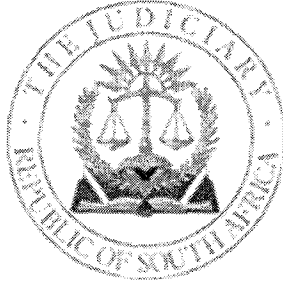


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2020/28832

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

[15 FEBRUARY 2022]

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SIGNATURE

In the matter between:

FREESTONE PROPERTY INVESTMENTS (PTY) LTD

PLAINTIFF

And

JDI RESEARCH (PTY) LTD

FIRST DEFENDANT

DIANE BYERLEY

SECOND DEFENDANT

J U D G M E N T

MUDAU, J:

- [1] This is an opposed application for summary judgment in terms of rule 32 of the Uniform Rules of Court. On 12 April 2018 the first defendant (JDI Research (Pty) Ltd (JDI)) as tenant duly represented by the second defendant (its director), concluded an agreement of lease with the plaintiff (Freestone

Property Investments (Pty) Ltd) for the hire of office premises at the Colony Shopping Centre, in Craighall Park. The commencement date of the lease was 1 April 2018 and its duration was until 31 March 2021. The second defendant (Mrs Byerley) signed in her personal capacity a deed of suretyship. The second defendant bound herself jointly and severally as surety and co-principal debtor with the first defendant in favour of the plaintiff for the due and punctual performance of the first defendant's obligations. The deed of surety was co-signed by her husband.

- [2] The plaintiff claims in its summons that JDI, in breach of its obligations under the lease, failed to make payment of rental, VAT, and electricity, sewerage, water and refuse removal charges for the relevant period, claim 1 being the arrear amount in the total sum of amount of R758,381.53 as well as ejectment of the first defendant. It claimed, in addition, interest on moneys due but unpaid at 12% per annum in accordance with the terms of the lease.
- [3] The defendants entered appearance to defend. The defendants filed a plea in terms of which the second defendant raised a "special plea" of *iustus error* in relation to her signature on the deed of suretyship document. The second defendant contends that she was taken advantage of and never intended or knew that she signed a suretyship. the defendants raised the nationwide lockdown which announced by the Presidency, pursuant to the provisions contained in the Disaster Management Act No 57 of 2002 (the Act) and the Regulations published in terms of the Act the Covid-19 regulations as a defence of vis major in the plea.

[4] Rule 32 provides:

“(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only—

- (a) on a liquid document;
- (b) for a liquidated amount in money;
- (c) for delivery of specified movable property; or
- (d) for ejectment;

together with any claim for interest and costs.”

[5] In *Raumix Aggregates (Pty) Ltd v Richter Sand CC, and Similar Matters*¹ the full court of this division aptly stated:

“The purpose of a summary judgment application is to allow the court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine triable issue, thereby conserving scarce judicial resources and improving access to justice. Once an application for summary judgment is brought, the applicant obtains a substantive right for that application to be heard, and, bearing in mind the purpose of summary judgment, that hearing should be as soon as possible. That right is protected under section 34 of the Constitution.”

[6] In terms of subrule 32(3) the defendant may (a) satisfy the court by affidavit or, with the leave of the court, by oral evidence that he has a bona fide defence to the action; or (b) give security to the plaintiff to the satisfaction of the court for any judgment, including costs, which may be given. The provisions of the rule are peremptory and accordingly, the defendant must disclose fully the ‘nature’ and the ‘grounds’ of his defence and the ‘material

¹ 2020 (1) SA 623 (GJ) at 627 para 16

facts relied upon therefor². The Defendant must also set out its defence in such a manner that it can be seen to be bona fide held³.

[7] In the affidavit resisting summary judgment deposed to by the second defendant's husband, first, *iustus* error is raised as a defence in that the second defendant was not there when the agreement with annexures of which the suretyship agreement forms part was executed. Second, *vis major* brought about by Covid-19 lockdown regulations. As for the rest the affidavit instead of setting out the facts based upon the defence is based, is drafted as heads of argument setting out legal arguments. There is accordingly no dispute in relation to the outstanding amounts.

[8] In this matter, it is clear from the dates on the relevant agreement that the defendants had sufficient time in concluding the agreement as they signed on 5 April 2018 whereas the plaintiff signed on 12 April 2018. It follows, accordingly, that the second defendant on her own version was granted sufficient time to read through all the documentation. The deponent of the plaintiff's founding affidavit states that, the second defendant in her own handwriting entered her name as the surety on the schedule to the lease agreement and that the second defendant herself arranged for her spouse to sign the suretyship, which is not disputed.

[9] Significantly, the suretyship is clearly marked deed of suretyship in bold letters and initialled next to such heading. The affidavit resisting summary judgment

² *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) at 73B–C.

³ *Breytenbach v Fiat (Edms) Beperk* 1976 (2) SA 226 (T).

is conspicuous by absence of an explanation why she alleges that it was signed in error. It is significant that it is not alleged by the 2nd defendant that the relevant document, nor even the part thereof which contains the suretyship obligation, was not read by her. Accordingly, I conclude that it must be accepted that the 2nd defendant did read the document. Where the parties should have realised that they were signing a deed of suretyship, they cannot avoid it on the basis of *iustus error*⁴. Generally stated, a party signing a contract unaware of its content, cannot escape liability on that ground alone. This does not amount to *iustus error*⁵. It is also significant that there is no allegation by the 2nd defendant that she would not have signed the form if she realised that it contained a personal suretyship provision.

[10] There is no explanation as to why the second defendant filled in her name on the covering page of the lease agreement, which makes it clear that there was a suretyship or why her husband signed the deed of suretyship. There are no facts set out to point out that the plaintiff made any misrepresentation, on the contrary it is the second defendant who represented that she was bound as surety. Under these circumstances the plaintiff is clearly entitled to rely upon this representation. Accordingly, there is no basis upon which the second defendant can allege that she was unaware of such suretyship.

[11] As to the defence of *vis major*, according to the plaintiff, the first defendant was already in arrears prior to the lockdown commencing on 27 March 2020 and failed to make any payment subsequently despite having occupied the

⁴ *Royal Canine South Africa (Pty) Limited v Cooper and Another* 2008 (6) SA 644 (SE).

⁵ See *Hartley v Pyramid Freight (Pty) Limited t/a Sun Couriers* 2007 (2) SA 599 (SCA).

premises after the initial lockdown ended at the end of May 2020. There is no attempt by the defendants to address this aspect at all but absolute silence. Vis major is something which is exceptional, extraordinary, unforeseen and relates to an inevitable accident⁶.

[12] For a claim of vis major to be valid, it must have a direct impact on the actual possibility of performance⁷. The mere difficulty in making performance does not prevent a valid contract from arising⁸. Accordingly, the defence raised cannot under the circumstances validly be to the aid of the defendants.

[13] The surety is the sole director and sole shareholder of the debtor. The debtor is but a shell and it is to the creditworthiness of the surety that the creditor looks. In practical terms, the creditor nominally contracts with the debtor but regards the surety as being the real debtor. The surety in turn willingly sign as such because she is the person who will benefit from the lease with the debtor coupled with absolute control over the actions of the debtor. I am of the view that the defendants must comply with the provisions of Rule 32(3)(b) of the Uniform Rules of Court, which require that the defendant satisfies the Court by affidavit or oral evidence that he has a bona fide defence to the action; and such evidence 'shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor'. It is clear from the affidavit resisting summary judgment that the second defendant is advancing a defence simply to delay the obtaining of a judgment to which the defendants well know that the plaintiff is justly entitled.

⁶ See *Roy v Basson* NO 2007(5) SA 84(C).

⁷ *Van Zyl v Van Biljon* 1987 (2) SA 372 (O).

⁸ *Hersman v Shapiro and Co* 1926(TPD) 367 at 375-377.

[14] I also hold that there is no factual basis laid for the speculation which I am invited to make and that there are no facts placed before the Court by the defendants which justify the conclusion that there is a *bona fide* defence based on explanations given regard being had to the facts relevant to this matter. The defendants have dismally failed to set out facts in the affidavit resisting summary judgment the relevant facts and circumstances to enable the Court to judge further that such defence is indeed bona fide and prima facie arguable. The consequence is that the defendants have no defence to the plaintiff's claim. It follows that the applicant is entitled to the relief which it seeks. I accordingly grant summary judgment for the plaintiff in the terms claimed in paras 1, 2, 3 and 4 of the notice of application for summary judgment in relation to claim 1. The suretyship agreement provides for attorney and client costs.

Order

[15] Summary judgment is granted against the defendants jointly and severally, the one paying the other to be absolved for:

[15.1] Payment of the sum of R758,381.53.

[15.2] Interest thereon at the rate of 12% per annum from September 2020 to date of payment.

[15.3] Costs of the suit on a scale as between attorney and client.


T P MUDAU

[Judge of the High Court]

Date of Hearing: 27 January 2022

Date of Judgment: 15 February 2022

APPEARANCES

For the Plaintiff: Adv. J G Dobie

Instructed by: Reaan Swanepoel Attorneys

For the 2nd Defendant only: In person