IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 6023/2015

In the matter between:

TRANSNET SOC LTD t/a TRANSNET PROPERTY Plaintiff
(Registration No. 1990/000900/06)

and

DEFENSOR ELECTRONIC SECURITY SYSTEMS (PTY) LMITED 1st Defendant

GERT RENIER VAN ROOYEN 2nd Defendant

HEARD ON: 5 MAY 2016

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 21 JULY 2016

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[1] These were action proceedings. The plaintiff instituted an action against the defendant. The relief sought was payment of the capital claim of R711 417.93, interest thereon together with costs.

The defendant filed notice of intention to defend the action. The notice triggered off the current summary judgment application.

[2] The fulcrum of the plaintiff's action was a lease agreement the parties conclude in Bloemfontein on 14 June 2014. The nub of the defendant's defence may be condensed as follows:

2.1 The original lease agreement was cancelled by the plaintiff on account of the defendant's breach;
2.2 The first defendant and the plaintiff then entered into a subsequent lease agreement which settled the dispute;
2.3 The same dispute which has already been mutually settled was wrongly rescucitated by the plaintiff as the subject matter of the present claim;
2.4 The second defendant was released from the bonds of suretyship when the aforesaid compromise was reached;
2.5 It was entirely unclear whether and to what extent the plaintiff relied on the limited R25 000 acknowledgment of debt, signed by the second defendant, as its cause of action.
2.6 The aforesaid uncertainty rendered the plaintiff's particulars of claim vague and embrassing.

[3] The plaintiff contended that those defences did not constitute bona defences. Consequently the plaintiffs applied for summary judgment against the defendant.

[4] An overview of the legal principles that govern the remedy termed summary judgment became necessary. Uniform Rule 32(3)(b) requires a defendant confronted with a summary

judgment application, to file an opposing affidavit which fully discloses the nature and grounds of defence as well as the material facts on which such a defence is based.

[5] A defendant must go beyond the mere formulation of the dispute. It is incumbent upon a defendant to fully disclose the real grounds upon which he disputes a claim. Material facts underlying a dispute must be raised – **Chairperson, Independent Electoral Commission v Die Krans Ontspanningsoord (Edms) Beperk** 1997 (1) SA 244 (T) at 249-F-G.

[6] A defendant must merely depose to facts which, if accepted as the truth or which if proved at the trial by admissible evidence – will disclose a defence – **Shepstone v Shepstone** 1974 (2) SA 462 (N). **Sumelar Ontwikkelings (Pty) Ltd v HTF Developers (Pty) Ltd** 2008 (6) SA 650 (T) at 653 A.

In certain circumstances a defendant is not required to fully disclose the facts on which its defence is founded. One such example is a defence of novation. **Barclays National Bank v Smith** 1975 (4) SA 675 (D).

[7] At this juncture a defendant is not enjoined to prove its defence on the usual civil standard of proof on a preponderance of probabilities. Moreover, in summary judgment proceedings unlike in provisional sentence proceedings, a defendant’s opposing affidavit is not subjected to stringent scrutiny by a court. **Kings Distributors v Raath Motors (Pty) Ltd** 1972 (1) PH at F18.

[8] It has been held that summary judgment proceedings were not and had never been designed to be used as a forum for the resolution of factual disputes - **<u>Fashion Centre v Jasat</u>** 1960 (3) SA 221 (N) at 222E.

[9] A court may refuse summary judgment even though it might reckon that the defence would probably fail at the trial. **<u>Eisenberg's v OFS Textiles Distributors (Pty) Ltd</u>** 1949 (3) SA 1047 (O) at 1055. All that is required of a defendant in this type of proceedings is that its opposing affidavit must at least disclose sufficient particularity to enable a court to determine whether it discloses a *bona fide* defence. **<u>Maharaj v Barclays National Bank Ltd</u>** 1976 (1) SA 418 (A) at 426 C-D.

[10] The question in the instant summary judgment proceedings is whether the facts as alleged by the defendant(s) in the opposing affidavit disclose a *bona fide* defence.

[11] Mr Motloung, counsel for the plaintiff, submitted that the answer to the question must be negative. Therefore, counsel urged me to find in favour of the plaintiff that the defendant failed to disclose a *bona fide* defence.

[12] Mr Van Aswegen, counsel for the defendants, disagreed. Contrary to the submissions made by his counterpart, counsel submitted that the question must be answered in the affirmative.

[13] In the first place I deal with the first defendant. The first defendant primarily raised a defence termed compromise. A

compromise is a substantive contract which exists independently of the cause that gave rise to its very existence. In the absence of a reservation of the right to proceed on the original cause of action, a compromise agreement bars any future proceedings based on the original cause.

[14] It has been authoritatively held that almost all agreements can be analysed in terms of an offer and an acceptance.

> "… every contract consists of an offer made by one party and accepted by the other."

Solomon J. See **Watermay v Murray** 1911 AD 61 on 70 where the statement was quoted with approval.

[15] In the instant matter, the plaintiff certainly accepted the first defendant's proposals for the settlement of the original dispute. In its letter dated 25 June 2015 the plaintiff stated, among others, the acknowledgement of debt would confirm the terms of the first defendant's settlement agreement. The first defendant's offer or settlement proposals were embodied in "anx grr2". The plaintiff's acceptance of those proposals was embodied in "anx grr1". The R25 000 amount of the acknowledgement of debt could not be reconciled with the amount of the claim, R711 417-93.

[16] It often happens, during the course of the negotiations leading to the formation of a contract or in the formal contract itself, that mention is made of a written document or that mentions is made of having the terms of the contract reduced to writing. In such

circumstance a question often and immediately raised is whether or not the informal contract is binding or whether the written document mentioned was only intended to prove the terms of the contract or whether it was contemplated that no binding contract would come into existence until a written document has been drawn up and executed.

[17] The salient principle of our law is that the burden of proof rest on the party who asserts that an informal contract, in other words an unwritten contract, was not intended to be binding until reduced to writing and signed. In **Goldblatt v Fremantle** 1920 AD 123 on 128-9 the court said:

> "Subject to certain exceptions, mostly statutory, any contract may be verbally entered into. Writing is not essential to contractual validity. And if during negotiations mention is made of a written document, the Court will assume that the object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that the writing should embody the contract."

[18] It was the case of the first defendants that the first defendant and the plaintiff concluded an informal contract on 25 June 2015 and that the aforesaid two annexures were merely written and designed to facilitate proof of their unwritten agreement. I could find nothing in those annexures that suggested that the parties intended to conclude a formal or written agreement in order to embody their contract. - **Goldblatt, *supra***. It was never the case of the plaintiff that apart from the written offer and the written acceptance, the parties had intended that no valid settlement would be binding unless it was embodied in a written form and

signed. The plaintiff asserted that no valid and new lease agreement came into existence because no written contract was ever signed. In view of such assertion, the burden of proof rested on the plaintiff to prove that written contract was intended – **Goldblatt *supra***. That the plaintiff failed to do.

[19] In the second place, I deal with the second defendant's defence. He was sued on the strength of suretyship agreement. Suretyship is an accessory contract. Consequently an extinction of the primary debtor's principal obligation necessarily extinguishes the surety's subsidiary obligation - Caney: The Law of Suretyship, second edition, on p197. I have earlier found that a compromise was reached between the first defendant and the plaintiff. On the premise that a compromise agreement was concluded, the plaintiff was precluded from proceeding against the first defendant by virtue of the original cause.

[20] It was axiomatic, therefore, that the second defendant, as a surety, could also not be held liable by the plaintiff, as the creditor of the principal debtor, on the strength of the very same original cause. The plaintiff's way to the second defendant was *longa via* the first defendant. There was no direct avenue open to the plaintiff. The liability of the second defendant was accessory to that of the first defendant. Seeing that the plaintiff had reached a *cul de sac*, there was no alternative avenue through which the second defendant could be reached. A compromise of a disputed main claim may necessarily bring about the release of a surety. - **Caney, *supra*, on p202**.

[21] The acknowledgement of debt, "anx e" has compounded the uncertainty concerning the plaintiff's claim. The document left much to be desired. For instance *ex facie* the document, the second defendant acknowledged that he was indebted to the plaintiff in the capital amount of R25 000. But then he undertook to liquidate the same debt at the rate of R25 000 per month from a specified date. That was one absurdity. The other was that nowhere in the entire document was the name of the first defendant, as the principal debtor, mentioned. There was absolutely no hint of any association between the second and the first defendant. Lastly, the second defendant did not reside on the leased premises as a tenant of the plaintiff. However, the acknowledged capital debt was described as rental arrears. The document was not a model of good draftsmanship. It was totally lamentable and at odds with the plaintiff's reconciliation statement pertaining to the first defendant's account. On 1 July 2013, shortly before the second defendant signed the acknowledgment of debt, the first defendant was alleged to be R304 239.72 in rental arrears. Given all those anomalies, the critique that the plaintiff's particulars were riddled with vague and embarrassing features was not far-fetched. The corollary of all this was that the defendants found it difficult to accurately indicate or spell out their substantive defence(s) to the substantive merits of the plaintiff's claim.

[22] I am of the view that a cloud of uncertainty which hangs over the plaintiff's cause of action by itself constitutes a sound reason for exercising my discretion in favour of the defendants. I am persuaded that the defendants have crossed the minimum

threshold. Since it cannot be said that they had shown no *bona fide* defence to the plaintiff's claim, I am inclined to hold that, in these circumstances, summary judgment should be refused. If I were to grant summary judgment in this matter, then my decision would not have been compatible to proper exercise of judicial discretion.

[23] Accordingly I make the following order:

23.1 The application for summary judgment is refused;

23.2 The defendants are granted leave to defend.

23.3 The costs of the summary judgment proceedings shall be costs in cause.

M. H. RAMPAI, J

On behalf of the plaintiff: Adv. SE Motloung
Instructed by:
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On behalf of the defendants: Adv. WA van Aswegen
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