REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

NORTH GAUTENG DIVISION,PRETORIA

CASE NO: 38538/2013

Reportable: No

Of interest to other judges: No

Revised.

24/8/2016

In the matter between:

SENA TRUCKING CC	Applicant
and	
PANGBOURNE PROPERTIES LIMITED	1st Respondent
JHIPROPERTIES (PTY) LTD	2nd Respondent
STANDARD BANK OF SA LTD	3rd Respondent
CAPITAL PROFUND (PTY) LTD	4th Respondent

JUDGMENT

MSIMEKI J,

INTRODUCTION

[1] The applicant, in this application, seeks final interlocutory relief in terms of which the third respondent is ordered to credit the applicant's bank account held with the third respondent using account number 375515283 with an amount of R2313 671 00.

BACKGROUND

[2] on 24 February 2012 the first respondent, as lessor, and the applicant, as lessee, entered into a Lease Agreement ("the lease") in respect of a property known as […] S. Road Roodekop ("the leased premises"). The applicant leased the property from the first respondent for a period of three (3) years from 1 February 2012 to 31 January 2015. A deposit of R2 313 671 00 in the form of a Bank Guarantee was required. The Guarantee was furnished by the respondent in the format marked annexure "H" to the lease agreement. In terms of clause 12.2 of part B of the lease the first respondent would have the right of applying the whole or portion of the deposit towards payment of rent, water, electricity, gas or other charges, key replacements or any other liability of whatever nature for which the applicant would be liable, including damages attributed to the cancellation of the lease. The deposit would be retained by the first respondent and/or its designated person free from interest until the applicant vacated the property and was completely discharged from its obligations to the first respondent arising from the lease. Clause 37 of part C of the lease provides that the applicant, upon termination of the lease, was to return and redeliver the leased premises to the first respondent in good order and repair and make good and repair at its own cost on demand any damage, breakages or in the alternative, at the first respondent's written election, reimburse the first respondent for the cost of replacing, repairing or making good any broken, damaged or missing articles howsoever caused. In terms of paragraph 2 of annexure "K" to the lease Agreement, an assessment of the property, as a recordal of the condition of the property upon occupation by the applicant to which the premises had to be returned at the end of the lease, had to be undertaken and would form part of the lease.

[3] The lease was concluded as a result of a Storage Agreement and its addendums which the applicant and Hitachi Power Africa (pty) Ltd ("Hitachi") entered into during December 2009. The last addendum seems to have been concluded on 1 March 2012. Clause 3.2 of addendum 3 provides that the lease would have been terminated on 17

February 2015.

[4] The lease was to expire on 31 January 2015. The lease guarantee, too, was to expire on 31 January 2015 or upon payment of the guaranteed amount, whichever event occurred first. On 16 February 2012 the guarantee was extended to 30 April 2015.

[5] At all relevant times, the second respondent acted as the management agent for the first respondent.

[6] The lease was to expire on 31 January 2015 while the Storage Agreement was to expire on 17 February 2015 which would have been seventeen days after the expiry of the lease. This necessitated negotiations between the legal representatives for the parties to have the applicant vacate the property on 17 February 2015. This was achieved. The applicant vacated the property on 17 February 2015.

[7] The applicant concedes that a dispute of fact has arisen between it and the first, second and fourth respondents relating to whether or not the property was properly reinstated. The applicant has further conceded that the dispute cannot be resolved during the course of this application. The applicant, as a result, decided to seek no relief against the first, second and fourth respondents. The applicant has withdrawn the application against them.

[8] The first respondent's attorneys addressed a letter to the applicant which was delivered by hand dated 3 March 2015 calling on the applicant to reinstate the property "as provided for in the agreement of lease within a period of seven (7) days" from 3 March 2015 failing which their client would " in accordance with the provisions of the agreement of lease carry out the required reinstatement works" and then hold the applicant liable for the reinstatement costs.

[9] On 11 March 2015 the applicant's attorney in an e-mail responded and advised the first respondent's attorneys that their client denied any wrongdoing and/or obligation to effect any further remedial measures and that any action which their client intended taking would be opposed.

[10] On 12 March 2015 the second respondent addressed two letters to the third respondent. The first letter enclosed a Letter of claim of Sena Tracking CC; the original Bank Guarantee; and a letter confirming that the second respondent was the management agent for the fourth respondent. The second letter advised the third respondent that the applicant had failed to comply with its obligations in respect of the lease and that the second respondent, the managing agent, requested the third respondent to pay the amount of R2 313 671 00 (two million three hundred Thirteen Thousand and six hundred and seventy-one Rand only) which was then due, owing and payable into their account number […] held with First national Bank in the name of JHI: Capital property Trust Account in terms of **Section** 32. The branch code and the reference number were also furnished.

[11] In short, the applicant's case is that the third respondent issued a lease guarantee for R2 313 671 00 in favour of the first respondent. The guarantee provided that the third respondent was holding the guaranteed amount on behalf of the applicant for the benefit of the first respondent in respect of a lease agreement between the applicant and the first respondent which amount would be paid to the first respondent unconditionally upon receipt by the third respondent of a first written demand. Pursuant to a letter from the second respondent, addressed to the third respondent, (referred to above), dated 12 March 2015, the third respondent made payment as directed. However, it is the applicant's case that payment by the third respondent of the guaranteed amount was erroneous and incorrect.

[12] The applicant, as a result, contends that the payment of the guaranteed amount as directed was in breach of the strict stipulations provided for in the guarantee because:

1. The payment should have been made into the first respondent's account and not the second respondent's accounts.
2. The payment was required to be made at the Sandton branch of the first respondent and not any other branch.

[13] The third respondent raised two points *in limine* in respect of the applicant's case. These are that:

1. The proceedings are inappropriate;

2. There is no cause of action against the third respondent.

[14] Advocate S. Maritz (Ms Maritz), for the applicant, and Advocate J. A. W. Babamia (Mr Babamia) for the third respondent agreed that it would be prudent to argue the whole case and not to deal therewith piecemeal. The Court acceded to the request and the parties argued the matter.

[15] It is noteworthy that the applicant conceded that:

1. A dispute of fact arose on the papers between the applicant and the first, second and fourth respondents which caused it to withdraw the application against them and proceed only against the third respondent.
2. The second respondent acted as managing agent for both the first and fourth respondents.
3. The lease guarantee is a demand guarantee.

[16] Mr Babamia submitted that the applicant's claim against the third respondent should fail because the applicant:

1. Has no right under the guarantee;
2. Has failed to demonstrate any injury or prejudice to itself as a result of the third respondent making payment to the first respondent through the second respondent under the guarantee.
3. Failed to demonstrate the absence of another satisfactory remedy.

According to Mr Babamia, the applicant failed to make out a case for final interlocutory relief and that, as a result, the application at this level of enquiry should fail. Mr Babamia saw no breach of the strict stipulations of the guarantee.

[17] It is imperative to consider the material terms of the guarantee. These are that:

1. The third respondent held the guaranteed amount on behalf of the applicant at the disposal of the first respondent.
2. The guaranteed amount would be paid to the first respondent unconditionally upon receipt by the third respondent of a first written demand.
3. The third respondent's responsibility under the guarantee was principal in nature and was not subject to the lease or any other agreement.

4. The third respondent would pay on demand and would not determine the validity of the demand or become party to any claim or dispute of any nature which any party might allege.
5. Payment under the guarantee would only be made at the Sandton branch of the third respondent against return of the original guarantee by the first respondent or the first respondent's duly authorised agent.
   (my emphasis).

Mr Babamia submitted that the terms of the guarantee clearly reveal that the third respondent's obligation towards the first respondent was wholly independent from the lease agreement. Iagree.

[18] The case of **Setlogelo v Setlogelo 1914 AD 221 at 227** clearly sets out the requisites for the right to claim an interdict. These are:

1. A clear right;
2. Injury actually committed or reasonably apprehended; and
3. The absence of similar protection by any other ordinary remedy.

[19] It is Mr Babamia's submission that the applicant has no right under the guarantee. The applicant, according to him, only caused the guarantee to be issued for the benefit of the first respondent. Further, according to him, the prejudice or absence of a right is determined by substantive law. Only the instruction or mandate to the bank, according to Mr Babamia, regulates the applicant's and the third respondent's rights and obligations towards each other. (See: Oelofse, AN 'The law of Documentary Letters of Credit in Comparative Perspective' pages 112- 113). It is for this reason that the applicant's rights against the third respondent arise from its mandate or instruction to the third respondent and not the guarantee. There seems to be merit in the submission.

[20] Mr Babamia submitted that the applicant does not rely on any breach of its mandate. The papers which, according to him give rise to the guarantee being issued to the first respondent make no reference to any mandate or its terms.

[21] The guarantee, according to Mr Bahamia, relates only to the first respondent and the third respondent and no other party. The two parties under the guarantee are the

only ones which have rights and obligations. Mr Babamia, as a result, submitted that the applicant's reliance on an alleged breach of the guarantee was misplaced. I agree. Only the first respondent, as beneficiary under the guarantee, if any breach was committed, according to him, would have recourse against the third respondent. The applicant, according to Mr Babamia, failed to establish a right to the mandatory interdict and the application as a result should fail. (See: **Lombard Insurance Co Ltd v Landmark Holdings (pty) Ltd and Others 2010 (2) SA 86 (SCA) at [20)).**

[22] Mr Babamia submitted that no injury committed to it, as a result of payments made by the third respondent, pursuant to the demand, was shown by the applicant. Even if the applicant had the right, Mr Babamia added, it still would have been required to demonstrate that the third respondent's breach of the strict stipulations of the guarantee caused injury or loss to it.

[23] Payment to the first respondent by the third respondent, through the second respondent, at a branch other than the third respondents Sandton branch, according to Mr Babamia, could not "conceivably" be said to have caused any loss to the applicant. Even if it had, Mr Babamia further added, that the applicant did not demonstrate it to be the case. There is also no evidence to show that the first respondent, the beneficiary under the guarantee, had complained that it had suffered injury as a result of the payment.

[24] The first, second and fourth respondents have in their answering affidavit confirmed that:

1. the property, the subject of the lease, was sold to the fourth respondent by the first respondent and that the property is still registered in the name of the first respondent which has to ensure that all of the rights of the fourth respondent in and to the property, including those relating to the lease agreement, remain secure until registration of transfer takes place.
2. The second respondent has been appointed as their property managing agent by both the first and fourth respondents and they both authorised the second respondent to, *inter a/ia,* collect rental payments and cash bank guarantees on their behalf.
3. The first respondent instructed the second respondent to demand payment under

the guarantee.

4. The second respondent, in its dealings with the third respondent, at all relevant times, acted as the duly authorised representative of the first respondent.

[25] The applicant, under the circumstances, according to Mr Babamia, failed to show any prejudice, loss or injury to itself, resulting from payment having been made pursuant to the demand. Payment according to him, was made to the beneficiary through the second respondent, its duly authorised agent. This again, according to Mr Babamia, demonstrates that the application falls to be dismissed.

[26] It is incumbent upon the applicant where a final interdict is required to allege and establish that it has no alternative legal remedy. (See: **Erasmus v Afrikander Proprietary Mines Ltd 1976** (1) **SA 950 (W) at 965H).** At page 285 paragraph 4.3, the applicant in its replying affidavit states:

"The disputes as between the Applicant and the First, Second and fourth Respondents will be dealt with in due course, if necessary, by way of action."

This, according to Mr Babamia, is indicative of the fact that the applicant "has an alternative remedy as against the other respondents should it transpire that they were not entitled to the proceeds under the guarantee". This "unwitting concession", according to Mr Babamia, puts an end to the present application. I could not agree more. The applicant, should it, in due course, be found that the first respondent was entitled to the proceeds under the guarantee, could under the circumstances, never be entitled to the return of the guaranteed amount. Mr Babamia, in his submission, concluded that the applicant's application, at this stage, ought to fail as the applicant failed to satisfy the essential requirements for sustaining a final interdictory relief. I agree.

[27] Mr Babamia dealt with the applicant's contention that the third respondent breached the strict stipulations in the guarantee when:

1. It made payment into the second respondent's account, instead of the first respondent's account;
2. It effected payment at a branch other than the Sandton branch of the third

respondent.

Mr Babamia's argument is that:

1. The guarantee does not stipulate that payment should be made into the first respondent's account. This is so.
2. The second respondent, at all material times, acted as the managing agent of the first respondent.
3. There was nothing wrong in the managing agent instructing the third respondent as to how and where to effect payment given the fact that the guarantee is silent regarding the account into which payment was to be made.

[28] It is Mr Babamia's submission that the place where the guarantee was to be called was not a material term. This, because the clause generally-

1. Determines the Court which has jurisdiction in the event of non-payment.
2. Reveals when payment is perfected by a debtor towards a creditor.

Indeed, jurisdiction is not an issue. The first, second and fourth respondents confirm that payment to the creditor's beneficiary has been perfected. I dealt with this above.

[29] The place of payment clause, according to Mr Babamia, was for the benefit of the third respondent and not the beneficiary, the first respondent. The third respondent could have declined payment unless same was made at its Sandton branch. However, there was nothing wrong in discharging an obligation pursuant to a demand as long as the beneficiary was happy to receive performance as demanded and where it preferred. Had the beneficiary wanted to receive performance at the third respondent's Sandton branch the third respondent would have had to oblige. The parties to the guarantee, according to Mr Babamia, waived the right to make payment and receive payment respectively at the Sandton branch of the third respondent. The waiver, according to Mr Babamia, has nothing to do with the applicant. Iagree. The applicant's contentions, according to Mr Babamia, are flawed. Iam afraid this appears to be the case.

[30] Ms Maritz, for the applicant, holds the view that payment should have been made only into the first respondent's account held with the third respondent. The beneficiary, according to her, is not entitled to payment if it neglects to present a document specified by the guarantee or presents a document that does not meet all the requirements of a

guarantee or if the demand is not made in a manner and within the prescribed period of the guarantee. Even very slight deviations according to her, should disentitle the beneficiary to receive payment. It is worse, according to her, if it is "not the beneficiary that requests payment of the guarantee, and a party with whom there is absolutely no legal relationship as between the guarantor, beneficiary and principal, then and in those circumstances, no payment should be made."

[31] It is for this reason, according to Ms Maritz, that the third respondent was not entitled to make payment in respect of the guarantee as there was no strict compliance with the terms of the guarantee as required.

[32] The applicant seeks an order in terms of prayers 1 and 3 of the notice of Motion dated 28 May 2015. Prayer 3, unfortunately seeks an order that the costs of the application be paid by the second, third and fourth respondents, jointly and severally, the one paying the others to be absolved. The prayer cannot be granted against the parties who were not in Court and against whom the application was withdrawn by the applicant.

[33] The facts of the case, as shown above, are such that there are a number of reasons which, according to Mr Babamia, warrant the dismissal of the applicant's application against the third respondent with costs.

[34] The respondent's attorneys, in their letter addressed to the applicant's attorneys dated 13 May 2015 appearing on page 270 of the papers in paragraph 7 said:
"There is no basis for an application against our client and if an application is instituted against our client, the application will not only be *opposed, but the contents of this letter will* be *brought to* a *court's attention and be used to persuade* a *court to grant punitive costs against your client."*

The applicant and his attorney were sufficiently forewarned about the punitive costs and the third respondent, accordingly, is entitled to such costs.

[35] The applicant brought an application seeking condonation for its late filing of its replying affidavit. In light of the fact that the application, in my view, should fail, I see no

purpose that will be served by granting the required condonation.

ORDER

[36] **The following order is made:**

The application is dismissed with costs on the scale as between attorney and client

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M. W. MSIMEKI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION THE HIGH COURT,

PRETORIA