



IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 67751/2011

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

.....

DATE

SIGNATURE

In the matter between:

DATE: 28/3/2014

SOUTH AFRICAN SECURITISATION

PROGRAM (RF) LIMITED

First Plaintiff/Excipient

SASFIN BANK LIMITED

Second Plaintiff

SUNLYN (PTY) LIMITED

Third Plaintiff

and

LEPPAN BEECH INCORPORATED

First Defendant

MEGAN ELIZABETH JARVIS

Second Defendant

SELLO EUGENE PHAJANE

Third Defendant

WARREN ROBERT BEECH

Fourth Defendant

DEIDRE VENTER (previously BONE)	Fifth Defendant
KEVIN PIETERSEN	Sixth Defendant
WESSEL JOHANNES JACOBUS BADENHORST	Seventh Defendant
ELIZABETH LOUW	Eight Defendant

JUDGMENT

MAKHUBELE AJ

INTRODUCTION

[1] Plaintiffs¹ issued summons against the first defendant, an incorporated firm of attorneys and second to eighth defendants who are or were directors of the first defendant for payment of the amount of R274, 203.22 , interest and costs of suit.

[2] This judgment concerns an exception taken by plaintiffs against certain averments in the pleas filed by sixth, seventh and eighth defendants (former directors of first defendant, referred to hereafter as "the defendants") on the basis that they do not disclose a defence to its claim.

¹ Second and third plaintiffs were joined on 08 May 2013, and the particulars of claim were subsequently amended to amongst other things reflect them as alternate plaintiffs. This, and the cession agreements between the plaintiffs has no bearing on the exception, although the lawfulness of the agreements is raised in the defences put up.

[3] It is common cause that the pleas, though filed separately are identical, and so are the exceptions. I will refer to the joint plea of the 6th and 7th defendant and the exception thereto.

ISSUES THAT ARE COMMON CAUSE

[4] The following issues are common cause or accepted as correct for purposes of the exception.

[5] Third Plaintiff and first defendant entered into a rental agreement on 04 May 2009 in terms of which the former let to the latter a “ *multifunctional copier* “ and “*fax option*” at a monthly rental of R5 928.00 for a rental period of 60 months commencing on 25 May 2009.

[6] Sixth, seventh and eight defendants were still directors of the first defendant at the time. They resigned on 04 January 2010, 13 October 2009 and 29 January 2010 respectively

[7] The defendants were no longer directors of the first plaintiff when it allegedly fell into arrears with the monthly rental payments. Sasfin, the second plaintiff, issued a letter of demand on 23 April 2010 and demanded payment of arrear amount of R11938.49.

[8] First defendant responded to this demand on 29 April 2010 and advised SASFIN that *"all contracts with Nashua were terminated on the basis of material breach, and all quipment, including the copier, subject t the abovementioned contract were uplifted by Nashua in mid March 2010. In the circumstances, no amounts are due and owing to Sasfin Bank by Leppan Beech Incorporated ("LBI").*

Please be advised further, that any and all actions taken by Safin, will be defended by LBI"

[9] The contract was subsequently cancelled without notice to plaintiff and summons were then issued.

RELEVANT PARTICULARS OF CLAIM

[10] In paragraphs 12, 13, and 14, plaintiff pleaded that second to eighth defendants are or were directors of the first defendant when the first defendant concluded a rental agreement with Sunlyn Rentals and that they are jointly and severally liable for the debts of the first defendant by virtue of Section 23 of the Attorneys Act 53 of 1979 read with Section 53(b) of the Companies Act 61 of 1973, alternatively with Section 8 of the new Companies Act 71 of 2008.² A copy of the first defendant's memorandum of association was also attached as annexure POC 3³.

² It is common cause that the provisions of the New Companies Act are not applicable because the agreement was concluded before it was enacted.

³ It reads as follows " The directors and past directors are liable jintly and severally together with the company , for its debts and liabilities contracted during their periods of office".

In paragraph 19.3, plaintiff stated that:

"In terms of clause 7⁴ the first defendant agreed that should it breach any of the conditions or terms of this agreement, or fail to pay any amounts to Sunlyn, Sunlyn, without notice and without affecting any of its rights be entitled to:

19.3.1 Claim immediate payment of all amounts which would have been payable in terms of the rental agreement until expiry thereof, whether such amounts are payable or not;⁵

19.3.2 In which case the first defendant agreed not to withhold payment or to make any deductions from the outstanding amount as a result of any loss of possession of the goods ; or

19.3.3 Immediately terminate the rental agreement, retain possession of the goods and all amounts already paid and claim all outstanding rentals.⁶"

[11] In paragraph 19.6 , the following was pleaded:

⁴ Rental Agreement, Annexure POC4

⁵ clause 7.1

⁶ clause 7.2

"In terms of clause 13 the first defendant agreed not to transfer its rights in terms of the rental agreement, nor part with possession of the goods to any party without first obtaining Sunlyn's written consent.

[12] The breach and subsequent steps taken by the plaintiffs is pleaded in the following paragraphs:

" 33. The first defendant failed to make monthly rental payments as agreed to in Annexure "POC4" , and which it had previously paid to the first plaintiff.

34. On 23 April 2010 Sasfin on behalf of the first plaintiff , demanded payment of the outstanding arrear amount of R11 938.49 from the first defendant. The written demand is annexed hereto as Annexure "POC7"

35. In response to the letter of demand the first defendant replied to Sasfin (representing the first plaintiff) in Annexure "POC8" dated 29 April 2010 and:

35.1 confirmed that it relinquished its possession of the leased goods without written approval from the first plaintiff; and

35.2 alleged that no amounts are due to the plaintiff and that any action by the first plaintiff to recovery (sic) ant outstanding amount will be defended.

36. The contents of Annexure "POC8" amounts to a material breach alternatively a repudiation of the material terms of lease agreement which the first plaintiff chose to accept.

37. The first plaintiff has elected to act in terms of clause 7.2 of the terms of business to the rental agreement and :

37.1 without notice to the first defendant and without prejudice to any other right it may have, terminate the rental agreement;

37.2 take possession of the leased goods;

37.3 retain all amounts already paid by the first defendant ; and

37.4 claim all outstanding rentals as pre estimated liquid damages including legal costs on the attorney and client scale.

38. On 13 May 2010 the first plaintiff, in terms of clause 7.2 of the terms of business, demanded the accelerated amount of R290, 721.68 from the first defendant which amount represents the first plaintiff's pre estimated and agreed liquidated damages. This demand, sent by registered post is annexed hereto as annexure "POC9" and the proof of posting.

39. The first plaintiff took possession of the goods and sold the leased goods at a fair and reasonable market related value of R20 000 which amount has been credited to the first defendant's account.

40. *In accordance with annexure "POC 10.1" and "POC10.2, being the detailed reconciliation and certificate of balance respectively, the first defendant is liable to the first plaintiff for an amount of R274, 203.22 together with interest thereon at a prime rate of interest plus 6% calculated from day to day from 01 July 2010 until date of fina payment.*

41. *Despite demand the first defendant remains indebted to the first plaintiff for an amount of R274, 203.22 which is now due and owing and payable".*

THE PLEA OF THE DEFENDANTS

[13] The sixth and eights defendants admitted that they were directors of the first defendant on the date the lease gareement was concluded. They however pleaded that **they were no longer directors at the time the plaintiff's claim for damages arose** (my emphasis) , having resigned on 04 January 2010 and 24 November 2009.⁷

[14] Suprisingly, in paragraph 8 they deny the contents of paragraph 12 of the particulars of claim in terms of which plaintiff had pleaded that they were directors of first defendant when the rental agreement was concluded.

In paragraph 9, they amplify the denial as follows:

⁷ paragraphs 5, 6, and 7 of the plea dated 14 January 2013

“ 9.1 In terms of the provisions of section 23 of the attorneys Act, Act 53 of 1979, the Defendants are liable for the debts of the First defendant which arose while they were directors of the First defendant. The Plaintiff's, alleged claim arose on or about 1 July 2010 and the Defendants had resigned as directors of the First defendant with effect from January 2010.

9.2 The New Companies Act, Act 71 of 2008 came into effect during April 2011, being a date after the resignation of the Defendants as directors of the First defendant and/or the Plaintiff's, alleged claim arising. In the premises, it is denied that the plaintiff can place reliance on the provisions of Section 8 of the latter mentioned act in an endeavour to hold the defendants liable for the debts of the First defendant.”

[15] In paragraph 10, defendants admit that they are jointly and severally liable with the first defendant for its debts in terms of the Attorneys and Companies Act.

However, in paragraph 11, they deny that “*the Plaintiff's claim relates to a debt and /or liability contracted during their period of office*”

[16] In paragraph 13, the defendants pleaded that “*..... the Plaintiff's claim is for payment of damages, which arose after the Defendant had resigned as directors of the First Defendant*”.

THE EXCEPTION

[17] The plaintiffs noted the defendants' admission that they were directors at the time the rental agreement was concluded and their denial of liability on the basis that they were no longer directors when the claim arose.

[18] Paragraphs 5 , 6 and 7 of the exception read as follows:

“ 5. According to paragraph 11 of the plea the defendants deny that the plaintiff's claim relates to a debt and/ or liability contacted (sic) by the first defendant during their period of office.

6. Assumig that the defendants' allegations are correct and that they were not directors of the plaintiff when the plaintiff's claim arose (as pleaded in paragraph 6 of the plea), these allegations disclose no defence on a proper interpretation of section 23 of the Act read together with the said lease agreement as pleaded in the particulars of claim.

7. The plaintiff contends that the second to eight defendants are jointly and severally liable for the debts of the first defendant in terms of section 23 of the At notwithstanding the resignation of any of the directors”.

THE LEGISLATION

[19] Section 23 (1)(a) of the Attorneys Act, Act 53 of 1979 (the Attorneys Act) reads as follows:

23. Juristic person may conduct a practice.—(1) A private company may, notwithstanding anything to the contrary contained in this Act, conduct a practice if—

(a) such company is incorporated and registered as a private company under the Companies Act, 1973 ([Act No. 61 of 1973](#)), with a share capital, and its memorandum of association provides that all present and past directors of the company shall be liable jointly and severally with the company for the debts and liabilities of the company contracted during their periods of office"

[20] Section 53 (b) of the Companies Act, Act 61 of 1973 (the Companies Act) reads as follows:

53. Memorandum may contain special conditions and may provide for unlimited liability of directors.

The memorandum of a company may, in addition to the requirements of section 52 –

(a)....

(b) in the case of a private company, provide that the directors and past directors shall be liable jointly and severally, together with the company, for such debts and liabilities of the company as are or were contracted during their periods of office, in which case the said directors and past directors shall be so liable.

SUBMISSIONS

[21] Counsel for both parties filed comprehensive heads of argument to address their respective standpoints. I am indebted to them, in particular their agreement at the outset that the only point they would argue is the meaning of the word “*contracted*” as it appears in both the Attorneys and Companies Acts . The judgment of Hefer JA, in the matter of Fundstrust (Pty) Ltd (in liquidation) v Van Deventer⁸ took center stage, with both counsel relying on different passages to drive their point home.

[22] Counsel for the plaintiffs , MrCothill submitted that:

(a) If a director was in office at the time the debt was consensually incurred, he is liable⁹

(b) The Fundstrust decision is distinguishable from the facts of this matter ;

(i) The Fundstrust matter concerned impeachment proceedings whereas in this matter the first defendant entered into a five year agreement.

⁸ 1997 (1) SA 710 (A)

⁹ with reference to paragraph 731B-C of the judgement

(ii) The rental agreement in this matter is for a fixed period and does not concern the subjective intentions of the directors accused of wrong doing.

(iii) An emphasis was placed in the Fundtrust matter on whether the directors foresaw the statutory liability of committee placed on them. Hefer JA concluded that they could not have foreseen such a consequence. The defendants in this matter agreed to a conclusion of the fixed term contract.

(c) counsel for the plaintiffs also referred me to the matter of **Sonnenberg McLoghlin Inc V Spiro** 2004 (1) SA 90 (C) where it was held amongst others that a director who discharges the debt of a company has recourse against the others.

(d) He also referred me to the matter of **Maritz & Another v Maritz & Pieterse Inc** 2006 (3) SA 481 (SCA). Section 53(b) of the Companies Act is intended to offer protection to creditors by making directors liable, and not to create an asset for the company in liquidation.

(e) On the intention of the legislator, he submitted that:

(i) Directors are held liable for contractual debts of a company in the context of incorporated firms. The parties in this matter entered into an agreement and made provision for breach thereof. The plaintiff's election is in accordance with the agreement. It could not have been the intention of the legislature to punish the creditor for his election. The damages arise from the breach of the contract and the election made by the plaintiff.

(ii) Section 23 of the Attorneys Act and section 53(b) of the Companies Act are a form of suretyship. The defendants suggest that they have been released from their obligations by their resignations. The resignations do not absolve them.

(iii) The argument of the defendants that the claim is no longer contractual is superficial because the genesis of their relationship is based on contract. A claim for damages was not excluded.

(iv) Clause 7.2 amounts to an agreement to pay the "pre estimated agreed liquidated damages".

(v) Defendants' argument about their resignation as having absolved them, if accepted, would mean that directors of attorneys' firms facing financial difficulties would simply resign to escape liability.

[23] In his heads of argument, Counsel for the defendants, Mr Prinsloo raised an issue about the fact that the exception does not go to the root of the plea because it is just but one point of law amongst many other defences raised by the defendants in their pleas. The amount of evidence during trial would not be reduced. He listed the defences in the plea.

However, in argument, this was not pursued. His submissions were centered around the defendants' belief that the damages claim arose after they had resigned. The anomaly, so the argument went, was being held liable for a debt that was not there when they resigned.

ANALYSIS

[23] I do not think that there is any merit in the defendants' contention that the damages claim arose when they were no longer directors and as such they are not liable. Clause 7.2 of the Rental Agreement is clear and does not need interpretation. The plaintiffs exercised a choice, as such, the liability for damages arising out of the breach was foreseeable.

[24] I agree with counsel for the plaintiffs that the relevant sections in the Attorneys and Companies Acts are some form of suretyship. The directors remain liable for as long as the debt exist and it does not matter how the contract is cancelled, as long as the cancellation complies with the terms agreed upon.

[25] The defendants' argument, as I understand it, is that the creditor acted in a manner that releases them from their obligations. Having accepted that they are sureties for the company, this argument stands to be rejected because there is no general principle that the creditor's conduct, even prejudicial entitles a surety to be released from suretyship.

[26] In Absa Bank Ltd v Davidson 2000 (1) SA 1117 (SCA), the court was confronted with the submission that there is a general so-called "*prejudice principle*" in our law to the effect that, if a creditor should do anything in his dealings with the principal debtor which has the effect of prejudicing the surety, the latter is fully released. Olivier JA, came to the conclusion that no such principle exists and held (at para 19):

"As a general proposition prejudice caused to the surety can only release the surety (whether totally or partially) if the prejudice is the result of a breach of some or other legal duty or obligation. The prime sources of a creditor's rights, duties and obligations are the principal agreement and the deed of suretyship. If, as is the case here, the

alleged prejudice was caused by conduct falling within the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer"

[27] My view is that it does not matter whether one looks at clause 7.2 or the meaning of the word "contracted" as it appears in the provisions of sections 23 and 53 of the Attorneys and Companies Acts respectively, the end result will be the same.

[28] The contractual debt became due after cancellation of the agreement. It does not matter that the creditor is the one who repudiated the contract or it was the one to be blamed for its cancellation. The fact that plaintiff sued for damages is not a defence to plaintiff's claim because such damages are as a result of breach of contract.

[29] The defendants and plaintiffs "contracted" clause 7.2 , in terms of which there is a built-in damages claim in the event of breach of contract. The claim for damages was triggered by failure on the part of the first defendant to honour monthly payments. In addition, first defendant admitted to having given away possession of the goods in contravention of the terms of the agreement. The plaintiff, as it was entitled to, immediately cancelled the agreement, without notice, as it was also entitled to.

[30] Paragraphs 6 – 11 of the 6th and 8th defendants' plea, though sufficiently pleaded, does not constitute a defence to plaintiff's claim for reasons stated above.

The plaintiffs have prayed for setting aside of paragraphs 6-11 of the defendants' respective pleas. Though I am inclined to accede to this request, the usual practice when upholding an exception is for leave to be granted for an amended pleading to be filed within a specific period.¹⁰ I will grant the plaintiff's to file an amendment.

COSTS

[31] Counsel for the plaintiffs argued that the defendants should be ordered to pay costs of the exception jointly and severally on the scale as between attorney and own client in terms of clause 7.2 of the agreement and that the costs should include the reserved costs of the unopposed hearing.

[32] There is nothing in the court file to indicate that costs were reserved at any time. The only time the matter was in court was for a joinder application and notice of intention to amend in terms of Rule 28. This was on 08 March 2013. The court file only indicates that prayers 1-4 granted. Prayer 4 reads as

¹⁰ **Group Five Building Ltd v Government of the Republic of South Africa** 1993 (2) SA 93

follows “ *That costs of the application against the respondents only in the event that they oppose same*”.

[33] There is no basis for me to make an order of costs for the hearing on 08 March 2013. Counsel for both parties were unable to provide me with further details as to the meaning of prayer 4 because it does not seem like costs were reserved.

[34] The defendants' pleas are bad in law, more especially in view of the fact that the agreement spells out exactly what would happen in the event of breach. There is no ambiguity as to the effect of breach of the terms of the agreement.

ORDER

[35] I am satisfied that the exceptions are good and well taken, and I make the following order;

[35.1] The exceptions are upheld;

[35.2] The defendants (6,7 and 8th) are ordered to pay costs jointly and severally, one paying the other to be absolved, on the scale as between attorney and own client

[35.3] Paragraphs 6-11 of the defendants' respective pleas are hereby set aside;

[34.4] The defendants are granted leave to amend their respective pleas only with regard to paragraphs 6-11 that have been set aside within 15 days of this order.

MAKHUBELE AJ

Acting Judge of the High Court

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