

NOT REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO:2036/2013

In the matter between:

LIBERTY GROUPLTD

Applicant

and

SOTIRIS SONITIS

First Respondent

CIRCUS CIRCUS FRANCHISING (PTY) LTD

Second Respondent

JUDGMENT

GORVEN J

[1] In this application summary judgment is sought. It arises from a lease which the applicant avers was concluded over premises situated at the Midlands Liberty Mall. Against the respondents, the applicant relies on a deed of suretyship which it says was executed by them in favour of the applicant in respect of the obligations of the principal debtor who is the named tenant in the lease. The applicant seeks a money judgment for rental and related amounts, including damages, which it says arise from the lease.

[2] In the particulars of claim, the applicant pleads the following. A written lease alternatively a partly oral, partly written lease alternatively a

tacit lease further alternatively an implied lease was concluded with the principal debtor. The written lease, alternatively the written part of the lease, comprises annexures 'A' and 'B' to the particulars of claim. Annexure 'A' is a letter dated 30 September 2011 signed by the Leasing Manager of the applicant inviting the principal debtor (as would be tenant) and the respondents to sign the letter. Their signatures would constitute an offer to lease and offers of deeds of suretyship respectively. The principal debtor and the respondents signed annexure 'A' on 3 October 2011 and the applicant's representative signed it on 5 October 2011. It is clear that annexure 'A' contains sufficient information to constitute a lease and deeds of suretyship. Annexure 'B' is a comprehensive lease agreement which is not averred to have been signed at all.

[3] The applicant goes on to plead that clause 22 of annexure 'A' contains two suspensive conditions. The first requires the cancellation of the existing lease over the premises by 30 September 2011. The second requires the arrears over the premises to be paid within 24 hours of the 'tenant receiving the signed confirmation of the landlord'. The applicant pleads the fulfilment of the first suspensive condition in that the existing lease was cancelled and the tenant given occupation of the premises by 30 September 2011. As regards the second condition, the applicant pleads that 'this suspensive condition is exclusively for the benefit of the Plaintiff and have (*sic*) been waived by it'. The applicant pleads, in the alternative, that both conditions were waived by the parties, alternatively that the parties waived their rights to cancel the agreement as a result of non-fulfilment, further alternatively that the lease was later revived or reinstated by the parties, further alternatively that the two conditions were both exclusively for the benefit of the applicant which waived them.

[4] Summary judgment has far reaching consequences. It is ‘intended to prevent sham defences from defeating the rights of parties by delay...’.¹ If summary judgment is granted, a defendant is precluded from defending the action and pleading or excepting to the summons. It therefore applies to a closed subset of claims and requires strict compliance with Rule 32. Even if the applicant has complied and the defendant does not make out a defence, the court has a discretion to refuse summary judgment.² In lieu of a trial where evidence is led and cross-examination takes place, the applicant must accordingly give limited evidence by way of affidavit swearing ‘positively to the facts verifying the cause of action and the amount, if any, claimed’ in the summons.³ This is why it is necessary for the deponent to be someone who has personal knowledge of the facts alleged in the particulars of claim and ‘it is improper for the deponent to make statements based only on his own information and belief’.⁴ It is crucial, therefore, that the cause of action verified by the deponent to the affidavit in support of summary judgment is a complete one.⁵

[5] For a complete cause of action arising from a contract subject to a condition precedent, a plaintiff must plead and prove one of two things. First, it may plead and prove the fulfilment of the condition.⁶ If the condition is not fulfilled by a particular date, the contract is rendered void.⁷ Secondly, it may plead and prove that the condition precedent was waived. If waived, it is as if the condition had been fulfilled. One of the

¹ *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) para 31.

² Rule 32 (5); *Gruhn v M Pupkewitz & Sons (Pty) Ltd* 1973 (3) SA 49 (A) at 58C-F.

³ Rule 32 (2).

⁴ *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC& another* 2010 (5) SA 112 (KZP) at 115E-F.

⁵ *Caltex Oil (SA) Ltd v Crescent Express (Pty) Ltd & others* 1967 (1) SA 466 (D) at 469C-D.

⁶ *Kate’s Hope Game Farm (Pty) Ltd v Terblanchehoek Game Farm (Pty) Ltd* 1998 (1) SA 235 (SCA) at 241C-D.

⁷ *Legate, JM v Natal Land and Colonization Co Ltd* (1906) 27 NLR 439 at 455; *Southern Era Resources Ltd v Farndell NO* 2010 (4) SA 200 (SCA) para 11.

two must be pleaded and proved for the contract to survive. Where a waiver of the condition is relied on, the waiver must, like fulfilment, take place before the date set for the fulfilment of the condition.⁸ This is because if the condition is not fulfilled or waived by the time fixed, the contract is rendered void. Since it is void, there is no longer an operative condition to be waived. Any subsequent contract between the parties which may come into effect cannot do so by way of waiver or by fulfilment of the condition. A fresh agreement is necessary in order to revive the void contract. Further, there cannot be both a waiver and a fulfilment of a condition precedent. The two situations are mutually exclusive. If the condition is fulfilled, it cannot be waived and if it has been waived, it cannot be fulfilled.

[6] In argument, the applicant submitted that fulfilment and waiver can be seen as complementary alternatives. As mentioned above, the particulars of claim, and therefore the evidence of the deponent verifying them, aver fulfilment of the first condition, alternatively that the applicant waived it, alternatively that the parties waived it, alternatively that the lease revived by agreement. It seems unlikely that a person could credibly give evidence that the condition was both waived by the applicant and fulfilled. Such evidence would be affirming contradictory factual situations. It seems even less likely that credible evidence can be given that the parties both waived the condition and that the lease was revived by the parties by agreement. How can both parties have waived the condition and also have agreed that the lease should be revived? If the condition was not waived, the lease was rendered void. If the condition was waived, the lease is extant and does not require revival. Similar reasoning applies to the alternative causes of action, one based on an express agreement and the

⁸*Trans-Natal Steenkoolkorporasie Bpk v Lombaard en 'n ander* 1988 (3) SA 625 (A) at 640C-G.

others on a tacit or implied agreement. The evidence in the supporting affidavit may therefore be self-contradictory because it is not clear that the alternatives set out above are not mutually destructive.

[7] If alternative causes of action are really complementary to one another and not mutually destructive, 'it is perfectly in order to verify a cause of action based on alternative claims. What is objectionable is verifying a cause of action based on two mutually destructive alternative versions of the cause of action'.⁹ It is also open to a deponent in support of summary judgment to verify a particular cause of action where a number of causes of action appear in the summons, even if they are mutually destructive of one another.¹⁰ As was said in *Smith*, though, if this is done, 'it must be clear that the cause of action on which the particular claim is based has been duly verified.'¹¹ Where mutually destructive versions are verified, there has not been a proper verification of the cause of action relied on 'because an essential allegation has in the same breath been verified and contradicted.'¹² In *Threeball Construction Ltd v Lipschitz*, Stegmann J reasoned in the following terms:

'Pleading inconsistent versions in the alternative is, of course, entirely proper. The pleader knows the limitations of the evidence available to him, and that it may be found not to go far enough to establish the *facta probanda* on which the first cause of action is based. He therefore pleads in the alternative that the available evidence is sufficient to make out a somewhat different cause of action with elements inconsistent with the cause of action first set out. The pleader's alternatives are as to the conclusions of law that are to be drawn from the available evidence. A witness is in a different position. He does not testify about conclusions of law but about facts. If he purports to testify that he met the defendant at a particular time and place and expressly agreed on a stated price, he cannot expect to be believed if he also testifies that he did not meet the defendant, and that they did not expressly agree on the stated price. That seems to me to be the effect of the affidavit filed on behalf of the plaintiff in the present matter...

⁹ Per Zulman J in *Diesel Power Plant Hire CC v Master Diggers (Pty) Ltd* 1992 (2) SA 295 (W) at 297C-D.

¹⁰ Per Booysen AJ in *Barclays National Bank Ltd v Smith* 1975 (4) SA 675 (D) at 682D-E.

¹¹ *Smith* at 682F-G. See also, *Esso Standard South Africa (Pty) Ltd v Virginia Oils and Chemical Co (Pty) Ltd* 1972 (2) SA 81 (O) at 85.

¹² *Smith* at 682G-H.

In the present matter it is not clear that the alternatives are complementary to each other (as they may be), and that they are not mutually destructive. It is therefore not clear that the plaintiff's affidavit is not self-contradictory, and the plaintiff cannot be said to have an unanswerable case.¹³

This reasoning is, in my respectful view, correct and applies equally to the present matter. Likewise, in the light of what I have dealt with above, in particular to the issue of fulfilment or waiver of the first condition or the revival of the lease by agreement, it cannot be said that the applicant has an unanswerable case. Nor is it clear that an essential allegation has not been verified and contradicted in the same breath.

[8] For these reasons, summary judgment cannot be granted. This is so regardless of whether or not the affidavit opposing summary judgment sets out a defence.¹⁴ As it happens, the opposing affidavit is by no means a model of clarity. I do not propose dealing with the opposing affidavit in detail or all of the submissions made by the respondent. The affidavit sets out that an alternative tenant to whom no objection could be raised was introduced to the applicant which would have resulted in the applicant mitigating the damages sustained but that the applicant rejected the introduction. This sets out, in broad terms, a defence to that portion of the amount claimed as damages but very little else is addressed in concrete terms. If I am wrong on the issue concerning the alternative causes of action, this would probably incline me in any event to exercise my discretion against granting summary judgment.

[9] The respondents urged me to award them costs on an attorney and client scale if I refuse summary judgment. It was submitted that if I find that the applicant verified contradictory causes of action, this disqualified it from obtaining summary judgment. They say that the trial court will not be

¹³1987 (2) SA 633 (W) at 634I-635E.

¹⁴*Shackleton Credit* para 25.

in a better position to determine this. In addition, on this basis, the applicant ought not to have brought the application and the respondents are unnecessarily out of pocket which warrants a punitive costs order. However, the analysis above only goes so far as to find that the alternative averments are not clearly consistent with each other. They may be found to be so. In addition, the respondents did not raise any of these issues. Their heads of argument raised only a point in *limine* that the deponent verified 'the cause of action' where there were in fact a number of alternative causes of action. As such, they submitted, it was not possible to ascertain which cause of action was being verified. I do not find this point convincing. All things considered, I am of the view that the usual order reserving costs for decision by the trial court will meet the case. It may well be that the respondents have no defence to the action.

[10] In the result, the following order shall issue:

1. The application for summary judgment is dismissed.
2. The defendants are given leave to defend the action.
3. The costs of the summary judgment application are reserved for decision by the trial court.

DATE OF HEARING: 15August 2013
DATE OF JUDGMENT: 20 August 2013
FOR THE APPLICANT: M Bingham, instructed by Gideon
Pretorius Inc.
FOR THE FIRST RESPONDENTS: S Hoar, instructed by Smith Tabata
Buchanan Boyes Attorneys.