

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

Case No.: 57910/2011

13/6/2012

In the matter between:

EDWARD ALAN WALLACE N.O
ROUX PETRUS JOHANNES GEBER N.O.
DIRK LE ROUX N.O
CHARLES FOURIE N.O

1 st Plaintiff	DELETE WHICHEVER IS NOT APPLICABLE
2 nd Plaintiff	(1) REPORTABLE YES/NO
3 rd Plaintiff	(2) OF INTEREST TO OTHER JUDGES: YES/NO
4 th Plaintiff	(3) REVISED: YES/NO
DATE	SIGNATURE
13/06/2012	[Signature]

and

WOMAN AFFAIRS BEAUTY SALON CC	1 st Defendant
DAVID BENJAMIN SITHOLE	2 nd Defendant
SHARON SHIRLEY SITHOLE	3 rd Defendant

JUDGMENT

MNGQIBISA-THUSI J:

[1] In its notice for summary judgment against the defendants, the plaintiffs, as trustees of the Karenpark Property Investment Trust ("the trust"), seek on behalf of the trust, an order on the following terms:

1.1 payment of the sum of R 200 486.33;

- 1.2 interest on the sum of R 200 486.33 at the rate of 2% per month, alternatively, 15.5% per annum *a tempore morae to date of final payment*;
- 1.3 costs on an attorney and client scale.

[2] On 11 August 2008 the first plaintiff, acting on behalf of the trust and the first defendant, represented by the third defendant, concluded a lease agreement in terms of which the trust agreed to lease certain premises to the first defendant. The lease was for period 11 August 2008 to 30 November 2012.

[3] The second and third defendants signed a deed of suretyship with the trust, binding themselves as sureties and co-principal debtors for the debts of the first defendant.

[4] It is common cause that:

- 4.1 in early 2009 the first defendant fell into arrears with its rental payments;
- 4.2 on 13 October 2009 the trust had sent the first defendant a final letter of demand for payment of rent accrued in the amount of R66 932.94.

[5] On 10 October 2010 the trust issued a summons which was served on the defendants at their domicilium addresses on 13 October 2010 in which the trust was claiming payment of an amount of R 211 486.33 plus interest which was outstanding rent for the period June 2009 to October 2011.

[6] The defendants filed a notice to defend. The plaintiff instituted summary judgment. The defendants filed their opposing affidavit late and are seeking to have this affidavit admitted. The attorney for the defendants has filed an affidavit giving an explanation for the late filing of the defendants' affidavit. I am of the view that the explanation given is reasonable and, in view of the drastic nature of summary judgment proceedings, I am satisfied that it would be in the interest of justice for the defendants' affidavit to be admitted.

[7] The defendants have raised the following points *in limine*:

7.1 That although the plaintiff's are claiming monthly arrear rental over a period of time, its verifying affidavit in support of summary judgment confirms the amount owed for the total owed, instead of confirming and verifying amounts for each month.

7.2 That the deponent to the affidavit in support of the summary judgment application only verified and confirmed the amount owed only in relation to the first defendant and not with regard to the second and third defendant.

[8] The points *in limine* raised by the defendants are at the least technical have no substance. The deponent to the affidavit in support of summary judgement does not necessarily have to verify each and every moth owed. It is clear and by their own admission the defendants have been in default of their rental payments for over a period of time. It is clear that the amount claimed by the plaintiffs is for the whole period of default. Further it is not necessary that the

deponent to the verifying affidavit to have confirmed and verified the amount owed for each defendant. The claim against these two defendants is based on and dependent on the first defendant's indebtedness. The second and third defendants. Therefore the points *in limine* raised by the defendants ought to fail.

[9] In its affidavit opposing the granting of summary judgment, the defendants allege that they have a bona fide defence against the plaintiffs' claim and that they are not opposing summary judgment solely in order to delay the plaintiffs claim.

[10] The defendant is opposing the granting of summary judgment on the following grounds:

10.1 that the plaintiffs' are estopped from claiming part of the amount in arrears

10.2 that by the plaintiffs accepting rentals after it had sent the final letter of demand, the plaintiffs had waived their right to claim under the agreement whatever it alleges it is owed.

[11] It was submitted on behalf of the defendants that after summons were issued, the defendants had concluded an oral agreement with two employees of the trust. The terms of this oral agreement was that if the defendants paid 50% of the money owed, the trust would waive its rights to the remaining balance of 50% of the amount owed.

[12] It is the contention of the defendants that because of the alleged oral agreement, the plaintiffs' were estopped from bringing this application.

Further, it is contended that because the plaintiffs had waived their rights to 50% of the debt owed and had not tried to enforce it for some time, they had waived their claim against the defendants.

[13] The above arguments by the defendants do not hold water in that in terms of the agreement; in particular clause 30 thereof, any variation to the terms of the agreement had to be in writing. Secondly the defendants do not show evidence leading to their conclusion that the two employees with whom they allegedly had an oral agreement with had the authority to waive the trust's rights to what was due to it.

[14] It is apparent that the defendants have not shown that they have a bona fide defence to the plaintiff's claim and I am of the view that their opposition is merely to delay the claim of the plaintiffs.

[15] Accordingly the following order is made:

Summary judgment is granted against the defendants jointly and severally the one paying the other to be absolved, for:

15.1 Payment of the sum of R 200 486.33.

15.2 Interest on the sum of R 200 486.33 at the rate of 15.5% per annum from 13 October 2011.

15.3 Costs on an attorney and client scale.



N. P. MNGQIBISA-THUSI
JUDGE OF THE HIGH COURT