipula Income Fund Ltd;

- 13.3. she oversees the plaintiffs' day-to-day operations and its relationship with its customers, including with the defendants; and
- 13.4. as such, she has personal knowledge of the facts at issue and can – and does – verify the cause of action on which the claim for summary judgment is based.
14. There is no reason to doubt or go behind Ms Jones's evidence in that regard, nor to require her to put up the resolution authorising Dipula's to provide managing services to the plaintiffs.
15. I accordingly find that Ms Jones' affidavit meets the requirements of Rule 32(2).

The arrears amount

16. The defendants do not dispute that the first defendant is in arrears to the plaintiffs. On the contrary, the second defendant states, in the affidavit resisting summary judgment, that:

"On or about December 2018, Imbabala Investments was unable to meet its financial obligations and therefore failed to pay the full rental amount owed by it to the Plaintiffs. This was due to a decline of business in the area and the general economic downturn in the country. Imbabala Investments, in an attempt to avoid merely defaulting in terms of its obligations as contained in the Agreement of Lease sought to negotiate with the Plaintiffs on an amicable way forward, in light of the reduction in its business. No agreement could be reached and the Plaintiffs therefore initiated these proceedings."

[emphasis added]

17. The defendants accordingly admit that the first defendant is indebted to the plaintiffs. They dispute only the extent of such debt.
18. In setting out the basis for such dispute, the second defendant says the following:

"37. The Plaintiffs claim the amount of R113 806.59, which comprises charges for rental and a pro rata contribution to water, electricity, refuse and sewerage (sanitation).

. . .

39. In the lease reference is made to clause 25 of Annexure A to the lease and to item 10 of the Schedule. A copy of clause 25 of Annexure A . . . provides no indication of how the pro rata

amount Municipal charges and utilities (charges payable by the tenant) is to be calculated.

40. *Item 10 of the rental schedule does not appear in the copy of the Agreement of Lease Annexed to the Plaintiffs' Particulars of Claim as Annexure "C". This is owing to the fact that the rental schedule commences on page 3 of 8, page 6 of the said schedule (whereupon item 10 thereof ought to appear) is missing. Accordingly, the annexures to the Plaintiffs' Particulars of Claim is incomplete in that page 6 of the rental schedule is in fact missing.*
41. *I reiterate that I do not have a full and complete copy of the duly signed Agreement of Lease and neither does Imbabala Investments. This is because the signed Agreement of Lease was returned to the Plaintiffs and no copy was provided to us.*
42. *In light of this it is impossible for me or for Imbabala Investments calculate the exact amount that the Plaintiffs are claiming against us or, more importantly, to verify whether this amount is in fact the true and correct amount that is owing and payable by the First Defendant to the Plaintiffs."*

[emphasis added]

19. The defendants' counsel, Mr Ben-Zeev, argued that these statements raised two separate grounds resisting the grant of summary judgment. First, the arrears claimed could not be ascertained on the pleadings before the Court. He therefore argued that the pleadings were excipiable and that the debt claimed was not for a liquidated amount. Second and in any event, the defendants had disputed the arrears claim on the basis that they were unable to ascertain and check the extent of the municipal service charges levied against them.

Have the plaintiffs competently claimed a liquidated amount?

20. It is common cause that page 6 of the schedule to the lease agreement has not been attached the particulars of claim, and that item 10 of the rental schedule appeared on that page. The pleadings do not disclose how the municipal services were to be pro rated and charged to the first defendant.
21. However, that does not, in my view, render the particulars of claim excipiable. As set out above, the plaintiffs have pleaded that:

- the first defendant was obliged, under the lease agreement, to pay “a contribution toward rates, taxes, electricity and water consumption charges, and pro rata sanitation and refuse removal charges”;
 - In breach of that obligation, the first defendant failed to pay the contributions for which it was liable under the lease agreement;
 - The extent of the first defendant's arrears is set out in a schedule to the particulars; and
 - The plaintiffs seek an order compelling it to pay such outstanding amounts.
22. I am satisfied that the plaintiffs have pleaded all the necessary elements to sustain their cause of action. The arrears claim is competent and is not, in my view, excipiable.
23. The question is then whether, in the absence of item 10 of the rental schedule being attached to the particulars of claim, the plaintiffs are entitled to summary judgment for their arrears.
24. Rule 32(1)(b) permits a plaintiff to apply for summary judgment in respect of “a liquidated amount in money”. A claim is for a liquidated amount where “*the amount . . . has been fixed by agreement or by judgment of the court . . . [or] if the amount is a mere matter of calculation*”. In the last-mentioned case, however, the data upon which the calculation is to be based would themselves have to be amounts about which there is no room for uncertainty, estimation or *debate*.¹ An amount is thus liquidated if it is readily ascertainable by simple calculation.
25. Mr Ben-Zeev accepted as much but submitted that the liquidated amount had to be ascertainable by calculation by the Court, and not merely as between the parties. He argued that the absence of the missing page from the lease agreement rendered the arrears claim unliquidated. However, that approach has not been accepted by in the authorities.² Rather, this Court has confirmed that “*when an amount is due upon a*

¹ Oos-Randse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk en Andere (2) 1978 (1) SA 164 (W) at 168H-169C (emphasis added), quoted with approval in Standard Bank of South Africa v Renico Construction (Pty) Ltd 2015 (2) SA 89 (GJ) para 15. See also Bannister's Print (Pty) Ltd v D&A Calendars CC and Another 2018 (6) SA 77 (GJ) para 14.

² See S Dreyer and Sons Transport v General Transport Services 1976 (4) SA 922 (C) at 923A-D

contract and the exact amount due is simply a matter for calculation from figures in books, the claim is liquidated".³ An amount can thus be liquidated even if it has to be calculated from evidence extrinsic to the pleadings.

26. In this case, I am satisfied that the contribution to municipal services owing by the first defendant under the lease agreement is easily calculated under the agreement and constitutes a liquidated amount. This objection by the defendants must therefore fail.

Have the defendants disclosed a *bona fide* defence on the amount of the arrears claim?

27. That raises the question whether the defendants have disclosed a *bona fide* defence to the amount claimed for the municipal services portion of the arrears claim. To do so, they were required to disclose the nature and grounds of their defence, as well as the material facts relied upon for them. The defence must be "*clear and supported by such detail as an honest despondent might reasonably have been expected to put forward even in a concise reply to a summary judgment application*", to avoid the impression that "*the defendant has, or may have, dishonestly sought to avoid the dangers inherent in the presentation of a fuller or clearer version of the defence which he claims to have*".⁴
28. In this case, the second defendant sets out the defendants' defence on the municipal services portion of the claim very sparsely. She implies that she and the first defendant were unable to calculate the municipal services contributions owing under the lease because they did not have a full copy of the lease agreement. But she does not positively state that she and the first defendant were unaware of how the municipal service fees would be pro rated and charged, or that they were unable to ascertain that on the documents available to them.
29. Indeed, a careful reading of the second defendant's affidavit suggests the contrary. Paragraph 41 of second defendant's affidavit (quoted above) does not identify what portions of the lease agreement were missing from the defendants' copy. Instead, it merely "*reiterates*" what is said earlier in the affidavit. The deficiencies in the defendants' copy of lease agreement are set out in paragraphs 33 and 34 of the affidavit, which state:

"During the course of these negotiations [between the plaintiffs and the first defendant], and on various occasions during February 2019, a full

³ *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T) at 739A (emphasis added), quoted with approval in *Standard Bank* (supra) para 16.

⁴ *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228G-229A.

copy of the signed lease was requested, as the one that had been signed had been returned to the Plaintiffs. The copy purportedly sent by the Plaintiffs was incomplete in that pages 1 to 4 of the suretyship agreement were missing. Only pages 5 and 6 were provided.

On 26 February 2019 we therefore again requested copies of pages 1 to 4 of the alleged suretyship agreement. This was only provided to us on 1 March 2019.”

[emphasis added]

30. Properly understood, then, the defendants’ copy of the lease was only missing pages 1 to 4 of the suretyship agreement, but was otherwise complete. Congruent with that, an email sent to Ms Jones on 27 February 2019 on behalf of the defendants (and attached to the affidavit resisting summary judgment) records that the defendants have:

“Pages 1-8 (preamble to the lease agreement)

Page 1-33 (terms and conditions)

Annexure C – Page 5 & 6 (PAGES 1-4 MISSING)

... ”

31. There is nothing before me to suggest that the defendants were missing page 6 of the schedule to the lease agreement, or that they were ignorant of how municipal charges were to be calculated or charged under item 10 of the schedule. Yet, despite that, they have failed to take issue with the amounts or extent of services charged to them or, indeed, any line item of the reconciliation attached to the particulars of claim.
32. In those circumstances, I find that the defendants have failed to put up sufficient facts and grounds to disclose a *bona fide* defence in respect of the municipal services amount that it owes.
33. The grounds of defence raised jointly by the first and second defendants must therefore fail. That leaves only the second defendant’s opposition to the suretyship claim.

The suretyship claim

34. As outlined above, the second defendant takes issue with the validity and enforceability of the deed of suretyship sought to be enforced against her. Among others, she claims that she had no intention to bind herself as surety and co-principal

debtor to the first defendant and was ignorant of the terms of the suretyship. She alleges that she was unaware that she entering into a deed of suretyship because:

- the bundle of lease documents that she signed included only two of the six pages of the suretyship;
- The suretyship agreement was an unusual agreement in the context of the lease and ought accordingly to have been drawn to her attention, but was not; and
- none of the information or documentation that would ordinarily be required for the conclusion of a suretyship was requested from her.

35. The plaintiffs' counsel, Mr Dobie, submitted that the second defendant's affidavit did not adequately disclose a defence of *justus error* because:

35.1. A party cannot escape liability for a contract solely on the ground that it was unaware of its contents. Where the parties ought to have been aware that they were signing a deed of suretyship, their mistake will not be reasonable and they cannot avoid its terms.

35.2. In this instance, the page of the suretyship agreement that the second defendant admits to signing records that "*the signatures on this page rate in connection with the terms and conditions of the suretyship provided by the undersigned as contained in pages 1-to-5 of this document*". The second defendant must or ought therefore to have been aware that she was binding herself to a suretyship and ought to have apprised herself of its terms.

36. Despite Mr Dobie's submission, I am satisfied that the second defendant has put up a *bona fide* defence to the suretyship claim. If she proves the averments set out above at trial, a court may find that her error was reasonable and that the suretyship was not validly concluded. In determining that question, it will have regard to the full context and background to the conclusion of the lease and suretyship agreement.

37. I am also mindful that a court should exercise its discretion in favour of granting leave to defend where there is a reasonable possibility that an injustice may be done by the grant of summary judgment.⁵ In this case, the lack of certainty around whether the second defendant was provided with, and signed, a complete copy of the suretyship or not would, in my view, render it inappropriate to grant summary judgment against her.

⁵ *Breitenbach* (supra) at 229D-F.

Costs

38. The plaintiffs have successfully established a case for summary judgment against the first defendant and are entitled to costs against it.

Conclusion

39. In the circumstances, I grant the following order:

1. In respect of claim 1:

1.1. Summary judgment is granted against the first defendant for:

1.1.1. Payment of the amount of R113 806.59;

1.1.2. Interest on the above amount, at the prevailing prime rate, as from time to time plus 2% per annum compounded monthly in arrears, *a tempora morae* from the date of service of summons to the date of final payment;

1.2. The second defendant is granted leave to defend;

2. In respect of claim 2, the first and second defendants are granted leave to defend;

3. The first defendant is ordered to pay the plaintiffs' costs of the summary judgment application.

I GOODMAN, AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Appearances

Counsel for the Applicants : Adv. JG Dobie

Instructing Attorneys : Roosebloom Attorneys

Counsel for the Respondents : Adv. O Ben-Zeev

Instructing Attorneys : Rina Caldiera Attorneys

Date of hearing : 6 June 2019

Date of judgment : June 2019