REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG LOCAL DIVISION,
JOHANNESBURG

CASE NO:11112/2012

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

4/04/2014
DATE

SIGNATURE

In the matter between:

E D S PROPERTIES (PTY) LIMITED Plaintiff

and

A J FOURIE First Defendant

J D FOURIE Second Defendant

JUDGMENT

OPPERMAN AJ

INTRODUCTION

[1] Plaintiff's claim against the two defendants is based on a suretyship agreement concluded between it and the two defendants on or about 2 September 2008 in favour of Exact Exporters CC ("**Exact Exporters**"). The suretyship agreement is embodied in a written lease agreement concluded between the plaintiff and Exact Exporters.

[2] At a pre-trial conference held, the parties agreed as follows:

> "*The parties agreed that the two special pleas of the Defendants shall be adjudicated separately. It is recorded that the determination of the two special pleas shall be definitive of the merits of the action, i.e. if the special pleas are upheld the Plaintiff shall have no claim against the Defendants and if the special pleas of the Defendants are dismissed then the merits of the Plaintiff's claim shall be accepted as proved.*"

[3] The parties also recorded:

> "*The parties agreed that the Defendants bear the onus to prove the two special pleas and to disprove the contents of a certificate as contemplated in clause 6.3 of the lease agreement, and that the duty to begin rests upon the Defendants.*"

THE SPECIAL PLEAS

[4] The case pleaded by the defendants was at variance with the case presented by the defendants at the trial. For purposes of comparison, it would thus be instructive to quote the first special plea *in toto:*

> "1. *The Plaintiff's cause of action arises out of a written contract between the Plaintiff (as Lessor) and Exact Exporters CC (as Lessee) annexed as "POC1" to the particulars of claim, and now referred to as "the lease agreement".*

2. *Clause 37 of the lease agreement provides for suretyship as co-principal debtor with the Lessee to the Lessor arising out of or pursuant to the lease agreement, including any renewal thereof.*
3. *The Plaintiff issued summons on the premise that the Defendants have bound themselves as sureties for Exact Exporters CC to the Plaintiff.*
4. *Having regard to the provisions as contained in the addendum to the lease agreement and the lease agreement, a certain Andre Fourie signed as surety* ***and not the Defendants****.*
5. *The Plaintiff instituted action against the wrong parties,* ***neither of whom has signed*** *or accepted the obligations as contained in the lease agreement as sureties; the Plaintiff has been so advised on numerous occasions prior to summons having been issued.*
6. *The Plaintiff's conduct has been malicious since it proceeded to institute action against the defendants having full knowledge that the Defendants are not the correct sureties."* (own emphasis)

[5] In short, the first special plea is that the defendants did not bind themselves as sureties in favour of the plaintiff in respect of the debts of Exact Exporters. The second plea is one of prescription. The defendants pleaded that Exact Exporters' debt became due during or about March 2009 and that summons commencing action was only issued during September 2012, more than three years after the debt arose. However, during argument, counsel for the defendants abandoned this defence in the form pleaded and replaced it with an argument that hinged on the so-called 'third agreement' not providing for the *domicilium citandi et executandi* of the defendants so that service of the summons did not serve to interrupt the running of prescription. I will deal with both the modified version of the first special plea and the modified version of the second special plea (the

prescription defence), both of which hinge on the 'third agreement,' in the appropriate place below.

EVIDENCE PRESENTED

[6] As the parties had agreed that the defendants bore the onus, both defendants testified first whereafter the defendants closed their case. The only witness called on behalf of the plaintiff was Mr Van der Walt.

COMMON CAUSE FACTS

[7] During or about June 2008 the plaintiff and Exact Exporters concluded a lease agreement in respect of Unit No. 7 at 149 Main Road, Pomona ("**the first lease agreement**").

[8] The first lease agreement was replaced with a lease agreement concluded on 2 September 2008 in respect of Units No. 2 and 3 at Pomona commencing on 1 October 2008 and terminating on 30 December 2011 ("**the second lease agreement**").

[9] The second lease agreement provides for the plaintiff as the lessor and Exact Exporters as the lessee. In clause 1.12 the first and second defendants are named as the sureties recording their personal details, inclusive of their identities numbers, postal address and physical addresses correctly.

[10] Clause 37 of the second lease agreement deals with the obligations of the first and second defendants as sureties for and co-principal debtor with Exact Exporters to the plaintiff for Exact Exporter's obligations to the plaintiff arising out of the second lease agreement.

[11] On 24 August 2008 and prior to appending her signature to the second lease agreement, the first defendant received, by e-mail, a copy of the second lease agreement.

[12] Both the first and second defendants were members of Exact Exporters as at date of signature of the second lease agreement.

[13] The second lease agreement was signed by both the first and second defendants as representatives of Exact Exporters and as sureties for the debts of Exact Exporters.

[14] At the beginning of 2009 one Mr Andre Fourie bound himself as surety for the debts of Exact Exporters arising from the second lease agreement.

[15] Exact Exporters breached the second lease agreement by failing to pay the rentals due from March 2009.

[16] During July 2009 a payment of R40 000 was made.

[17] On or about 10 July 2009 the second lease agreement was cancelled and Exact Exporters was called upon to vacate the premises no later than 11 August 2009.

[18] The plaintiff immediately placed boards at the premises and was able to let unit no. 3 on 5 February 2010.

[19] The second lease agreement made provision for a certificate by the auditor of the plaintiff as to the amount owing by Exact Exporters and to the fact that the due date of payment of such amount had arrived. Such certificate would be sufficient and satisfactory proof of the facts therein stated until the contrary has been proved.

[20] Mr Van der Walt, who testified on behalf of the plaintiff, confirmed that Haasbroek Steyn were the auditors of the plaintiff and that the certificate dated 25 February 2014 had been prepared by them. The certificate reflected that a reduced amount was claimed, being the sum of R595 366,52 as opposed to the amount of R611 586,79 claimed in the summons. This was so as a result of payments made by the other surety, Mr Andre Fourie, who had also bound himself as surety and co-principal debtor for the debts of Exact Exporters in respect of the second lease agreement.

[21] Clause 37.3 of the second lease agreement provided that the sureties (the first and second defendants) chose as their *domicilium citandi et executandi* the addresses set out in section "A" of the second lease agreement.

[22] Both the first and second defendants chose 122, 13th Avenue, Beyers Park as their *domicilium citandi et executandi.*

[23] The returns of service of the combined summons and the annexures thereto, reflects that service was effected at the chosen *domicilium citandi et executandi* on 28 March 2012.

THE THIRD AGREEMENT

[24] Without foundation on the pleadings or in any document, both Mr and Mrs Fourie testified that at the beginning of 2009 they, together with Mr Andre Fourie and Mr Van der Walt had met and it was agreed that Mr Andre Fourie and Exact Exporters Couriers CC ("**Exact Exporters Couriers**") would "take over" the obligations of Exact Exporters and

the two defendants obligations ('**the third agreement**'). No evidence was produced as to the nature of the discussions, how this third agreement was to be implemented nor why it had not been reduced to writing.

[25] Mr Van der Walt denied that such a meeting occurred and denied the conclusion of the third agreement. I am required to consider whether, in the light of the whole agreement clause in the document relied upon by the plaintiff, evidence of an oral agreement, is admissible.

[26] Whether the parol evidence rule is regarded as a rule of evidence or as a rule of substantive law,[1] it has been received into South African law. In *Purchase v De Huizemark Alberton (Pty) Ltd t/a Bob Percival Estates*, 1994 (1) SA 281 (WLD) at 283I-J, Mohamed J, with whom Goldstein concurred, restated the position thus:

> "It is perfectly true that when a jural act is incorporated in a document it is not generally permissible to adduce extrinsic evidence to contradict its terms and, therefore, that, when a transaction has been reduced to writing, the writing is regarded as the exclusive memorial of the transaction, and no other evidence may be given to contradict, alter, add to or vary its terms."[2]

[27] At the time of the alleged conclusion of the third agreement (being at the beginning of 2009) the second lease agreement was still very much alive (it was to run from 1 October 2008 until 30 September 2011).

[28] Paragraph 35.2 of the second lease agreement provides:

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1 Principles of Evidence, 3rd ed., Schwikkard and Van der Merwe, p 38

2 See too *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47; *National Board (Pretoria) (Pty) Ltd and Another v Estate Swanepoel* 1975 (3) SA 16 (A) at 26A; *Rielly v Seligson and Clare Ltd* 1977 (1) SA 626 (A) at 637D.)

> "No amendment or cancellation of this lease or any provision or terms thereof shall be binding unless recorded in a written document signed by the parties."

[29] It is common cause that the third agreement was not reduced to writing. The third agreement purports to cancel the second lease agreement.

[30] It is trite that evidence to introduce the third agreement would be inadmissible.[3] See *Brisley v Drotsky*, 2002 (4) SA 1 (SCA) which reconfirms the principles enunciated in *Shifren (*Footnote 3).

[31] It is thus clear that evidence to contradict the existence of the second lease agreement should be excluded.

[32] Counsel for the defendants was invited to provide authority for the counter position. This invitation was not taken up.

[33] I accordingly hold that evidence relating to the existence and content of the third agreement, is inadmissible, but even if that evidence were admitted, I would, for the reasons set out below, reject the defendants' version in regard to the third agreement.

FIRST SPECIAL PLEA

[34] The first special plea is quoted above.

[35] In it the defendants deny signing the second lease agreement, in paragraphs 4 and 5 of the first special plea. Yet, not only was the signature of the defendants admitted during the course of the trial,

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3 *SA Sentrale Ko-Op Graanmaatskappy Bkp v Shifrin* 1964 (4) SA 760 (A); See too *Brisley v Drotsky* 2002 (4) SA 1 (SCA), *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* 2009 (1) SA 196 (SCA); *Kovacs Investments 724 (Pty) Ltd v Marais* 2009 (6) SA 560 (SCA); *SH v GF and Others* 2013 (6) SA 621 (SCA)

they both conceded that it governed the relationship between the parties for the period September 2008 until March 2009. This *volte face* was cause for doubt as to the defendant's credibility; as was the fact that the third agreement was never pleaded. The plaintiff was required to deal with this third agreement for the first time at the hearing of this matter. I am, for purposes of the analysis, assuming that the evidence relating to the content of the third agreement were admissible. I have already found it is not, the issue now though is whether it is both acceptable and credible.

Evaluation of the evidence relating to the third agreement

[36] The parties agreed that the defendants bore the onus in respect of both special pleas.

[37] Plaintiff's witness, Mr Van der Walt denied the conclusion of the third agreement and even denied attending a meeting where such terms were discussed. He said that if an agreement had been cancelled, he would have reduced such cancellation to writing. That this is indeed the manner in which he conducts business is borne out by clause 38 of the second lease agreement which records the cancellation of the first lease agreement. There is no reason to doubt that he would have done the same if the third agreement had been concluded.

[38] Defendant's counsel put to Mr Van der Walt that he had Initially only instituted action against Mr Andre Fourie as surety of Exact Exporters and only much later had pursued the first and second defendants. This, he did, so the accusation went, because of the existence of the third agreement. Mr Van der Walt responded that he had decided to

pursue Mr Andre Fourie first as he had held the view that Mr Andre Fourie had held more assets and that it was more likely to recover the debt owing to the plaintiff from Mr Andre Fourie. I find nothing implausible in this explanation. He was fully entitled, as a prudent businessman, to pursue the party most likely to extinguish the debt owing to the plaintiff.(Mr Andre Fourie would presumably, as a surety who had made payment in part of the principal debtor's debt, have his rights as against his co-sureties. The net result for the two defendants in this action would thus be the same.)

[39] By contrast, the defendants testified about the third agreement and the meeting in very vague terms. They stated that the business of Exact Exporters was to be "taken over" by Exact Exporters Couriers and that this was agreed to with Mr Andre Fourie in the presence of Mr Van der Walt. As pointed out hereinbefore, not only was this version at variance with what was pleaded but it was also raised for the first time at the trial. Not one written document was produced to corroborate the existence of the third agreement which plainly was an important one in a number of respects, not least of which was that, if the defendants are to be believed, it might have included a request to be released from their suretyship obligations, a request for the cancellation of the second lease agreement, to name but a few.

[40] I thus find that the defendants failed to discharge the onus which rested upon them. Insofar as my assessment of the probabilities might be wrong, and that the probabilities are equal, then, in such event, the onus would shift the scales in favour of the plaintiff.

SECOND SPECIAL PLEA

[41] The defendants pleaded that the debt, in terms of the second lease agreement, became due during March 2009.

[42] They pleaded that the summons commencing action was served during September 2013 and that any debt arising out of the second lease agreement (and the suretyship agreement) had thus prescribed.

[43] It bears mentioning that subsequent to the service of the summons on the *domicilium citandi et executandi* on 28 March 2012, the plaintiff caused the summonses to be served on the defendants at their residential address on 7 August 2012. It is presumably the second service to which reference is made in the plea embodying the prescription defence.

[44] Be that as it may, counsel for the defendants accepted that there was proper service on the defendants at their *domicilium* address on 28 March 2012. She argued that the third agreement did not make provision for a *domicilium* address and because the third agreement cancelled the second agreement, no *domicilium* address had been chosen. Accordingly, so the argument ran, service on the *domicilium citandi et executandi* had no legal effect.

[45] I have already found that no reliance can be placed on the third agreement, that the second lease agreement and the suretyship which it contained remain the foundation of the parties' legal relations, and this argument must accordingly also fail.

CONCLUSION

[46] I accordingly find that both special pleas fall to be dismissed with costs. The parties agreed that if the special pleas of the defendants were to be dismissed, then the merits of the plaintiff's claim would be accepted as proved. This, notwithstanding, the plaintiff relied on a certificate of indebtedness, the content of which was not disputed.

[47] I accordingly make the following order: Judgment is granted against the first and second defendants jointly and severally, the one paying the other to be absolved, for:

1. Payment in the amount of R595 366,52;
2. Interest thereon calculated at the rate of 15,5% from 31 January 2010 to date of final payment;
3. Costs of suit.

T OPPERMAN

Acting Judge of the High Court

Heard: 26 February 2014

Judgment delivered: 4 April 2014

Appearances:

For Plaintiff: H H Cowley

Attorneys: Van Rensburg Schoon Inc

For First and Second Defendants: Adv. V Olivier

Attorneys : Meijer Attorneys