IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

DATE: 22/07/2021 LENYAI AJ

CASE NO: 11560/2019

In the application between:

LIBERTY GROUP LIMITED

Applicant

(Herein represented by JHI RETAIL (PTY) LTD

and

PLUMIFON (PTY) LTD T/A SALLY WILLIAMS ICE CREAM First Respondent

GEORGE ANTHONY SINOVICH Second Respondent

MARK SACK Third Respondent

JUDGMENT

This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgment and order are accordingly published and distributed electronically. The date and time of hand-down is deemed to be 09h30 on 23 July 2021.

LENYAI AJ

[1] This is a claim for damages suffered by the applicant as a result of the respondents holding over of property belonging to the applicant after the cancellation of a lease agreement.

[2] In this application the following order is sought against the respondents:

(a) That judgment be granted against the Second and Third respondents, jointly and severally the one paying the other to be absolved, in the sum of R257 184.86.

(b) That the Second and Third respondents pay the costs of this application on the scale as between attorney and client, jointly and severally the one paying the other to be absolved.

[3] The applicant brought an application for condonation for the late filing of the replying affidavit. After reading the papers and having heard the parties I was satisfied that the applicant has shown good cause and I granted the condonation.

[4] The third respondent also brought an application for condonation for the late filing of the heads of argument. After reading the papers and having heard the

parties I was satisfied that the third respondent has shown good cause and I granted the condonation.

[5] On the 19th of February 2019 the applicant instituted action proceedings against the respondents in which they sought confirmation of cancellation of the lease agreement, payment of R117 366.03 for arrear rentals, interest on the aforesaid sum at the rate of 10.25 % *per annum a tempore morae*, eviction of the first respondent and/or other occupant from the leased premises and a claim for damages

[6] On the 4th of July 2019, summary judgment was granted against the third respondent, jointly and severally with any order which may be granted against the first and second respondents and the applicant's claim for damages was postponed *sine die*.

[7] On the 10th of July 2019, default judgment was granted against the first and second respondents jointly and severally and the applicant's claim for damages was postponed *sine die*.

[8] This is now the applicant's claim for damages which serves before the court.

[9] The applicant avers that its action against the respondents arose from a breach of a commercial lease agreement by the first respondent for non-payment of rental and other charges payable under the lease agreement.

[10] The second and third respondents are cited in their capacities as sureties and co-principal debtors.

[11] The applicant cancelled the contract on the 19th of February 2019 as a result of the breach.

[12] The applicant avers that the First Respondent did not vacate the premises as ordered and remained in unlawful occupation until subsequently liquidated on the 1st of August 2019.

[13] The applicant further avers that it was able to procure a new tenant from 1 November 2019.

[14] The applicant accordingly, claims damages for the period 1 March 2019 till 30 October 2019 in the amount of R258 554,15.

[15] The applicant contends that it has quantified its damages firstly by a factual affidavit deposed to by its official and secondly by an expert in the field of market related rental who has verified the damages claimed by the applicant in the amount of R257 184, 86.

[16] The applicant avers that the lease agreement provides for costs to be paid on the scale as between attorney and client.

[17] The second and third respondents raised two points *in limine* in their answering affidavits and the third respondent raised a further two points which were not raised by the second respondent.

[18] The second and third respondents aver that the applicant brought a substantive application wherein it seeks damages as a result of the first respondent's breach of a lease of agreement, concluded between first respondent and the applicant.

[19] The first respondent was placed in voluntary liquidation on 1 August 2019 and two liquidators were appointed. The respondents aver that the applicant was obliged to cite the liquidators in the application and they have not done so.

[20] The second and third respondents contend that as a result of the applicant's non-joinder of the first respondent's duly appointed liquidators, all parties are not properly before court, and consequently the application stands to be dismissed.

[21] The applicant contends that when it instituted this application on the 31st of October 2019 was not aware that the first respondent had gone into voluntary liquidation. In the matter of ***Bowring NO v Vrededorp Properties CC & another* 2007 (5) SA 391 (SCA)** para [21] it was held that *"The substantial test is whether the party alleged to be a necessary party for purposes of joinder has a legal interest in the subject-matter of the litigation, which may be affected prejudicially by the judgment of the Court in the proceedings concerned ..."*

[22] This principle has been formulated over years as is evident in the matter of ***Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A)** where the court held that *"Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests."*

[23] Having been convinced by the authorities, the applicant decided to withdraw its claim against the first respondent and cured the non-joinder complaint by delivery of the amended notice of motion.

[24] The applicant contends that to the extent that the second and third respondents allege that it cannot proceed against them without the first respondent, the

second and third respondents in their answering affidavit confirmed that they are cited herein and have bound themselves as sureties and co-principal debtors.

[25] The applicant further contends that in the deed of suretyship, the second and third respondents waived the benefit of excussion. It is trite that once the principal debtor's estate has been declared insolvent, does not release the surety and co-principal debtor from his obligations.

[26] This principle was confirmed in the matter of ***Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron*** **1978 (1) SA 463 (A)** at 472B-C where the court held that *"From the above and other authorities it appears that generally the only consequence (albeit an important one) that flows from a surety also undertaking liability as a co-principal debtor is that vis-à-vis the creditor he thereby tacitly renounces the ordinary benefits available to a surety , such as those of excussion and division, and he becomes liable jointly and severally with the principle debtor (see, for example, Caney, Law of Suretyship, 2nd ed ..p 51; Wessels on Contract , 2nd ed., paras . 4087, 4088, and 4124; Voet, 46.1.16 and 24 (Gane's trans., vol. 7 , pp. 38-9, 48-9; Pothier on Obligations , paras. 408, 416 (Evans' trans., pp 330, 335-6)".*

At 472C-D, the court emphasised that: *"However, he retains the right, on paying the creditor, to obtain a cession of the latter's rights and securities in order to recover the full amount from the principal debtor."* This principle of right of recourse was further cemented in the matter of ***Zungu-Elgin Engineering (Pty) Ltd v Jeany Industrial Holdings (Pty) Ltd and Others*** **(1138/2019) [2020] ZASCA 160 (3 December 2020)**.

[27] The authorities are clear and it is trite that a surety becomes liable for the debts of the principal debtor as a co-principal debtor and the defence or benefit of excussion and division are not available as he is deemed to have tacitly renounced them. I am of the view that the point *in limine* of non-joinder stands to be dismissed.

[28] The second and third respondents aver that the current monetary limit for Regional Magistrate court is R400 000,00.

[29] They further aver that the applicant is claiming substantially less from the respondents than the limit referred to above. The applicant's election to have launched this application in the High Court amounts to an abuse of process, a practice which has been frowned upon by the Honourable Court.

[30] The second and third respondents contend that the court should not countenance the applicant's conduct and make an order that the applicant's current application be transferred to the Regional Court to be further deliberated there, along with an appropriate cost order.

[31] The applicant contends that the point *in limine* of abuse of process by the respondents is without merit. This claim for damages flows from the postponement of damages *sine die* by this court in respect of the default judgment against the first and second respondents and the summary judgment against the third respondent on the 4th and 10th of July 2019 respectively.

[32] The applicants aver that the second and third respondents seek to transfer the claim for damages to the Regional court, notwithstanding that the cancellation, eviction and arrear rental claims have been adjudicated by this court.

[33] The applicants contend that the claim for damages is a pending claim and is appropriately before the court. A transfer of the claim to the Regional court would only inconvenience the Regional court, but also this court has all the pleadings and documents in the court file before it and has already adjudicated the aforesaid issues in July 2019.

[34] This court has concurrent jurisdiction with the lower courts and it is correct that the High court frowns upon litigants approaching it where claims fall within the realm of a lower court. I am however of the view that in certain circumstances the court must decide each case on its merits in order to arrive at a just and fair decision. The circumstances of this case arose from a postponement by this court of the damages claim of the applicant *sine die* in July 2019. The court has all the pleadings and documents on CaseLines and it makes perfect sense for this court to conclude the matter and put it to rest. To transfer the matter would only drag the matter on indefinitely and that is not desirable, as the saying goes, justice delayed amounts to justice denied. To finalise the matter in this court does not prejudice any of the parties and the court is willing and ready to finalise this matter. The Supreme Court of Appeal in the matter of **The Standard Bank of SA Ltd and Others v Thobejane and Others (38/2019 & 47/2019) and the Standard Bank of SA Ltd v Gqirara N O and another (999/2019) [2021] ZASCA 92 (25 June 2021)** confirmed this conclusion wherein it held that "*The High Court must entertain matters within its territorial jurisdiction that fall within the jurisdiction of the Magistrates' Courts, if brought before it, because it has concurrent jurisdiction with the Magistrates' Court*". This point *in limine* of abuse of process stands to be dismissed.

[35] The third respondent avers that before referring a matter to arbitration or a court for adjudication of the dispute between the parties (clause 50.2), the applicant was required to comply with clause 50.1 of the lease agreement.

[36] The third respondent further avers that, the applicant was required to approach the first respondent's CEO and communicate with the latter with a view to resolving all issues relating to the lease. It is only pursuant to the expiry of 5 days after the dispute has been placed in the hands of the appointed executives for landlord and tenant that either party may invoke clause 50.2 mentioned above where resolution was impossible.

[37] The third respondent contends that the applicant has neither pleaded it in the action which preceded this application nor anywhere in its founding papers whether it complied with clause 50.1. Failure to comply with clause 50.1 renders the issue of this application premature, necessitating its dismissal with costs.

[38] The applicant contends that subsequent to the court cancelling the lease agreement, ordering the eviction of the first respondent, ordering the payment of arrear rentals by the respondents and most importantly, postponing the claim for damages *sine die*, the point *in limine* of premature application can only be described as disingenuous.

[39] The applicant further contends that a call for arbitration after the material issues of cancellation and eviction have been determined by the court cannot be sustained.

[40] I am of the view that the respondents have squandered their opportunity to raise this defence earlier when this matter started in 2019 before the summary

judgment and default judgement were granted and cannot now cry foul. This point *in limine* of premature application stands to be dismissed.

[41] The third respondent avers that the applicant has launched an application and purports to rely upon a contract and/or security document. Each month claimed relating to a lease constitutes a separate cause of action and it was necessary for this court to be privy to all documents upon which the applicant relies.

[42] The third respondent further avers that the applicant has failed to allege and/or aver and /or attach material facts relating to the lease and security documents. These omissions render the application defective, attaching an extract from a lease agreement and court orders in previous proceedings without any basis is insufficient and therefore the applicant has not made out a case against him. Based on this point *in limine* of no cause of action alleged, the application stands to be dismissed with costs.

[43] The applicant contends that both the second and third respondents accept in their answering affidavits that they are before this court in their capacities as sureties and co-principal debtors. The respondents also rely on certain provisions of the lease agreement in their answering affidavit.

[44] The applicant reiterates that this application arises from the orders granted on the 4th and 10th of July 2019 in which this claim for damages was postponed *sine die* as part of the orders. As a corollary, the pleadings which include the lease agreement and the deed of suretyship, form part of the documents before this court in the adjudication of the claim for damages. This application is brought under the same case number and is not a new matter, it is an ancillary

application which flows directly from the pleadings, documents and orders are before this court.

[45] The applicant contends that not only is the cause of action defined in the founding papers, but the second and third respondents are fully acquainted with the case they have to meet based on their own version put up in their answering affidavits.

[46] On careful reading and consideration of the papers and having heard the parties I am satisfied and agree with the applicant that this matter is proper before this court. This matter has been adjudicated on by this court before and we are merely dealing with the part that was postponed being the claim for damages. All the pleadings and documents are on CaseLines and I have seen and read them all. In light of the above, I am of the view that this point *in limine* of no cause of action stands to be dismissed.

[47] The second and third respondents aver that the applicants elected to approach the court on notice of motion for a relief for unliquidated damages by adducing the evidence of an expert whose evidence cannot be tested through cross examination.

[48] They aver that the applicant is claiming damages in the sum of R257 184,66 for rental and other charges in terms of the lease agreement for the period 1 March 2019 to October 2019. In support of its claim, the applicant attached an expert affidavit of Mr Avery to the founding affidavit.

[49] The applicant further attaches an affidavit by its general manager which it alleges should be construed as a certificate as stipulated in clause 28 of the

lease agreement, which shall be *prima facie* evidence as to the correctness of its claim.

[50] The respondents rely on the matter of ***Economic Freedom Fighters v Manuel* 2020 JDR 2773 (SCA) at para 105** where it was held that *"Motion proceedings are particularly unsuited to the prosecution of claims for unliquidated damages, whether in relation to defamation or otherwise."*

[51] However in the proceedings for final relief, the approach to determine the facts was clearly set out in the ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)** at 634H-635C where the court held that:

> *"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact … If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of court … and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those that it determines whether the applicant is entitled to the final relief which he*

seeks ... Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers ..."

[52] The matter of ***Wightman t/a JW Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA)** paras [11]-[13], dealt with how courts should decide on the adequacy of a respondent's denial in motion proceedings for purposes of determining whether a real, genuine or *bona fide* dispute of fact has arisen. It was held that:

"[11] The first task is accordingly to identify the facts of the alleged spoliation on the basis on which the legal disputes are to be decided. If one is to take the respondents' answering affidavit at face value, the truth about the preceding events lies concealed behind insoluble disputes. On that basis the appellant's application was bound to fail. Bozalek J thought that the court was justified in subjecting the apparent disputes to closer scrutiny. When he did so he concluded that many of the disputes were not real, genuine or bona fide. For the reasons which follow I respectfully agree with the learned judge.

[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine

or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers ...

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirements because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents,

inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflects such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

[53] Turning to the matter before me, the applicant avers that the second and third respondents accept in their answering affidavits that motion procedures are competent if no *bona fide* dispute of fact exists which was reasonably foreseen. The respondents seemingly take issue with the amount of damages as stated by the applicant's attorney in the amount of R281 179.50 as opposed the lesser amount indicated by the expert in the amount of R257 184,66.

[54] I find the respondent's behaviour to be quite peculiar, instead of placing expert evidence of their own before court to dispute the damages determination of Mr Avery, such as to raise a real, genuine or *bona fide* dispute of fact, they have chosen to be evasive and accusatory towards the applicant. The respondents have not availed themselves of their right to apply for Mr Avery to be called for cross-examination under Rule 6(5)(g) of the uniform rules of Court if they seriously believed that there is a real, genuine or bona fide dispute of fact.

[55] The applicant in its heads of argument aver that the respondents contend that due to the applicant's alleged failure to mitigate its damages for September and October 2019, its damages are to be reduced to R123 535,52. The applicant avers that although there is no merit that lies in this contention by the

respondents, it is interestingly and inherent to this contention is an acceptance of the balance of the applicant's damages as computed by the Mr Avery, the applicant's expert.

[56] The respondents in my view have squandered their opportunity to raise a real, genuine or *bona fide* dispute of fact as set out in the ***Plascon-Evans*** case. Instead they have chosen to duck dealing with the facts raised by the applicant by raising technical issues which are not assisting their case or the court in any way, as well as alleging that the applicant has not clearly set out a case against them. The respondents are well aware of the facts alleged by the applicant and should have rather placed before the court countervailing evidence to persuade the court to see their point of view.

[57] I am not convinced that in the matter before me there is a real, genuine or *bona fide* dispute of fact and am satisfied that the respondents have not met the requirements set in cases of ***Plasco-Evans*** and ***Wightman supra.***

[58] In the matter of ***Hyprop Investments Ltd and Another v NCS Carriers and Forwarding CC and Another*** **2013 (4) SA 607 (GSJ)** in consideration of whether a damages claim from a cancelled lease is liquid or not, the court held that: *"However Nestadt J pointed out (in the same passage) that there is a significant qualification to applying the lease rental figure, namely that: 'it is only in the absence of evidence to the contrary that the rental value of the premises is assumed to be the rental paid under the lease (Cooper op cit at 208)'. The reference is to Cooper The South African Law of Landlord and Tenant (see now 1994 2 ed at 243) and the cases there cited. If there is*

evidence to the contrary, then the claim is illiquid with the result that it cannot support motion proceedings.

Unlike most cases where the liquidity or otherwise of ordinary damages is classified by reference to the claim made, the liquidity of a holding over claim for a market value rental is dependent on the pleaded response. The reason is to be found in the effective deeming of a market rental value to be the same as the rent provided for in the agreement unless there is evidence to the contrary.

If there is no legally effective challenge to the landlord's allegations that the rental provided for in the lease is the market rental value, then the damages are readily ascertainable and therefore liquidated. This appears to be the most sensible approach because without countervailing evidence the agreement struck by the parties reflects the amount at which willing and able parties are prepared to conclude their transaction. It also enables a landlord to use the expedited processes of motion proceedings and summary judgment to pursue a damages claim based on holding over."

[59] The applicant contends that a lessor is obliged to take reasonable steps to mitigate its damages or loss, this principle was formulated in the matter of ***Hazis v Transvaal and Delagoa Bay Investment Co Ltd* 1939 AD 372** at 388. The court held that: *"This rule about mitigating damages relates not to what the claimant in fact did, but to what he should have done. It is in essence a claim based on negligence - neglect to do what a reasonable man would do if placed in the position of the person claiming damages. The defendant in such claim says 'admitting that in fact you suffered those damages, you have only yourself*

to blame for having suffered so much, or at all, because you did not take reasonable steps to protect yourself and, therefore me.'"

In the premise I am convinced that this matter before me is indeed a liquid claim for damages and it is proper before this court.

[60] The respondents contend that the applicant ought to have accepted as lessee from 1 September 2019 a new tenant procured by the respondent. They contend that they had advised the applicant of a potential tenant, Café Rider, for the premises.

[61] The applicant contends that the facts upon which the ambit, nature and terms of Café Rider's willingness to be a lessee relies solely on the credibility of its authorised representative. The respondents have not produced an affidavit deposed to by a representative of Café Rider in support of their contention and this evidence cannot be accepted by a court as it amounts to inadmissible hearsay evidence.

[62] The SCA in ***Monyetla Property Holdings (Pty) Ltd v IMM Graduate School of Marketing (Pty) Ltd and another*** **(20023/2014) [2015] ZASCA 32; 2017 (2) SA 42 (SCA) (25 March 2015)** the court has cemented the general principle in relation to the measure of damages of lessor as well as mitigation of damages, and held that *"In the context of a lease cancelled by the lessor due to a breach by the lessee, the prima facie measure of damages is the rental that would have been paid for the premises over the remaining period of the lease less any amounts received which would not have accrued had the lease not been cancelled - and of course a lessor who cancels is obliged to take reasonable steps , such as reletting the premises, in order to mitigate its loss."*

[63] The applicant contends it took reasonable steps to mitigate its damages and procured a new tenant two months after the first respondent vacated the premises.

[64] I am not convinced by the submission by the respondents that they procured a tenant for the applicant from 1 September 2019. There is no evidence placed before court to corroborate their statement and the court cannot rely on their word alone. In the premise I find the applicant's contention reasonable.

[65] In the premises, the following order is made:

(a) That judgment is granted against the Second and Third respondents, jointly and severally the one paying the other to be absolved, in the sum of R257 184.86.

(b) That the Second and Third respondents pay the costs of this application on the scale as between attorney and client, jointly and severally the one paying the other to be absolved.

M.M.D. LENYAI

ACTING JUDGE OF
THE HIGH COURT

GAUTENG DIVISION,
PRETORIA

CASE NUMBER: 11560/2019

HEARD ON: 26 April 2021

FOR THE APPLICANT: ADV. G.T. AVVAKOUMIDES

INSTRUCTED BY: Mark Efstratiou Inc

FOR THE SECOND RESPONDENT: George Anthony Sinovich

Fish Hoek, Cape Town

FOR THE THIRD RESPONDENT: ADV. J.M. HOFFMAN

INSTRUCTED BY: Swartz Weil van der Merwe Greenberg Inc , Melrose Estate

c/o Friedland Hart Solomon & Nicolson , Monument Park

Pretoria

DATE OF JUDGMENT: 23 July 2021