IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 69225/2012

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED. ✓

1/3/16

1/3/16 DATE

SIGNATURE

In the matter between:

SOUTH AFRICAN SECURITISATION PROGRAMME (RF) LIMITED	1ST PLAINTIFF
SASFIN BANK LIMITED	2ND PLAINTIFF
SUNLYN (PTY) LTD	3RD PLAINTIFF

And

ABAKHOLWE COMMUNITY DEVELOPERS	1ST DEFENDANT
MATOME ZACHARIA BOPAPE	2ND DEFENDANT
AVHAKHOLWI ISHIMAEL MAKUNGO	3RD DEFENDANT

JUDGMENT

Fabricius J,

1.

Plaintiffs' claim is that on 18 August 2010 and at Polokwane the Third Plaintiff ("Sunlyn"), and First Defendant, concluded a written rental agreement. The right, title and interest in respect of the agreement was consequently ceded in terms of written agreements of cessions and/or sale agreements in the sequence from Sunlyn to the Second Plaintiff ("Sasfin"), on 29 March 2006 and from Sasfin to the First Plaintiff ("SASP"), on 16 November 2009.

The cause of action in respect of the First Defendant is founded upon its breach of the agreement, more particularly, its failure to make payment of the monthly agreed-upon instalments.

2.

In terms of the agreement First Defendant entered the agreement referred to in Addendum A thereto for a minimum period of 60 months. The agreement would commence on 25 August 2010. First Defendant was required to maintain monthly instalment of R 2 430.07 plus Vat. First Defendant complied with this payment obligation from 25 August 2010 until June 2011. No further payments were made thereafter except for a single payment of R 8 000. According to this agreement, if payment was not made in respect thereof, Sunlyn would be entitled amongst others, to demand payment of the total outstanding balance of the rentals for the entire minimum period plus the notice period referred to, and any other amounts payable by it in terms of the agreement, whether due for payment or not. The agreement also contained a clause that a certificate signed by a manager of any of the Plaintiffs as to the amount of any arrears of rental and the total outstanding balance would constitute prima facie proof of its accuracy.

3.

The cause of action in respect of the Second and Third Defendants is founded in suretyship. This Deed of Suretyship contained a similar clause relating to the mentioned certificate.

4.

Defendants filed Special Pleas together with their plea, and I will deal therewith in more detail hereunder. In essence its defence is that Plaintiffs had not delivered any equipment to First Defendant, and that First Defendant had in fact entered into an agreement with Panasonic Polokwane in respect of such equipment. The particular agreement relied upon by Sunlyn was indeed signed by First Defendant, but the relevant amount had been filled in by the First Plaintiff in the absence of First Defendant and without consensus. In fact, it had only agreed with Panasonic to pay R 700 per month.

5.

Before the commencement of the trial I read the Pleadings and of course the Special Pleas contained in that document and considered that there would be substantial overlapping and repetition of evidence and argument if I were to consider – and decide upon – the Special Pleas prior to hearing all the evidence *in toto*. I therefore ruled, in exercising my power to regulate the proceedings before me, that I would deal with the Special Pleas at judgment stage, after having listened to – and considered – all relevant evidence. Plaintiffs' Counsel then handed up a "trial note" which set out Plaintiffs' case and details of Defendants' plea in some detail. Thereafter, Counsel for the Defendants was asked to make any comment he wished, but declined the opportunity to do so. The trial then proceeded and First Plaintiff called five witnesses. Thereafter, Second Defendant testified and just prior to his cross-examination, Defendants' Counsel rather surprisingly, asked me to recuse myself. His introduction was that he had instructions to do so. Before dealing with his reasons for such an application, I may just add that it is a well-established principle in the context of advocacy, that an Advocate is not merely a mouth-piece

of his Attorney or client. He must use and apply his own judgement, knowledge and experience and advise his Attorney and client accordingly.

See: ***Law of South Africa, Vol 14, Part 2 par. 132 at p.136***

Counsel's application to recuse myself was based on the following:

5.1

There was a perception of bias, because I did not decide their Special Pleas before the trial as a whole, I made comments as to why the whole debate and evidence about the cessions had not been debated and agreed upon at the pre-trial stage as it ought to have been in my view to curtail the proceedings, and to avoid the leading of unnecessary evidence. I also made a comment as to where contracts could be signed in the absence of statutory provisions. It is extremely difficult to understand the second and third points raised in this regard which have no merit whatsoever even in the eye of the most critical observer who would have an interest in the outcome of the proceedings. As far as the first part of the argument is concerned, there is no doubt whatsoever that a Court has full powers to determine its own procedure having regard to the nature of the case before it and the interest of justice

in general, so as to ensure that the proceedings are dealt with as efficiently and expeditiously as possible.

See: ***Western Assurance v Caldwells 1918 AD 262***. This has been a long established principle.

An application for recusal must be based on reasonable grounds, otherwise almost every single proceeding would grind to a halt if Counsel was entitled to request such recusal as a result of any ruling by a Court which seemed to an Attorney or his client to be of an adverse nature. In my view the request for recusal was not based on such reasonable grounds and accordingly it was refused. It borders on the frivolous.

As to the test for recusal, see ***President of the Republic of South Africa v SA Rugby and Football Union 1999 (4) SA 147 CC at 170 - 175***.

6.

Plaintiff's evidence:

It is trite law that a party alleging contract must prove its terms, the relevant *animus*

contrahendi and the breach. In this particular context, Plaintiff called the following witnesses, whose evidence I will briefly deal with:

6.1

Robberts:

He was in the employment of Panasonic Polokwane as a sales representative. Panasonic supplied air-conditioning equipment, Photostat machines, security systems, PA systems and telephone systems amongst others. In August 2010, First Defendant was an existing client which had previously bought an air-conditioning system. He also knew the Second and Third Defendants and in this particular instance, dealt with the Third Defendant. In the line of his duties he often canvassed clients as to any requirements they might have, and accordingly contacted the Third Defendant who told them that system was required. He made an appointment and visited him after discussing the required needs. In the context of this transaction he said that he provided the Defendant with the initial quote of R 700 per month which First Defendant accepted. He also advised him that the relevant credit application would be submitted to various financial institutions and informed him of the amount

required by ABSA Technologies to settle their outstanding balance in respect of a rental agreement which First Defendant already had with that entity. He also advised him that Sunlyn had approved the incorporation of the settlement amount with ABSA Technologies and that the new monthly instalment was calculated at R 2 430.07. That is the amount reflected on the schedule to the Master Agreement of Hire which was signed by the Second Defendant. He had obtained the settlement amount from ABSA, the relevant documentation was prepared by his Office Assistant Wilma, and the completed agreement was signed in the presence of one Myburgh, who had since left the employment of Panasonic. He also attended to the "confirmation of installation" letter which was signed by Second Defendant in his presence, after he had personally taken it to the premises of First Defendant for signature. The main features of his evidence were that he advised Second Defendant that the deal would be placed with a financial institution as Panasonic did not provide finance, and that the deal was eventually placed with Sunlyn. He also told Second Defendant that the new rental amount was indeed R 2 437.07 prior to the conclusion of the agreement, and that the rental agreement together with all the other relevant

documents were signed by Second Defendant after they had been duly completed prior to signature thereof. I had no problem with the testimony of Robberts as his evidence to a large extent was supported by objective documentary proof. The essence of cross-examination was that both Defendants did not know him, and that he was never at First Defendant's offices. In this context I asked Defendants' Counsel whether it was contended that all of his evidence was a fabrication, and Defendants' Counsel confirmed this and stated that Defendants had dealt with a certain Craig, who was the owner of Panasonic.

7.

Herman Smit:

He was also in the employment of Panasonic and testified that Panasonic did not have an equipment rental agreement with First Defendant and that the invoice issued by Panasonic to First Defendant in August 2015 did not relate to any such rental relationship, neither did the four settlement options provided by him to the Second and Third Defendants relate to such an agreement with Sunlyn at all. His

evidence was not challenged. He stated that Panasonic supplies equipment and does the relevant servicing thereof whilst Sunlyn was the particular finance house.

8.

G. Vorster, I. Vorster and M. Tavares:

These witnesses gave evidence about the relevant cessions and last mentioned gave uncontested evidence of First Defendant's breach of the agreement and the extent of the Defendants' indebtedness towards the First Plaintiff.

9.

Defendants' case:

Defendants in their Amended Plea raised three Special Pleas namely, non-joinder, lack of *locus standi* and estoppel. The issues of non-joinder and *locus standi* are founded on the same grounds advanced by Defendants in support thereof namely, that the equipment forming the subject matter of the rental agreement was delivered to the First Defendant by Panasonic and not by any of the Plaintiffs, that the relevant

credit application was made to Panasonic and not to any of the Plaintiffs, and that no relationship existed between First Defendant and any of the Plaintiffs. Further, as at 31 July 2015, Panasonic was still billing First Defendant and amongst others also provided it with four repayment options to settle the debt. Defendants therefore alleged that Plaintiffs should have joined Panasonic as a party to these proceedings and that Plaintiffs also lacked the requisite *locus standi* in any event.

As far as *locus standi* is concerned, sufficiency of interest depends on the facts of each case and there are no fixed rules.

See: ***Gross v Pentz 1996 (4) SA 617 (SCA).***

The general rule is that it is for the party instituting proceedings to allege and prove its *locus standi* and the onus of establishing that issue rests on that party. The rental agreement concluded between the parties ex facie the document itself, establishes the parties thereto: First Defendant and Sunlyn. The Deed of Suretyship clearly records that Second and Third Defendants bound themselves as surety and co-principal debtors for the obligations of First Defendant towards Sunlyn, and not to Panasonic. On 23 August 2010, five days after the conclusion of the agreement,

First Defendant acknowledged and confirmed its obligations towards Sunlyn. This particular document emanates from Sunlyn, and states that the particular equipment had been supplied by Panasonic. Second Defendant signed this document and Robberts was a witness. This document also states that the relevant equipment has been delivered and installed, that there was an escalation agreed upon at 5% per annum, that the initial rental period was 60 months, that the agreed initial monthly rental was R 2 430.07 excluding Vat. Further, it is clear and not disputed that in respect of the period 25 August 2010 to June 2011, First Defendant made payment to SASP in terms of the rental agreement, and not to Panasonic. It is clear from Defendants' approach to this trial that they totally disregarded the fact that the relevant agreement had been ceded that I mentioned. Furthermore, on 7 September 2011, First Defendant wrote to Sasfin (not to Panasonic), describing its financial difficulties and that it had tendered to meet its financial obligations towards Sasfin once its financial position had been restored. In paragraph 8 of this letter, the Second Defendant said the following: "We trust that our submission will be considered and wish to appreciate the good relationship we have with you".

10.

Having regard to the objective evidence, and the unsatisfactory explanations tendered by especially the Second Defendant, the Special Plea of non-joinder and/or absence of *locus standi* is without any merit and is accordingly dismissed. The Plaintiffs had no reason to cite Panasonic as a Defendant and in light of the Defendants' defence to this action, they ought to have issued a third party notice in terms of ***Rule 13 of the Rules of Court***. There was also no explanation given why they did not call the said Mr Craig as a witness.

11.

The defence of estoppel, as set out in the Special Plea, is founded on the grounds that First Defendant was under the impression, by virtue of an alleged misrepresentation made to it by either First Plaintiff or the agent acting on behalf of Panasonic that it was entering into an agreement with Panasonic, that the monthly rental was calculated at R 700 and not R 2 430.07 as claimed by the Plaintiffs.

This special plea is without any merit on the same grounds relating to the first two Special Pleas. The objective evidence that I have referred to is wholly destructive of this plea. The suggestion that the monthly rental agreed upon was in fact for an amount of R 700 is also without any merit. The agreement itself provides for payment R 2 430.07. Five days after the conclusion of the agreement, First Defendant acknowledged and confirmed its monthly obligation towards Sunlyn in this amount, as I have said, for the period of 25 August 2010 to June 2011. First Defendant made payment to the First plaintiff in terms of the agreement, and not to Panasonic. The letter of 7 September 2007, makes no mention whatsoever of an incorrect monthly instalment amount. Also, in the context of the defence of estoppel it is in any event so that a representation by a party unrelated to the party to the litigation is irrelevant. The Special Plea of estoppel founded on misrepresentation was also not properly pleaded and as a whole there is no merit to it at all. Both Second and Third Defendants said a number of times that Panasonic had withheld important facts from them.

12.

Second Defendant also stated that he signed the relevant agreement in blank having only agreed to pay an amount of R 700 per month. Robberts said that the agreement had been completed and that the correct amount had clearly appeared therein. I accept the evidence of Robberts in this context and in the others that I have referred to as it is fully supported by objective documentary evidence. I have also followed the approach set out in ***Stellenbosch Farmers Winery Group Ltd and Another v Martell and Others 2003 (1) SA 11 SCA***, in the context of material conflicting versions. Having regard to the objective evidence that I have referred to, the overwhelming probabilities are that the facts attested to by Robberts are true, and that those attested to are the Second and Third Defendants are not true. Neither of them was able to explain what had happened or what would happen to the amount owed to ABSA once they entered into a new agreement with Panasonic. The evidence given in regard to the relevant cessions were not disputed by the Defendants. It is also clear that there was no allegation that the suretyship document was blank when it was signed.

13.

There is no merit in either of the Special Pleas as I have said or Defendants' defence in general. Plaintiff has clearly proven its claim having regard to the objective facts that I have mentioned. It is clearly inconceivable that First Defendant could have believed that it was paying Panasonic. Clause 16 of the relevant agreement provides for costs to be granted on the Attorney and own client scale and there is no reason why this order should not be made.

The following order is therefore made:

1. **Judgment is granted in favour of the First Plaintiff against the First, Second and Third Defendants, jointly and severally, the one paying the other to be absolved, in the following terms:**

1.1 Payment of the amount of R 146 984.93;

1.2 Payment of interest on this amount at the rate of 14.5% (prime rate plus 6%), per annum, from 11 July 2012 to date of final payment;

1.3 Costs of suit on the Attorney and client scale.

JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Case number: 69225/12

Counsel for the Plaintiffs: Adv S. Aucamp

Instructed by: Smit Jones & Pratt Attorneys

Counsel for the Defendants: Adv L. Letsoalo

Instructed by: Matuba Maponya Attorneys

Date of Hearing: 4 & 5 February 2016

Date of Judgment: 1 March 2016 at 10:00