REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 2645/2015

DATE: 15 SEPTEMBER 2016

In the matter between:

JACQUES VAN DEN BERG Applicant

And

JOHN MEYRICK WILIAM SAYERS N.O. First Respondent

TESSA MARION SAYERS N.O. Second Respondent

Date heard: 25 July 2016

Date delivered: 15 September 2016

JUDGEMENT

DE VOS J:

[1] In this application the applicant seeks an order rescinding and setting aside a default judgement granted against himself on the 22nd June 2015. In terms of the said default judgement the applicant has to pay the respondents:

1.1 the sum of R719 214,54;

1.2 interest on the amount of R719 214,54 at the rate of 9 per cent per annum a tempora morae to date of payment; and

1.3 costs of suit.

[2] The nature of the respondents' cause of action as set out in their particulars of claim is the

following:

2.1 HBD Property Trust (the Trust) represented by the first respondent, and Copperzone 124 (Pty) Ltd represented by the applicant, concluded an oral lease agreement during April 2013 for the extension of an existing written lease agreement. This oral lease agreement would endure from the 1st December 2013 to 28 February 2015. In terms of the oral lease agreement:

(a) Copperzone would make payment of a monthly rental of R150 000 and electricity, water and refuse removal charges;

(b) the terms of the prior written lease agreement concluded between the Trust and Copperzone on *11 * December 2008 would* be applicable, save fox is stated in (a) above.

2.2 After expiry of the written lease agreement Copperzone breached the oral lease agreement in that it failed to make payment to the Trust for electricity and water for February 2014 in the amount of R19 214,54 and failed to make payment of rental in the amount of R150 000 for the months of March 2014 and April 2014 totalling R319 214, 54.

2.3 As a result of Copperzone's default the Trust cancelled the oral lease agreement on 30 April 2014 (on which day Copperzone vacated the premises being the subject of the oral lease agreement).

2.4 As a result of Copperzone's material breach, alternatively repudiation of the oral lease agreement, and the Trust's consequent cancellation of the oral lease agreement, the Trust suffered damages in the amount of R410 000, being the rental payable by Copperzone to the Trust for the balance of the period of the oral lease agreement less the rental received by the Trust from other tenants.

[3] Judgement was granted in favour of the respondent on the basis of a suretyship signed by the applicant on 1st December 2008. It is common cause that the suretyship referred to was signed pursuant to the written agreement of lease (the lease) being concluded between the Trust and Copperzone. The commencement date of the written lease was the 1st December 2008 and its termination date 30 November 2013. The applicant, acting personally, bound himself in writing in favour of the Trust as surety *in solidum* for and joint and several coprinciple debtor with Copperzone, for the punctual payment of all sums of money and obligations which Copperzone might have in the past owed or incurred or might at present or in the future owe or incur to the Trust from whatsoever cause and howsoever and whensoever arising, including but not limited to damages for breach of contract or otherwise arising from the written lease agreement and any extensions or renewals thereof, and for the due and proper performance by Copperzone of its obligations to the Trusts.

[4] In terms of the deed of suretyship, the applicant chose his *domicilium citandi et executandi* at 1.. [B….] [C…. R….], [C….. L…. E….], [E….], [P…..].

[5] The summons was served at the applicant's chosen *domicilium citandi et executandi* in terms of the deed of suretyship on 21st January 2015.

[6] The applicant did not defend the action, and consequently default judgement was granted against the applicant in favour of the respondents.

[7] The main issue to be determined in this matter is whether the suretyship, which was signed on the same date as the written lease agreement was signed, has been transferred to become part of the oral lease agreement subsequently entered into, extending the expiry date of the written lease agreement

[8] Before the applicant can succeed in his application brought pursuant to rule 31(2)(6) of the Uniform rules, the applicant must show good cause for his application and must show that his application is made *bona fide.* I further keep in mind that the applicant need not deal fully with the merits of the case but that he must produce evidence that the probabilities are actually in his favour. After considering all the relevant circumstances it falls within the discretion of the court whether to set the judgement aside or not. It is the respondents' contention that the applicant's application is not *bona fide* and that the applicant has no *bona fide* defence to the respondents' claim and that the application should be dismissed.

[9] It is the applicant's contention that he was unaware that the summons was served on the address referred to as his *domicilium citandi et executandi* in terms of the deed of suretyship. The applicant also contends that the deed of suretyship ended when the written lease was terminated. Accordingly there existed no *domicilium citandi et executandi* on which the respondents could rely upon for service of the particulars of claim. The applicant further states in his application that he presently, and at the time when the particulars of claim was served, resides at another address namely Stand 122, Benquela Cove Lagoon Wine Estate, Hermanus. It further appears that when the Sheriff served the summons at the applicant's chosen *domicilium* (as set out in the deed of suretyship), the Sheriff was advised that the applicant had left the given address. The applicant contends that he only became aware of the default judgement for the first time on the 17th August 2015 when the Sheriff served a warrant of execution at 5 Main Road, Bryanston. The Sheriff was bearing a letter recording the applicant's details and a case number and instructions to the Sheriff to attach at the movable property located there. A Mr Gavin Green, a director working at the above address then made contact with the applicant to advise him of same. Only then was the applicant able to instruct his attorneys to investigate the matter and to ascertain what had indeed transpired. The applicant states that had he known of the summons when it was served, he would have immediately defended the action. The respondents do not dispute that the applicant was not in wilful default of having defended the action. However, the respondents

contend that the application is not *bona fide* and that the applicant has no *bona fide* defence to the respondents' claim.

[10] The applicant further contends that the respondents were aware of the applicant's whereabouts and that they misled the court *a quo* in their affidavit filed in support of their application for default judgement. In this regard the applicant relies on a letter dated 12th August 2015 written by the respondents' attorneys confirming that they are aware of the applicant's whereabouts. At this stage of the proceedings I do not think it is necessary to go into detail about the applicant's whereabouts at the time when the summons was served. It is

quite clear from the Sheriff's return of service that the applicant has left the said address referred to in the suretyship at the time when summons was served. For record purposes it must be noted that the respondents, in their opposing affidavit, state that they were unaware of the applicant's new address.

[11] It is not in dispute between the parties that the written lease agreement was terminated on the 30th November 2013. In paragraphs 6 and 7 of the particulars of claim the respondents allege that during or about April 2013 (ie seven months before the termination date of the written lease agreement) . . *the Trust represented by the First Plaintiff and Copperzone represented by the Defendant concluded an oral lease agreement. . . '* the terms of which were, inter alia, that the written lease . . *would be extended subsequent to the termination thereof on 30 November 2013, for the period 1 December 2013 to 28 February 2015* In paragraph 7.1 to paragraph 7.3 of the particulars of claim the respondents describe the oral lease agreement as a separate lease agreement. In paragraph 20 of the particulars of claim the respondents described the oral lease agreement as '. . . *an extension and/or renewal of the written lease agreement* . . . '. The respondents allege in paragraph 13 of the particulars of claim that

Copperzone ' . . *breached the oral lease agreement. . . '* by failing to make certain payments to the Trust and that the applicant was therefore indebted to the Trust as he had '*bound himself as surety, and by virtue of the oral lease agreement being an extension and/or renewal of the written lease agreement'* (paragraph 20 of the particulars of claim).

[12] It is the applicant's contention that the respondents acknowledged in their particulars of claim that the basis for the applicant's alleged liability ultimately stems from the fact that the suretyship was originally intended to be in respect of the written lease agreement. Therefore it is contended that the applicant was released from the obligations recorded in the suretyship when the written lease agreement terminated on 30 November 2013 as it was only applicable in respect of the written lease agreement. Apart from the applicant's denial that his suretyship was extended to the oral lease agreement he further denies that he concluded any form of oral lease agreement on

behalf of Copperzone, or of entering into any oral extension of the written lease on behalf of Copperzone.

[13] There cannot be any doubt that the respondents' cause of action is the suretyship signed by the applicant on 01 December 2008. The written lease agreement was signed on the same date. The respondents' particulars of claim contain ambiguous allegations as to whether the oral lease agreement was a) a separate lease agreement as read from paragraphs 14 and 15 of the particulars of claim; or b) an extension and/or renewal of the written lease agreement as read from paragraphs 20 of the particulars of claim. These allegations are contradictory in a material respect and were not pleaded in the alternative. The respondents acknowledge that the basis for the applicant's alleged liability ultimately stems from the fact that the suretyship was originally intended to be in respect of the written lease agreement. In contrast thereto the applicant contends that Copperzone had complied with all its obligations in terms of the written lease agreement and was released from the obligations recorded in the suretyship when the written lease agreement terminated on 30 November 2013.

[14] Having regard to the aforementioned facts there is a reasonable explanation given by the applicant for his failure to defend the action. Accordingly, it must be decided whether the applicant sets out grounds for a *bona fide* defence in his application. Apart from the respondents' particulars of claim being excipiable, it appears that the applicant denies concluding an oral agreement of lease and/or entering into any oral extension of the written lease agreement on behalf of Copperzone. This denial constitutes a dispute of fact and on the papers as it stands I cannot find anything that contradicts the applicant's version in this regard. If this denial was placed before the court *a quo* before judgement was granted, judgement in favour of the respondents would not have been granted. The denial in itself constitutes a defence which in my view is bona fide.

[15] The respondents' contention as formulated in the particulars of claim that the oral agreement was a renewal/extension of the written lease agreement must further be considered. It is not disputed that the wording of the deed of suretyship provides that the applicant bound himself as surety *in solidum* for and joint and several co-principal debtor with Copperzone for the *'punctual payment of all sums of money and obligations which (Copperzone) may have in the past owed or incurred or may at present or in the future owe or incur to the Trust from whatsoever cause and howsoever and whensoever arising, including but not limited to damages for breach of contract or otherwise arising from the written lease agreement and any extensions or renewals thereof, and for the due and proper performance by (Copperzone) of its obligations to the Trust'.* Broadly speaking the respondents' cause of action as pleaded in the particulars of claim falls within the

ambit of the obligations of Copperzone in respect of which the applicant bound himself in favour of the Trust as surety and co-principal debtor.

[16] The question that must be determined is whether the suretyship binds the applicant as alleged by the respondents or at all. The applicant contends that the suretyship has been terminated when the written lease agreement came to an end. If it did come to an end, the default judgement was granted erroneously. It is the applicant's contention that clause 28 of the written lease agreement provides that *'[tjhis agreement shall be the whole and only contract between the landlord and the tenant. .. Should any variations be required at any time during the currency of this Agreement of Lease, including <u>this clause</u>* [own emphasis], *such variations shall only be binding on the parties, if contained in writing and signed by the Landlord and the Tenant'.* It is the applicant's case that clause 28 is an entrenched clause, since it applies not only to the rest of the lease agreement but also to itself. It is therefore contended that any oral extension or renewal of the written agreement was accordingly of no force unless same was reduced in writing and signed by the parties. The applicant further contends that clause 4 of the written agreement of lease stipulates that the option to renew the lease could only be exercised by a written notification to the landlord. As this did not occur there been no valid extension/renewal of the written lease agreement.

[17] The respondents contend that clause 28 of the written lease agreement is not applicable. It only deals with variations to the written lease agreement which must be in writing. The separate oral lease agreement pleaded by the respondents is not a variation of the written lease agreement. The respondents' claim is therefore evidently a separate oral lease agreement and not a variation of the written lease agreement. The respondents further contend that clause 4 of the written lease agreement is not applicable. This clause provides for written notification of the renewal of the written lease agreement. The separate oral lease agreement pleaded by the respondents is not a renewal of the written lease agreement as envisaged in terms of clause 4 of the written lease agreement.

[18] It is quite clear that the respondents in their particulars of claim describe the oral agreement as an extension or renewal of the written lease agreement. The respondents' argument before me that it is merely an oral agreement seems to be in direct contrast with what is alleged in the particulars of claim. If the oral agreement was a renewal of the written lease agreement or an extension thereof, it was not legally competent for the court considering the application for default judgement to have made the order. The respondents' particulars of claim must be read together with the written agreement of lease and the suretyship. The respondents' claim is not supported by its own documentation and their claim could simply not succeed on that basis. The same holds for the contradictory supposition that the oral agreement was a new agreement. If a separate oral agreement of lease was entered into, the words *'extension '* or *'renewal '* of the written lease agreement as pleaded become nonsensical. On the respondents' version the exact same terms identical to those contained in the written agreement of lease, including clauses 28 and 4 thereof, became applicable save for terms relating to duration, rental and other payments.

The two sets of allegations regarding the nature and import of the oral agreement are clearly contradictory and incompatible with each other - they are mutually inconsistent, and such inconsistency goes to the root of the respondents' cause of action. Having regard to the fact that the differing averments referred to above were not pleaded in the alternative, the problem arises that the applicant is prejudiced to the extent that he is unable properly to prepare to meet his opponent's case. Even a complete denial of the allegations contained in the particulars of claim does not detract from the fact that same are patently contradictory and incompatible. The lack of clarity referred to above constitutes a *bona fide* technical defence that must be upheld in favour of the applicant.

[19] Whatever the terms of any oral agreement were, of whatever nature, and who acted on behalf of Copperzone, is a question of fact which must be proven by the respondents on a balance of probabilities. The applicant's denial of entering into an oral agreement read together with the

vagueness of the allegations contained in the particulars of claim referred to above constitutes, in my view, a *bona fide* defence on behalf of the applicant. *Prima facie* it appears that the suretyship relied upon by the respondents refers specifically to the terms of the written lease agreement and terminated on the same day as the written lease agreement came to an end. The respondents admit that Copperzone fully complied with its obligations in terms of the written lease as appears from paragraph 44 of their opposing affidavit. It follows logically that if the written lease was *'extended'* as alleged, then by implication there was no outstanding obligations in respect of the *'extended'* oral lease agreement. There is no new separate suretyship which accompanied the so-called new lease agreement. It is not necessary for me to speculate at this stage of the proceedings as to the outcome of the factual dispute between the parties. It is sufficient to conclude that in my view the applicant is entitled to have the judgement being set aside as prayed for.

ACCORDINGLY, I MAKE THE FOLLOWING ORDER:

1) The default judgement granted on 22nd June 2015 against the applicant is rescinded and set aside;
2) The first and second respondents are ordered to pay the costs of this application; the one paying, the other to be absolved.

DE VOS J

JUDGE OF THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA

For the applicant:	Adv. D. Milne
Instructed by:	Schwarz-North Incorporated
c/o A.L. Maree Incorporated	
For the first and second respondents:	Adv. L. Hollander
Instructed by:	Darryl Furman & Associates
c/o Morris Pokroy Attorney	