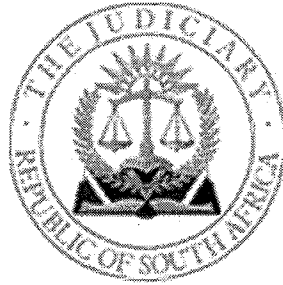


REPUBLIC OF SOUTH AFRICA



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

Case No: 37366/2018

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

13 Dec. 2018
DATE

CHJ Badenhorst
CHJ BADENHORST AJ

In the matter between:

CENTENARY PLANT HIRE CC

Applicant

and

DOUGLAS ROBERT ACHESON

Respondent

J U D G M E N T

BADENHORST AJ:

[1] The applicant makes application for summary judgment against respondent, who stood surety for the obligations of CAYENNE SPORT CC arising from a written agreement of lease. The amount claimed is R1 900 101.71 which is calculated in a detailed schedule attached to the applicant's particulars of claim.

[2] The applicant relies on two suretyships signed by the respondent. The first dated 31 October 2014 ("the first suretyship") is a suretyship in terms of which respondent and the second defendant, Mr Langton, both signed as sureties. The second, dated 16 March 2016 ("the second suretyship") was signed by respondent alone.

[3] The principle which applies in proceedings of the present kind is expressed as follows in *First National Bank of SA Ltd v Myburgh* 2002 (4) SA 176 (C):

*"[9] Because of the drastic nature of the relief sought, the Court has, in terms of Rule 32(5), a discretion to grant the defendant leave to defend the action even where he has failed to comply with Rule 32(3)(b). **The Court will grant summary judgment where plaintiff has an unanswerable case. If the Court has the slightest doubt, the Court will not grant summary judgment.** (Fourlamel (Pty) Ltd v Maddison 1977 (1) SA 333 (A) at 347H; Gilinski v Superb Launderers And Dry Cleaners (Pty) Ltd 1978 (3) SA 807 (C) at 811E - H.)"* [emphasis added]

[4] Counsel for the respondent argued several technical defences. The first set of defences appear from a Notice of Exception dated 7 December 2018 ("the exception") and the second set are raised in the opposing affidavit. All the exception defences are repeated in the affidavit. A number of the exception points were conceded by counsel for respondent on his feet, namely grounds three and four.

The exception defences

Alleged failure to account for the deposit

[5] The lease provides for payment of a deposit by the tenant of R 175 595.00 (see clause 7 read with the schedule of particulars, paragraph 12 at page 21 of the papers).

[6] The respondent's first ground of exception reads as follows:

"the plaintiff has failed to account for the defendant's bank deposit/guarantee in the amount of R175 595.00 pursuant to clause 7 of the said lease agreement, headed 'Deposit of Bank Guarantee', read with paragraph 7 of plaintiffs

particulars of claim and the payment reconciliation attached as annexure "C" which does not reflect the aforesaid deposit".

[7] Clause 7 of the lease provides for a deposit to be paid, not by the respondent (defendant/surety) but by the tenant. This fact is obviously fatal to the proposed exception point.

[8] Moreover and in any event, annexure C to the claim reflects the financial information for the period 1 October 2017 to 31 December 2018. The deposit was required to be paid long before this period, so it will of course not be reflected in annexure C.

[9] I reject this defence as devoid of merit.

No certificate

[10] This ground of exception is duplicated in the respondent's second and fifth grounds of exception.

[11] The point made by respondent is that in terms of clause 23 of the lease, "*a certificate ... shall be prima facie proof of the amount of any indebtedness owing by the tenant to the landlord at any time ...*" and that the applicant's failure to annex a certificate renders its claim excipiable.

[12] A certificate is manifestly optional. There is no obligation on the applicant (landlord) to make use of a certificate to prove the amount owing.

[13] I accordingly reject this defence.

Two suretyships

[14] As noted above, the respondent first signed a suretyship together with Mr Langton. Clause 3 thereof provides as follows:

"the liability of the sureties in terms of this suretyship shall be joint as well as several".

[15] The second suretyship was signed at a later date by the respondent alone.

[16] Counsel for respondent takes the following point in paragraphs 17.3 and 17.4 of the Notice of Exception:

“17.3 By having only one party sign the second suretyship the joint and several liability was equally compromised. The first and second defendants are seemingly not bound by the second suretyship which the plaintiff relies upon.

17.4 The first defendant has been prejudiced by the plaintiff's failure to set out the alleged claim against the principal debtors and accordingly is not in a position to plead to the plaintiffs particulars of claim which is based entirely upon suretyships giving rise to an alleged ancillary indebtedness.”

[17] I have to confess that counsel's complaints are difficult to comprehend – the objection in paragraph 17.3 appears to make something of the fact that respondent signed the second suretyship alone. But no defence arises from that fact. The legal position remained the same throughout, considering that already in terms of the first suretyship, respondent's liability is joint and several.

[18] In the second paragraph it is stated that plaintiff failed to set out the alleged claim against the “principal debtors”. But this is an incorrect allegation – in paragraph 7 of the particulars of claim, it is stated that CAYENNE (the tenant), the “principal debtor” (singular), breached the lease agreement by failing as agreed to pay the monthly rental and charges resulting in arrears of R1 900 101.71 as set out in annexure “C”.

[19] The seventh ground of exception introduces matter which is extraneous to the particulars of claim, namely an email dated 5 February 2018 which is alleged, in the exception, to establish “a tacit acceptance of a reduction in respect of the

monthly rental obligations of Cayenne for the remainder of the year 2018, as contemplated by the parties”.

[20] The fundamental problem with this line of reasoning is of course the trite principle that an exception cannot be founded upon facts which do not appear in the particulars of claim.

[21] During argument the email relied upon by the respondent was handed up by consent – it is from applicant to the respondent and reads as follows:

*“Hi Doug,
You need to do this as a matter of urgency as the account is getting to the stage where drastic action needs to be taken. We have not even received the R150 000 payment you proposed to pay. At least make this payment in the interim as we finalise a solution going forward. As we currently stand the amount payable is approximately R624 000.00.”*

[22] The email, manifestly, does not support the allegation made in respondent’s Notice of a so-called “*tacit acceptance of a reduction*” of the tenant’s monthly rental obligations.

The defences raised in the affidavit (in addition to the Notice of Exception)

The attack on the capacity of the deponent to the affidavit filed in support of summary Judgment and the alleged inadequate wording thereof

[23] Respondent’s first contention is that Ms Jacobs, who deposed to the affidavit, “is clearly not in a position to swear positively to the facts” (par 6.5).

[24] Ms Jacobs describes her position to be that of Property Manager employed by Broll Property Group, the plaintiff’s duly authorized managing agent..” and she says that she is “...*able to and do swear positively to and verify both the facts, causes of action as well as amounts set out in plaintiff’s particulars of claim ...and confirm all such to be true and correct*”.

[25] Nowhere in respondent's affidavit does he respond to these allegations on any meaningful, factual, basis. There is accordingly no basis on which this Court can reject what Ms Jacobs says and the defence must fail.

[26] A related point made by respondent is that "*Jacobs does not verify either the plaintiff's cause of action or the amount*". But, as appears from the words cited in paragraph [24] above, there is no substance in respondent's incorrect statement.

Not a liquidated amount of money

[27] Confusingly, respondent raises this point twice and under separate headings.

[28] The amount claimed is plainly a liquidated amount of money. Respondent's contentions to the contrary are devoid of merit.

The dispute resolution clauses allegedly not adhered to

[29] Respondent cites clause 33 of the lease (not the suretyship) which prescribes an extra curial dispute resolution process involving a referee.

[30] Remarkably, it is contended that applicant "*followed the incorrect procedure in seeking redress*" in the present proceedings.

[31] The applicant is, of course, pursuing the respondent in terms of the suretyships, not the lease. There is no prescribed dispute resolution process in the suretyships. The dispute resolution clause in the lease is entirely irrelevant. This defence must also fail.

The 15 kilometers rule

[32] It is alleged in paragraph 64 of the opposing affidavit that the applicant's attorney has failed to comply with Rule 17 (3) which provides as follows:

"(3) (a) Every summons shall be signed by the attorney acting for the plaintiff and shall bear an attorney's physical address, within 15 kilometres of the office of the registrar, the attorney's postal address and, where available, the attorney's facsimile address and electronic mail address."

[33] This point was not pursued by counsel for the respondent in argument before me and I assume that it has, wisely, been abandoned.

[34] Even if it is correct that applicant's attorney's offices (in Fairland, Johannesburg) are a little more than the required distance away from the seat of the Court, there being no suggestion of any prejudice suffered by the respondent, I would have regarded this as so unimportant in the circumstances of this matter that I would have condoned the non-compliance.

CONCLUSION

[35] In conclusion, I am satisfied that the applicant has an unanswerable case and I accordingly grant summary Judgment as follows:

- (a) Payment of the amount of R1,900,101.71;
- (b) Interest on the above at the rate of 12% per annum from 2 October 2018 to date of payment;
- (c) Costs of suit on the scale of attorney and client (as provided for in terms of the lease).



CHJ BADENHORST AJ
Acting Judge of the High Court of South Africa,
Gauteng Local Division

APPEARANCES

<i>For the applicant:</i>	<i>Mr J.G. Dobie</i>
<i>Instructed by:</i>	<i>REAAN SWANEPOEL ATTORNEYS</i>
<i>For the respondent:</i>	<i>Mr A. ALLISON</i>
<i>Instructed by:</i>	<i>ROTHBART INC ATTORNEYS</i>
<i>Date of hearing:</i>	<i>11 December 2018</i>
<i>Date of judgment:</i>	<i>13 December 2018</i>