

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

24/3/2017

Case No: A606/2016

In the matter between:

EME INVESTMENTS (PTY) LTD

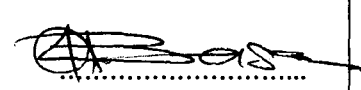
First Appellant
Second Appellant

EBEN VAN DER BERG

and

BIPROPS 46 (PTY) LTD

Respondent

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
24/3/2017	
DATE	SIGNATURE

JUDGMENT

ELLIS, AJ:

(1) This is an appeal from the grant of summary judgment in a magistrate's court. Appellants applied for and were granted condonation for the late filing of their appeal, which application was not opposed by respondent.

(2) The respondent (plaintiff in the action) sued the appellants (defendants in the action) for arrear rental in the amount of R159 600.00, due to first appellant's repudiation of a five (5) year lease agreement prior to the termination date thereof, i.e. 30 June 2019. It is common cause that first appellant vacated the leased property at the end of November 2015. Second appellant was cited in the action as surety and co-principal debtor with first appellant, on account of a deed of surety executed in favour of respondent.

(3) In their opposing affidavit to the summary judgment application, appellants raised two defences. The first defence attempts to indicate that the respondent's summons does not disclose a cause of action, in that the written lease agreement does not afford respondent the remedy to keep the agreement in force and to claim for "specific performance". The second defence alleges that the respondent's claim against the second appellant is subject to the provisions of section 14 of the Consumer Protection Act 68 of 2008 ("CPA"). Both defences in no way purport to advance any defence on the merits of the respondent's claim, i.e. the liability of appellants to pay the arrear rental.

(4) During the hearing in the court *a quo*, counsel for appellants, after having heard respondent's argument, apparently conceded that the first defence is not a *bona fide* defence on the merits, but only technical in nature. In reply, counsel for respondent graciously accepted this apparent concession. The aforesaid is depicted in the record of proceedings in the court *a quo*.

(5) However and before us, counsel for appellants conceded that the second defence raised by appellants in the court *a quo* is without any merit, but proceeded to argue the appeal on the grounds of appeal, specifically relating to the first defence. Respondent objected thereto on the basis of appellants' concession made in the court *a quo*.

(6) In this regard it is necessary to refer to the matter of *Kevin and Lasia Property Investment CC and Another v Roos NO and Others*,¹ where counsel for appellant, during the course of argument in the court *a quo*, made a formal admission, apparently incorrectly, which prompted the court *a quo* to make an adverse finding. On appeal, the issue to be decided was whether appellant was entitled to withdraw the admission. To this end, Mthiyane JA held as follows:

"[12] It seems to me that one must consider the context in which the admission was made. Having regard to that context, the admission did not require a formal withdrawal. In the circumstances in which it was made, the admission amounted to no more than an election not to pursue a particular line of argument on available facts. There is no suggestion that, because of the admission, the liquidators failed to place further facts before the Court - on the contrary, before the admission was made, they had elected not to deliver a replying affidavit. No question of *mala fides* can arise. The admission could therefore be withdrawn on appeal." ²

(7) In support of the aforesaid, Heher J in *Saayman v Road Accident Fund*³ observed the following:

"[28] In the contexts of civil proceedings an admission is a statement against interest which has the effect of binding the party on whose behalf it is made. If that effect is absent this statement cannot amount to an admission and the well-established rules relating to the withdrawal of admissions cannot apply to it. In fact, a withdrawal is strictly unnecessary, and prejudice to the other party is not an issue. An admission,

in its formal sense, also requires at least an intention, explicit or inferred, and unequivocal, to remove a fact that depends on proof from the field of contention.

[29] Concessions are made by counsel in the course of a trial for a variety of reasons without a contemplation that he is thereby committing his client and without any intention to limit the issues. The statement in question may, for example, be used as an assumption on which to found an argument, or be made in a bona fide spirit of fairness, intending to convey to the court counsel's candid view of the way the court should proceed. In the absence of formality the context must necessarily be decisive of whether an admission has been made.⁴ As will be seen, I am of the view that it provides the answer in this case to. Although there was some suggestion that the alleged admissions had been made between counsel before being communicated to the court, there was no evidence in that regard, and the issue can be limited to statements contained in the heads of argument and repeated in oral argument to the court *a quo*.⁵

(8) In view of the fact that neither the court *a quo*, nor this Court formally noted the appellants' so-called concessions as formal admissions, coupled with the fact that a summary judgment is a drastic remedy, it is appropriate under the circumstances to deal with the merits of appellants grounds of appeal.

(9) The first 20 grounds of appeal relate to appellants' first defence, whilst grounds 21 to 26 concern the second defence and ground 27 is raised in respect of costs.

(10) It is trite that a *bona fide* defence must be a defence in law⁶ and the facts set out in the appellants' affidavit must be sufficient to support such a defence. As already referred to above, the appellants' affidavit discloses two defences which are in essence legal arguments proffered against respondent's cause of action.

(11) Accordingly and in order to establish repudiation, the true question is whether the acts or conduct of the party evince an intention no longer to be bound by the contract.⁷ As already indicated above, the first appellant vacated the premises at the end of November 2015. It is therefore clear that appellants no longer wish to be bound to the written lease agreement.

(12) In the case of repudiation, it is trite that an innocent party is not compelled to rescind the contract, but may reject the repudiation and claim specific performance (or damages) from the repudiator.⁸ This is exactly what the respondent avers in its particulars of claim. It decided to uphold the contract and claim for arrear rental that was already due and payable.⁹

(13) Although the respondent's particulars of claim does not specifically pleads the computation of the arrear rental, the appellants neither dispute the contents of Annexure "C" to the particulars of claim (the calculation of respondent's claim), nor the fact that respondent agreed to reduce the monthly rental to R35 000.00 Plus VAT from 1 November 2015, "*until such time that we finalize a new tenant.*"¹⁰

(14) The appellants specifically rely on the provisions of clause 5 of the written lease agreement in order to substantiate their first defence. Clause 5 of the lease agreement is a cancellation clause and does not assist the appellants in this instance. Moreover, the written lease agreement in no manner whatsoever stipulates or indicates that respondent has waived its common law or contractual remedies, not specifically recorded in the lease

agreement. In this regard, the appellants first defence appears to suggest that such an alleged waiver should by implication be read into the lease agreement. Such argument is plainly forced, unsubstantiated and not supported in law. A tacit term cannot be implied into an agreement if it is in conflict with an express term.¹¹ Wherefore there is no merit in any of the grounds of appeal raised by appellants in respect of their first defence, and this defence is consequently not a *bona fide* defence to the respondent's summary judgment application.

(15) As indicated above, the second defence concerns the applicability of section 14 of the Consumer Protection Act 68 of 2008 ("CPA"), on the respondent's claim against the second appellant and the second appellant has bound himself as surety and co-principal debtor.

(16) Accordingly and by bounding himself as co-principal debtor, the second appellant thereby renounced the benefits of excussion and division *vis-à-vis* the respondent and became liable jointly and severally with the first appellant.¹²

(17) However and in view of the fact that the debt of the second appellant remains accessory to the principle debt, it follows that the provisions of the CPA can only find application in the event that the lease agreement falls under this Act.

(18) In its particulars of claim, the respondent specifically averred that the provisions of section 14 of the CPA is not applicable as both Landlord and Tenant are juristic persons and that the matter is not subject to the National Credit Act 34 of 2005 (“NCA”).

(19) Section 1 of the CPA contains no definition of a lease agreement or a deed of surety, similar to the agreements in this instance. The only definition relating to ‘rental’, provides as follows:

“rental” means an agreement for consideration in the ordinary course of business, in terms of which temporary possession of any premises or other property is delivered, at the direction of, or to the consumer, or the right to use any premises or other property is granted, at the direction of, or to the consumer, but does not include a lease within the meaning of the National Credit Act;”

(20) It is common cause that the lease agreement in this instance is a long-term lease agreement, which does not provide for temporary possession of any premises and that the provisions of the NCA are not applicable.

(21) The appellants in their grounds of appeal, specifically contend that the suretyship constitutes “a transaction”¹³ alternatively “an agreement”,¹⁴ further alternatively “a consumer agreement”,¹⁵ as defined in section 1 of the CPA, and that section 14 of the CPA is consequently applicable to the suretyship entered into between the respondent and the second appellant.

(22) However, the aforesaid definitions may not be viewed in isolation and regard must also be had to the definitions of “consumer” and “supplier” in the CPA. These terms are defined in section 1 of the CPA as follows:

“consumer”, in respect of any particular goods or services, means:

- (a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business;
- (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3);
- (c) if the contexts so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and
- (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e).

“supplier” means a person who markets any goods or services.

(23) In this regard, section 5(2)(b) of the CPA specifically provides that the CPA does not apply to transactions in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister in section 6.

(24) Notwithstanding the aforesaid, section 14(1) of the CPA, which deals specifically with the expiry and renewal of fixed-term agreements,

provides that the section does not apply to transactions between juristic persons, regardless of their annual turnover or asset value.

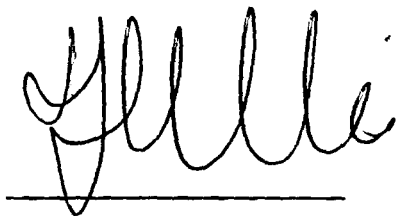
(25) In view of the foregoing it must therefore be accepted that the first appellant is a consumer as defined in the CPA for all intent and purposes, but that section 14 of the CPA does not apply to the written lease agreement due to the fact that first appellant is a juristic person. It follows logically that the deed of surety, as an accessory agreement to the written lease agreement, also falls outside the provisions of the CPA and that section 14 of the CPA does not apply. The second defence raised by the appellants is therefore bad in law and does not constitute a *bona fide* defence to respondent's summary judgment.

(26) In view of the above, the court *a quo* cannot be faulted for granting the summary judgment application with interest and costs, on the basis that appellants failed to raise a *bona fide* defence on the merits of respondent's claim.

ORDER:

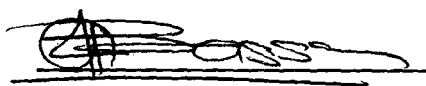
1. In the result I make the following order:

1.1 The appeal is dismissed with costs on the scale as between attorney and own client.



I. ELLIS
ACTING JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED:



BASSON J
JUDGE OF THE HIGH COURT

APPEARANCE ON BEHALF OF APPELLANTS: Adv C.E. Thompson

APPEARANCE ON BEHALF OF RESPONDENT: Adv J. de Beer

Date of hearing: 14 March 2017

¹ 2004 (4) SA 103 (SCA).

² *Kevin and Lasia Property Investment CC and Another v Roos NO and Others* 2004 (4) SA 103 (SCA) at [12].

³ 2011 (1) SA 106 (SCA).

⁴ *In Standard Bank of SA Ltd v Minister of Bantu Education* 1966 (1) SA 229 (N) Caney J said (at 242H-243G):

'Whatever may be the position concerning counsel's authority to bind his client by admissions formally made and recorded in a civil case, it seems undesirable that counsel's opening of a case should be accorded decisive effect in regard of proof of facts necessary to a party's case or defence. Opening remarks are, in common with counsel's

closing argument, usually not recorded. If such matters are to be used in coming to a conclusion in a judgment, they must be set out therein and used, in the ordinary course of events, with considerable circumspection. No use was made of this factor by the court *a quo* and it is quite uncertain what its conclusion in that regard would have been.'

Heher J concluded by recording that "I respectfully adopt the entirety of this reasoning. See also *Kevin and Lasia Property Investment CC and Another v Roos NO and Others* 2004 (4) SA 103 (SCA) at para 12."

⁵ *Saayman v Road Accident Fund* 2011 (1) SA 106 (SCA) at [28]-[29].

⁶ *Vetpac Animal Health CC v Tantis Trading 274 CC* [2012] JOL 28493 (KZD) at [10]-[11]; *Visser and Another v Kotze* [2013] JOL 29985 (SCA) at [14]-[18].

⁷ *Schlinkmann v Van der Walt* 1947 (2) SA 900 (E) at 919.

⁸ *De Wet v Kuhn* 1910 CPD 263 at 266-267; *Ager v Hitchcock* 1950 (3) SA 372 (D) at 377. In any event, the decision in *Tuckers Land & Development Corporation (Edms) Bpk v Van Zyl* 1977 3 SA 1041 (T) at 1045, clearly states that a claim for specific performance in the form of "klinkende munt" is a competent claim in the Magistrate's Court.

⁹ *De Wet v Kuhn* 1910 CPD 263 at 267.

¹⁰ Annexure C1 to appellants Opposing Affidavit in the summary judgment application.

¹¹ *Transnet Ltd v Rubenstein* 2006 1 SA 591 (SCA) at [18].

¹² *Kilroe-Daley v Barclays National Bank Ltd* 1984 4 SA 609 (A) at 623.

¹³ Section 1 of the CPA defines transaction as follows:

"transaction" means:

(a) in respect of a person acting in the ordinary course of business:

- (i) an agreement between or among that person and one or more other persons for the supply all potential supply of any goods or services in exchange for consideration; or
- (ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or
- (iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or

(b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a).

¹⁴ The definition of "agreement" in the CPA reads as follows:

"agreement" means an agreement or understanding between or among two or more parties that purports to establish a relationship in law between or among them.

¹⁵ Section 1 of the CPA defines "consumer agreement" in the following terms:

"consumer agreement" means an agreement between a supplier and a consumer other than a franchise agreement.