

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: HCA64/2023

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

DATE..... SIGNATURE.....

In the matter between:

DEVENCO INVESTMENTS 21 (PTY) LTD

APPELLANT

And

WHITE HALL TRADING AND PROJECTS 64 CC

FIRST RESPONDENT

R. MAAKE

SECOND RESPONDENT

JUDGEMENT

Deane AJ

Introduction

1. This is an opposed appeal against the judgment of the Magistrate's court, Tzaneen, delivered on 4 February 2022.
2. The Appeal application is premised on eight grounds as listed in the Notice of Appeal.¹
3. Together with this application is an application for the late compliance with Rule 50(4)(a) of the *Uniform Rules of Court*.
4. Having considered the application for condonation and the applicable principles, this court granted condonation as applied for.

Background Facts

5. The Appellant instituted action against the First and Second Respondents (Respondents) for arrear rentals of a written lease agreement attached to the summons marked Annexure "A".
6. The amount claimed by the Appellant is R196 971.90.
7. The Respondents are denying liability on the Appellants' claim and raise a defence that they did not sign the lease agreement on which the Appellant is relying to wit: Annexure "A" of the summons. The Respondents allege that Annexure "A" is not the document which the Second Respondent signed.
8. The Second Respondent also submits that he only signed Annexure "RM1" on a temporary basis in order to secure the premises for the church, Holy Ghost Embassy NPC.

¹ Record: p 283.

9. It is not disputed that when the Second Respondent signed Annexure “RM1” the unit number of the premises and the period of lease agreement were still left blank and not completed.
10. The blank spaces on Annexure “RM1” were said to be completed by one Mr De La Rey (De La Rey), a director of the Appellant.
11. The church, Holy Ghost Embassy NPC was registered as a nonprofit company on 01/09/2015.
12. Holy Ghost Embassy NPC took occupation of the property of the Appellant on 1 May 2016.
13. The Second Respondent locked the premises with a chain and padlock when they were busy moving out of the said premises.
14. The Second Respondent made no payments to the Appellant and all payments received in terms of the premises were made by Holy Ghost Embassy NPC.

The Appellant’s Case

15. In terms of a written lease agreement, Annexure marked “A”, the Appellant let to the First Respondent, premises from the 1st of May 2016 for a 5 (five) year period at an initial rental of R21 929.82, which amount would escalate on the 1st of May 2017 and each year thereafter by 10%.
16. The Appellant submits that the Second Respondent represented the First Respondent and bound himself as co-debtor for any liabilities of the First Respondent.
17. It is also known that the premises are used for commercial purposes and do not serve as residential accommodation for anyone.

18. In terms of the lease agreement, all monies payable by the First Respondent to the Appellant were payable monthly in advance on the first day of every calendar month, free of deduction and set off.
19. In material breach of its obligations the First Respondent failed to maintain regular payments. Accordingly, the First Respondent is indebted to the Appellant.
20. As a result of the said breach, and in terms of Clause 15 of the Lease Agreement, the Appellant as Lessor had the right to cancel the lease and resume possession of the premises.
21. In terms of Clause 18.2 of the Lease Agreement, the First Respondent is liable for the legal costs on the attorney and client scale.
22. The Second Respondent as co-debtor is liable jointly and severally with the First Respondent for payment of the aforesaid amounts.

The Second Respondent's Case

23. Holy Ghost Embassy NPC is a church organisation and it wanted to establish itself in Tzaneen.
24. In order to secure the premises which are the subject of the Appellants claim, it was agreed between Pastor Steven, representing the Holy Ghost Embassy NPC, De La Rey who was representing the Appellant (Appellants representative), and the Second Respondent representing White Hall Trading and Projects CC, that whilst they were awaiting the church papers required, the First Respondent will conclude the lease agreement with the Appellant.

25. It was further agreed that the duration of the lease agreement with the First Respondent will be left open and shall be inserted when Holy Ghost Embassy NPC replaces the First Respondent as the lessee.²
26. The lease agreement, which the Appellant uses as a basis of his claim, is not the original lease agreement that the First Respondent concluded with the Appellant.
27. When the documents of Holy Ghost Embassy NPC became available same was forwarded to the Appellant's representative.
28. There was an oral agreement with the Appellant's representative that the original lease agreement should be varied so that the agreement should be between the Appellant and Holy Ghost Embassy NPC.
29. The Appellant's representative undertook to vary the lease agreement accordingly and on 22 February 2017 the Appellant's representative emailed the Second Respondent the new (amended) lease agreement between the Appellant and Holy Ghost Embassy NPC.³
30. The Appellant's representative forwarded the new lease agreement to have it signed by the representative of Holy Ghost Embassy NPC.
31. The Second Respondent could not sign and send the amended lease agreement to the Appellant's representative as he was cited as the representative of Holy Ghost Embassy NPC and consequently requested the Appellant's representative to use one of the pastors as a representative of Holy Ghost Embassy NPC, and not the Second Respondent himself.⁴

² Record: Annexure B, p 27.

³ Record: Annexure C, p 28.

⁴ Record: Annexure E, p 30.

32. The Second Respondent accordingly denies that he is contractually indebted to the Appellant as the lease agreement is between the Appellant and Holy Ghost Embassy NPC, not between the Appellant and the Respondents.

First Ground of Appeal

33. The first ground of appeal is that the Magistrate erred in failing to indicate clearly whether it was her finding that:

“5.1. No lease agreement ever came into existence between the parties; or

5.2. That a lease agreement did come into existence on a temporary basis but lapsed at some point in time.”

34. It is the Appellants submission that the Respondents amended plea,⁵ more specifically paragraph 2 thereof, indicate that the Respondents admitted that they concluded a lease agreement with the Appellant. Accordingly, the Respondents were liable for rent until such a time as it was found that the lease agreement expired.

35. The Respondents admit that they concluded a lease agreement with the Appellant, but they deny that the annexed copy marked “A” is the one signed by the parties. The Respondents further submit that the annexed copy marked “A” has been amended after signatures without the Respondents consent. The lease agreement signed by the Second Respondent on behalf of the First Respondent is the one marked Annexure “RM1”.

⁵ Record: pp 64-67.

36. The Respondents further submit that they concluded the agreement not in their interest but in the interests of Holy Ghost Embassy NPC, (a church where the Second Respondent was a member at the time of signing the agreement).
37. When the matter came before the Magistrate, the Magistrate, correctly concluded that “*the only question that the court must decide on in this matter is, what were the intention of the parties at the time they entered into the contract*”.⁶
38. From the papers before me and after hearing oral submissions, the lease agreement marked Annexure “C” shows that the Appellant prepared an amended agreement. This Annexure “C” indicates that the name reflected therein is that of the church, Holy Ghost Embassy NPC. It also shows that the names of the Respondents have been struck out, purportedly by the Second Respondent, with an instruction that states “please fix” and for a request to call Pastor Steven “on this matter”.⁷
39. Looking at the record in its entirety, it is clear that this amended agreement is meant to reflect the intention of the parties. It is the Appellants representative who inserted the name of Holy Ghost Embassy NPC as the lessee with the *domicilium citandi* at Unit 36 Savannah Block B, Silverlakes, Pretoria.⁸
40. This is also clear from the record of the arbitration proceedings.
41. Furthermore, the evidence of the Second Respondent wherein he testified that he was requested by the church to secure the premises for Holy Ghost Embassy NPC on a temporary basis, was corroborated by two witnesses Mr Oubaas Sabela and Pastor Steven Mamba.

⁶ Record: p 280, para 26.

⁷ Annexure C: p 28.

⁸ Annexure C, para 13.

42. In addition, the wife of the Second Respondent, testified that she was a member of the church since 2016, whose head office was in Pretoria with a branch in Tzaneen. She assisted Holy Ghost Embassy NPC with the administration of the Tzaneen branch, and she ensured that payments for the rental of the premises were done on a monthly basis after they received the monthly invoice from the Appellant. The payments were made using the bank account of Holy Ghost Embassy, Tzaneen.
43. To this effect the bank statements were used as evidence during the proceedings, clearly indicating that the premises paid for by the church, Holy Ghost Embassy NPC, Tzaneen, were utilised for church related interests.
44. When one has regard to the e-mail communications on record,⁹ it becomes even more clear that both the Appellant's representative and the Second Respondent had the necessary intention and agreed to vary the agreement.
45. The e-mail communications are clearly an attempt to vary the agreement in line with the original intention of the parties.
46. In *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and Another*,¹⁰ the Supreme Court of Appeal (SCA) confirmed the legal validity of the use of an e-mail and an ordinary signature when varying or cancelling a contract which contains a non-variation clause. The SCA also confirmed that the legal requirement for an agreement to be in writing, with the exception of a contract that is required to be reduced to writing, is satisfied if it is in the form of a 'data message' as defined in *Electronic Communications and Transactions Act 25 of 2002 (ECTA)*. In this case the court ruled that a contract was lawfully cancelled through

⁹ Annexures D29, E30, E

¹⁰ (725/13) [2014] ZASCA 178; 2015 (2) SA 118 (SCA).

e-mails sent between the parties. The judgment has set a precedent in the validity of the cancellation of a written agreement via e-mail.

47. Furthermore, section 22(1) of the *ECTA* provides that “[a]n agreement is not without legal force and effect merely because it was concluded partly or in whole by means of data messages”. This provision applies to e-mail correspondence as well as other data generated, sent, received, and stored by electronic means. Therefore, a formal requirement for an agreement, such as that the contract be in writing is satisfied if it is in the form of an e-mail.
48. There is therefore no question about the legal validity of varying or amending an agreement via electronic messages like e-mail. However, the amendments as required and requested by the Second Respondent were not affected accordingly.
49. Additionally, the Second Respondent testified that after he sent the documents to De La Rey to amend the lease agreement (Annexure “C”) to have his name and the First Respondent’s name removed, it was still not done. The Second Respondent then called De La Rey to request that his name be removed as a party to the agreement, but this too was not complied with.
50. The Second Respondent also explained that he went to Pieter Human’s offices to uplift the original contract, and this contract that he uplifted did not have his signature nor the unit number and duration of the lease on it. The evidence indicates that the Second Respondent went to the office of the agent to uplift the contract since he did not see the one signed and amended by De La Rey until he saw it annexed as Annexure “A” to the summons.

51. Looking at the Annexure “A” lease agreement, the names of the Respondents have been inserted therein and clearly do not take into account the intention of the parties at the time that the lease agreement was initially concluded.
52. It is therefore clear that the Appellant places reliance on a lease agreement that it had unilaterally amended. The original lease agreement signed by the Second Respondent is different from the copy the Appellant has annexed to his Particulars of Claim, in that the Appellant inserted in the space left blank the duration of the lease agreement.¹¹
53. Furthermore, the Respondents submit that the lease agreement concluded and/or signed by the Second Respondent was never brought before court by the Appellant due to the reason that the agreement relied upon by the Appellant, which was attached to the summons as Annexure “A” is not the one the Second Respondent concluded and/or signed.
54. Annexure “A” was amended after the Second Respondents signature and certain information was added without the Second Respondents knowledge; therefore, it cannot be said that there has been a meeting of the minds.¹² It is also apparent that the Second Respondent did not sign the amendments made by De La Rey. At the time of the Second Respondents signature, the agreement did not have the duration and the description of the leased property. This is clear from Annexure “RM1” to the Respondents amended plea.
55. It is also undisputed that all payments for rental were made by Holy Ghost Embassy NPC.
56. The Magistrate correctly found that a lease agreement existed, but it was not for the benefit of the Respondents and/or not intended to bind the Respondents contractually but rather it was for the sole purpose of securing the premises on behalf of Holy Ghost Embassy NPC.

¹¹ See Annexure A to the Particulars of Claim.

¹² Respondents Heads of Argument: para 4.

Second Ground of Appeal

57. The Appellants second ground of appeal is that the Magistrate erred in finding that it was an undisputed fact that Pieter Human acted as an agent for the Appellant and that the Magistrate omitted the extremely important facts, namely:

“38.1 that a valid lease agreement was concluded between the parties, and

38.2 that the lease agreement concluded between the parties was never replaced by another lease agreement with different parties.”

58. Looking at the evidence before me, De La Rey, the one witness for the Appellant, stated that:

“I am 74 years old and director of the Plaintiff. I have personal knowledge of the facts of the matter. Plaintiff rented out a factory premises at Loretta Park. A Real Estate Agency of Realty Elk Pieter Human found a tenant. The signature of tenant was done at Real Estate Agency the one to be used is Annexure A..... The lease agreement, when it was filled in the period was not filled in. I phoned Pieter Human and he said that the lease period is indeed five years. Mr Human was acted as a representative of the lessee.”¹³

59. From the Appellants own version Pieter Human was an agent of the Appellant.

60. It is therefore correct that the Magistrate found that it was an undisputed fact that Pieter Human acted as an agent for the Appellant.

¹³¹³ Record: p 78, lines 1-10.

Third Ground of Appeal

61. As its third ground of appeal, the Appellant submits that the Magistrate erred in finding that to establish what the *consensus ad idem* of the parties was at the time of entering into the contract, it was of utmost importance to look at the discussion between the Second Respondent and the agent, Pieter Human.

62. When one has regard to the record, the Magistrate indicates the following:

*“(27) See AJ Kerr, The Principles of the Law of Contract (sixth edition) page 3 where it is written:because the parties themselves (or their agents) form that contractual legal bond, that intention is of fundamental importance.....”*¹⁴

63. The Magistrate then subsequently goes on to reference a few case laws.¹⁵

64. Based on the principles referred to above by the Magistrate, she was correct in concluding that it was important to understand what the intention of the parties at the time of entering into the contract or agreement was. The discussion between the Second Respondent and the agent is where the meeting of the minds of the parties was.

65. It is very clear that De La Rey did not personally negotiate and/or conclude the agreement with the Second Respondents but did that through Pieter Human as his agent.

66. Furthermore, and in support of this third ground of appeal, the Appellant submits *“that it is clear from the record and the Defendant’s amended plea, more specifically paragraph 2*

¹⁴ Record: p 280, para 27.

¹⁵ Record: p 280, para 28.

thereof that the Defendants admit that they concluded a lease agreement with the Plaintiff and attach the admitted lease agreement as Annexure RM1 to its amended plea.”¹⁶

67. It must be noted that it is not disputed that a contract was entered into.

68. However, Annexure “RM1” to the Respondents amended plea and Annexure “A” to the summons are two different documents.

69. The record clearly indicates that the Appellant’s claim is not based on Annexure “RM1” but rather on Annexure “A” to the Particulars of Claim.

70. The Second Respondent however denies that the annexed copy marked “A” is the one signed by the parties. The Second Respondent submits that that Annexure “A” has been amended after signatures without the Respondents consent, and which is the issue in dispute.

71. I am in agreement that Annexure “A” has been unilaterally amended and without the consent of the Second Respondent.

Fourth and Fifth Grounds of Appeal

72. The Appellant submits that the Magistrate erred in finding that the failure by the Appellant to call Pieter Human as a witness was detrimental to the Appellant’s case.

73. The Appellant submits that it was not necessary to call Pieter Human to testify since the Respondents already admit that they concluded a lease agreement with the Appellant.

74. In addition, the Appellant submits that the Magistrate erred in finding that in the absence of Pieter Human’s evidence she was not even going to evaluate the testimony of De La Rey.

¹⁶ Appellants Heads of Argument: p 12, para 25.2.

75. In looking at the Magistrates' reasons for same, it is indicated that:

*"..... the fact that the agent, Mr Pieter Human was not called by the Plaintiff is absolutely detrimental to the case of the Plaintiff. Only the Defendants and their witnesses gave an explanation of what transpired at the offices of Mr Human (the agent for the Plaintiff). What was actually discussed and agreed upon prior, the signature of second Defendant placed on RMI, are of utmost importance. Placed before the court is only the version of the Defendants and nothing from the side of Plaintiff in respect of the negotiations."*¹⁷

76. The court went on to state that:

*"...On the Plaintiff's version, he, only two months after the premises was occupied, met with the second Defendant and others in order to discuss alterations at the premises..... Plaintiff in person was never part of any discussions before an agreement was reached. Plaintiff was represented by his agent, Mr Human. The only person on the side of Plaintiff to explain what was negotiated was Mr Human, and the Plaintiff elects not to call him to testify."*¹⁸

77. In evaluating the evidence before it, the Magistrate in the judgment states that:

"the four (4) witnesses for the Defendants corroborate each other in their testimonies. First witness for Defendants explained that he went to the second witness for the Defendants to ask for his assistance to make use of his close cooperation to secure

¹⁷ Record: p 281, para 34.

¹⁸ Record: p 281, paras 35-36.

the premises for the church. Second witness only came to the negotiations because of the request of Mr Rodwell Oubaas Sabela, (first witness for the Defendants),”¹⁹

78. Furthermore, the Magistrate writes that:

“.... the first Defendant’s witness acted in this manner on advice of Mr Pieter Human, the agent of the Plaintiff.....Never did second Defendant made any payments to the Plaintiff. All payments were made by the Holy Ghost Embassy NPC.”²⁰

79. Looking at the reasoning of the Magistrate in light of the evidence adduced, indeed, the court was only faced with the version of the Respondents and nothing from the side of the Appellant in respect of the negotiations.

80. Due to the fact that the lease agreement, Annexure “A” to the summons, was disputed by the Respondents it was indeed of utmost importance that the person who represented the Appellant during the signature and/or conclusion of the Annexure “A” be called to testify in order to clarify the issues in dispute.

81. The evidence is that the Second Respondent admitted that indeed a contract was signed by the Second Respondent at the offices of Pieter Human, but that Annexure “A” is not the one that was signed by the Second Respondent. It was therefore vital that the agent be called to testify. The failure to do so meant that on the evidence before the Magistrate, the version of the Respondents was more probable than not.

¹⁹ Record: p 281, para 31.

²⁰ Record: p 281 paras 32-33.

82. Regarding the exclusion of De La Rey's evidence, from the record De La Rey only met with the Second Respondent and other members of Holy Ghost Embassy NPC two months after the premises were already occupied.

83. It is not disputed that De La Rey was not personally a part of the discussions or negotiations before an agreement was reached.

84. In looking at what the real issue in dispute was before the Magistrate, the weight of De La Rey's evidence to the dispute was therefore questionable and could be rejected by the Magistrate.

Sixth and Seventh Grounds of Appeal

85. The Appellant submits that the Magistrate erred in finding that the Second Respondent never acted on his own behalf and in finding that the Appellant failed on a balance of probabilities to prove its case.

86. The Appellant avers that from a reading of the agreement (Annexure RM1) it is clear that the Second Respondent bound himself as surety and co-principal debtor together with the Second Respondent.

87. Looking at the evidence before the Magistrate, Pastor Stevens, one of the four witnesses for the Respondents, he corroborated the evidence of the Second Respondent, wherein the Second Respondent indicated that he had not signed the agreement for and/or on his own benefit and/or behalf, but rather the signature was for the sole purpose of securing the premises on behalf of Holy Ghost Embassy NPC. This was done because the Second Respondent was advised by the agent, Pieter Human, that the owner prefers juristic persons to lease his premises rather than natural persons.

88. It was also not disputed that the Second Respondent never made any payments to the Appellant and that all payments were made by Holy Ghost Embassy NPC, a clear indication that the Second Respondent did not sign the agreement for his own benefit.

89. The evidence was also that the premises were indeed leased and/or utilised by the church, Holy Ghost Embassy NPC and not by the Respondents.

90. It is therefore clear that the evidence overwhelmingly favours the Respondents herein.

Eighth Ground of Appeal

91. The final ground of appeal is that the:

“Magistrate erred by totally ignoring the Second Respondents allegation in its affidavit in support of its application in terms of Rule 28A(3)(b) dated 13 April 2018 where the Second Respondent states in paragraph 6.3 and 6.4 that Holy Ghost Embassy NPC requested him to use his close cooperation, Whitehall Trading and Project 64 CC, to secure the lease for the benefit of the Church and undertook to pay rent and or all financial requirements in the lease agreement, to which he agreed and subsequently used his close corporations name and also signed as surety and co-principal debtor”.²¹

92. Upon the evaluation of all the evidence the Magistrate concludes that:

“in the evaluation of Mr De La Rey and also the testimony of the first, second and fourth witness of the Defendants, it were never explained that the second Defendants witness went to any meeting with Mr Human or Mr De La Ray alone, without being

²¹ Appellant Heads of Argument: p 19, para 30 and Record: p 287, para 8.

*accompanied by members of the church. This shows that second Defendant never acted on his own behalf - he only accompanied the main role players - the members of the church”.*²²

93. The court went further and held that *“the intention of the parties present in negotiation is clear: That intention of the second Defendant was only to help the Church on a temporary basis to secure the premises and that another lease agreement will follow between Plaintiff and Holy Ghost Embassy NPC”.*²³

94. It is therefore clear that the Magistrate considered the issue and eventually found in favour of the Respondents. Once again it must be noted that the Respondents did not deny signing a contract, but they dispute that the contract attached to the summons and upon which the Appellant is relying on as the basis of its claim is not the one signed by the Second Respondent.

95. In all the above, the Appellant has failed to prove on a balance of probabilities and to show cause why the Magistrate’s decision should be set aside or replaced. Consequently, the appeal stands to fail, and the following order is made;

ORDER:

1. The Appeal is dismissed with costs.

²² Record: p 282, para 41.

²³ Record: p 282, para 42.

T DEANE
ACTING JUDGE OF THE HIGH COURT,
POLOKWANE; LIMPOPO DIVISION

I AGREE

KGANYAGO J
JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

FOR THE APPELLANT : Adv WM Dreyer
INSTRUCTED BY : Stewart Maritz Basson
FOR THE RESPONDENTS : TF Mamitwa
INSTRUCTED BY : TF Mamitwa Attorneys
DATE OF HEARING : 17 May 2024
DATE OF JUDGEMENT : 22nd July 2024