

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 4635/2010

In the matter between:

SPARTAN TECHNOLOGY RENTALS (PTY) LTD

Applicant

and

QUIPSELL TRADING 1041 (PTY) LTD
(Registration No 2005/009099/07)

1st Respondent

ALITORI 1470 CC
(Registration No)

2nd Respondent

HENDRIK GIDEON BURGER
(Identity No.)

3rd Respondent

QINISO KENNEDY KHOZA
(Identity No.)

4th Respondent

JACOBA JOHANNA PRINS
(Identity No.)

5th Respondent

RUDOLF FRONEMAN KOTZE
(Identity No.)

6th Respondent

FRANS JACOBUS LUBBE
(Identity No.)

7th Respondent

JUDGMENT: LEKALE, AJ

HEARD ON: 27 JANUARY 2011

DELIVERED ON: 17 FEBRUARY 2011

INTRODUCTION

[1] This is an application for payment of money on the basis of suretyship agreement signed by and/or on behalf of the respondents read together with several master rental agreements concluded by and among the applicant and various debtors.

[2] The application is being opposed by the respondents on, *inter alia*, the grounds that an application procedure is not appropriate *in casu* and, further, that the applicant has not proved the amount claimed.

BACKGROUND

[3] The applicant launched motion proceedings against the respondents jointly and severally for payment of R1 055 684,03 in respect of arrear and future rentals allegedly owing to it by eight debtors in respect of whom the respondents bound themselves jointly and severally as sureties and co-principal debtors.

[4] The respondents delivered opposing papers to which the applicant replied by, *inter alia*, enclosing a draft order effectively amending the amount claimed to R870 250,84.

[5] The applicant, further, invited the respondents to address any errors in its recalculated claim.

[6] The parties, eventually, submitted Heads of Argument in terms of which:

6.1 the applicant maintains, *inter alia*, that application procedure is appropriate because there is no real and genuine dispute of fact among the parties;

6.2 the respondents contend, further, that the applicant has not taken into account the fact that, while future rental is claimed, no provision for probable changes in the prime interest rate is made.

ISSUES RAISED

[7] When all is said and done, the parties are at *variance* on the following questions:

7.1 as a preliminary issue, whether or not motion proceedings are appropriate in the circumstances of the matter regard being had to, *inter alia*, the dispute between the parties over the quantum of the claim; and, if appropriate

7.2 whether or not the applicant has succeeded to prove its claim in respect of accelerated payments on the papers before the court.

SUBMISSIONS BY THE PARTIES

[8] The parties are, effectively, in agreement on the following, among others:

- 8.1 the quantum of the arrear amounts claimed;
- 8.2 that clause 3.5 of the Master Rental Agreements provides that payments payable will, if applicable, be linked to and varied in accordance with any changes in the prime rate during the term of each agreement;
- 8.3 that it is not possible to determine prime rates for the purposes of quantifying and accelerating the respondents' future indebtedness to the applicant.

[9] In his oral submissions on behalf of the applicant, Mr Van Blerk contends, *inter alia*, to the effect that;

- 9.1 the dispute relates to a principle viz. whether or not the applicant is entitled, in the circumstances of the matter, to levy interest on accelerated future rentals in the light of the impossibility relating to the determination of future applicable prime rates as contemplated by clause 3.5 of the rental agreements. The respondents, further, did not address the disputed amounts seriously and unambiguously as required by law;
- 9.2 the real issue to be determined, therefore, relates to the proper interpretation of clause 3.5. In his view the only sensible commercial interpretation is that, if the applicant accelerates future payments, it should not be entitled to levy prime-rate-linked interest;

9.3 it is, further, not necessary for the applicant to adduce oral evidence to prove the amount payable because all the court has to do is to use a calculator to verify the amount on the basis of the calculations set out on the papers.

9.4 If the court is not satisfied with the claim relating to accelerated future payments, then the court should award the claim in respect of arrear rentals only.

[10] On behalf of the respondents, Mr Zietsman, submits to the following effect, among others:

10.1 application procedure is not advised in the circumstances because of, *inter alia*, its inherent inhibitions such as the limited number of sets of affidavits which may ordinarily be exchanged and the absence of an opportunity for the respondent to make payment into court;

10.2 there, further, exists a dispute of fact with regard to the amount payable in respect of future rentals;

10.3 the applicant has, furthermore, failed to prove its case with regard to the quantum claimed insofar as:

a. whereas the suretyship agreement provides for proof of the amount of indebtedness for which the respondents are liable to be in the form of a certificate signed by any of the applicant's directors, the amended amount set out in the

applicant's replying affidavit was not proved by way of such certificate;

b. the rentals fluctuate over time and the applicant should, as such, have proved the amount payable.

FINDINGS

[11] In the light of applicable law and the facts herein, I am satisfied that:

11.1 the court has a discretion to allow a claim for payment of money to proceed on application and, in so doing, it is not limited to the consideration as to whether or not there exists a dispute of fact on papers;

(Compare **REGAL TRADING COMPANY (PTY) LTD v COETZEE** 1956 (1) SA 766 (O) at 767A-D.)

2. in the circumstances of the present matter motion proceedings are not indicated due to, *inter alia*, the nature of the dispute, the fact that the claim consists of a composite amount which is not broken up into separate claims for arrear amounts and amounts in respect of the remaining contract periods as well as the desirability of hearing and observing witnesses from both sides on the calculations. In this regard it should be noted that, although Mr Van Blerk was at pains to explain how the court can go about verifying and doing calculations, he was quick to point out that calculations may be complex. It is, probably, for

that reason that the parties resorted to knowledgeable people like financial directors and chartered accountants in dealing with the disputed calculations and amounts herein. The need to observe rules regarding the number of sets of affidavits in proceedings of this nature is also one of the considerations. The parties are expressly averse to the referral of the matter for oral evidence; (Compare **JAMES BROWN AND HAMER (PTY) LTD v SIMMONS NO** 1963 (4) SA 656 at 660D and **TRANSVAAL RACING CLUB v JOCKEY CLUB OF SA** 1958 (3) SA 599 (W) at 604A-E.)

3. even if I am wrong in the foregoing finding, it is clear from available evidence that the applicant has not proved the amount claimed insofar as it is common cause that it is impossible, at this stage, to determine the respondent's future indebtedness to the applicant;
4. even if I am, furthermore, wrong in the foregoing finding, the determination of the question related to the interpretation of the interest clause would, in my judgement, not assist the court in resolving the dispute. That question is not dealt with on the papers nor is it addressed in the Heads of Argument filed. The interpretation of contracts seeks to establish the common intention of the parties and should, as such, be dealt with

properly with due regard to surrounding circumstances, if necessary. It is, thus, not appropriate to deal with it as a peripheral issue in these proceedings without hearing the parties fully on the same. It may well be correct, as contended by Mr Van Blerk, that in the case of accelerated payments prime-rate-linked interest is not applicable because payment is sought to be made immediately and not in the future when such prime rate would, normally, be determined and levied. The claim here is, however, composite. The facts of the matter and considerations of equity, in my view, require the matter to be dealt with as a whole and not on a piecemeal basis as the case was in **ACADEMY OF LEARNING (PTY) LTD V HANCOCK & OTHERS** 2001 (1) SA 941 (C) where the claims were separate and distinct although they flowed from the same matrix.

5. the submissions made by counsel on both sides only go to illustrate how far apart the parties are on the nature of the dispute. Mr Van Blerk contends that it is about the interpretation of the interest clause. Mr Zietsman's argument is, however, mainly dedicated to the quantum of the claim and not the alleged interpretation dispute.

ORDER

[12] For the foregoing reasons the application is dismissed with costs.

L. J. LEKALE, AJ

On behalf of the applicant: Adv. P. J. van Blerk SC
Instructed by:
Webbers Attorneys
BLOEMFONTEIN

On behalf of the respondents: Adv. P. Zietsman SC
Instructed by:
Symington & De Kok
BLOEMFONTEIN

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