

SOUTH AFRICA / JUDGMENT

Apollon Property Fund (Pty) Ltd v World Focus 2138 CC and Another (Reasons) (20467/24)

[2024] ZAWCHC 331 (12 August 2024)

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COURT

Western Cape High Court, Cape Town

BEFORE

Montzinger

CASE / FILE NUMBER

20467/24

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IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case number: 20467/24

Before: The Hon. Mr Acting Justice Montzinger

Hearing: 12 August 2024

In the application between:

APOLLON PROPERTY FUND (PTY) LTD (Registration number: 2017/333373/07) Plaintiff and
WORLD FOCUS 2138 CC (Registration number: 2008/255160/23) First Respondent MOHAMED
OSMAN ABDI Second Respondent

REASONS

FOR GRANTING SUMMARY JUDGEMENT

Montzinger AJ

Summary

Introduction

1. This matter concerns an application by the plaintiff, Apollon Property Fund (Pty) Ltd, for summary judgment against the first defendant, World Focus 2138 CC, and the second defendant, Mohamed Osman Abdi, who stood surety for the first defendant's

obligations. The plaintiff's claim arises from the alleged breach of a written lease agreement concluded between the plaintiff

and the first defendant.

2. The plaintiff was unable to successfully serve process on the second defendant. It then elected to rather pursue judgement against the second defendant by virtue of an existing surety agreement. The second defendant appointed attorneys and defended the action and the application for summary judgement. However, on the eve of the hearing of the summary judgement the second defendant's attorneys withdrew.
3. At the hearing of the matter nobody appeared on behalf of the second defendant. Ms. Nel appeared on behalf of the plaintiff. The matter proceeded in the second defendant's absence.
4. The chronology of events leading to the application for summary judgement started on 5 December 2019, when the plaintiff and the first defendant entered into a written commercial lease agreement concerning the property situated at 98 Long Street, Cape Town. The lease was initially set to commence on 1 February 2020 but was subsequently amended by an addendum to rather start on 23 March 2020. The first defendant was granted a two-month rental-free period, with the obligation to start paying rent from 1 June 2020. The lease was for a term of five years, subject to an annual rental escalation of 8% starting from the second anniversary of the starting date.
5. The first defendant took occupation of the property but failed to meet its rental and other financial obligations under the lease.

Specifically, from March 2021 to October 2021, the first defendant failed to make timely payments, resulting in arrears amounting to R 1,585,767.07. Despite subsequent partial payments totalling R 738,847.28, a significant amount remained outstanding.

6. The plaintiff's attorneys issued a demand for the outstanding amount on 3 November 2021, but the first defendant continued to default on its obligations. Consequently, by May 2022, the arrears had increased to R 1,194,368.71. The plaintiff, having exhausted attempts to secure payment, ultimately cancelled the lease agreement on 26 May 2022.
7. Despite the cancellation, the first defendant remained in occupation of the property until 31 October 2022. For this period, the plaintiff claimed an additional sum of R 1,251,715.35 for rent and other charges, which the first defendant failed to pay.
8. On the same day the lease was concluded, the second defendant signed a deed of suretyship, binding himself as surety and co-principal

debtor for all the first defendant's obligations under the lease. The plaintiff now seeks to enforce this suretyship to recover the outstanding amounts.

9. The lease agreement contained an arbitration clause; however, due to the defendants' non-compliance, the arbitration process failed. The plaintiff then instituted the current action. Although a plea was filed the second defendant did not rely on an alternative dispute resolution alternative to halt the present

proceedings.

10. Only the second defendant took part in the litigation. After being served with a notice of bar, the second defendant filed a plea, wherein he disputed the amounts claimed by the plaintiff and raised a defence based on an alleged verbal agreement that purportedly

absolved the defendants from liability under the lease.

11. The plaintiff, asserted that the second defendant's plea lacked merit and did not raise a bona fide defence. It therefore seeks summary judgment for the amounts claimed, together with interest and costs.

12. The issues before this Court are twofold:

12.1 Whether the plaintiff has made out a case for summary judgment.

12.2 Whether the second defendant's plea and opposing affidavit disclosed a bona fide defence that would warrant the refusal of summary judgment.

13. I start by briefly restating the principles applicable to a court's approach when dealing with a summary judgement application. I will then analyse the plaintiff's claim and the defences raised by the second defendant and evaluate whether the defendant should be granted leave to defend the main action.

The legal principles

14. The legal principles governing summary judgment are well-established and had been consistently applied and endorsed across numerous

decisions over the years. Given their settled nature, it is unnecessary to restate every specific aspect of these principles. A

substantial body of case law provides clear directives on the requirements and considerations for granting summary judgment, even

in the face of the recent amendments to the summary judgment procedure.

15. For instance, in *Tumileng Trading*[1], the court reaffirmed the established principles laid down in earlier cases such as *Maharaj*[2] and *Joob Joob Investments*[3]. The court in *Tumileng Trading* specifically noted that, despite the procedural amendments, the core principles remain intact, ensuring that summary judgment is granted only where the absence of a bona fide defence is evident, and the necessity for a full trial is not substantiated.

16. With that in mind a court, when evaluating a request for summary judgement, begins by ensuring that the procedural requirements

outlined in rule 32 of the Uniform Rules of Court have been satisfied.

17. The plaintiff must file an affidavit that verifies the cause of action and asserts that the defendant has no bona fide defence, as confirmed in Maharaj. This affidavit must be properly served and meet all formalities, including the timeliness of its filing. Once procedural compliance is established, the burden shifts to the defendant to present an affidavit disclosing fully the nature and grounds of the defence, along with the material facts relied upon, as required by rule 32(3)(b).
18. The defendant's affidavit must demonstrate a bona fide defence that is legally cognisable and factually supported, as underscored in Breitenbach[4]. The court then scrutinises the defendant's allegations to determine whether the defence is bona fide, plausible and substantial enough to warrant a trial.
19. Even if the defendant's defence appears weak or insubstantial, the court retains a residual discretion to refuse summary

judgment.

This discretion, highlighted in Tumileng Trading allows the court to consider whether granting summary judgment might result in an injustice, particularly where there is a reasonable possibility that a fuller exploration of the issues at trial could reveal a valid defence. This discretion ensures that summary judgment is granted only in cases where the absence of a bona fide defence is clear and unequivocal.

20. In the context of summary judgment and the liability of a surety the court must consider whether a valid surety agreement has been concluded. This the court must do so by carefully evaluating the formal requirements set forth by the law. According to the General Law Amendment Act 50 of 1956, for a suretyship agreement to be valid, the terms must be embodied in a written document signed by or on behalf of the surety. This includes the identification of the three necessary parties: the creditor, the principal debtor, and the surety[5].
21. In respect of the liability of a surety suffice to state that the principle of liability of the surety for the debt of the principal

debtor is equally well-established in our law. A suretyship agreement, by its nature, involves the surety binding himself to the

creditor to fulfil the obligations of the principal debtor should the latter default. In Incentive Labour the court held that a surety is jointly and severally liable with the principal debtor for the debt, provided the terms of the suretyship agreement are clear and meet the statutory requirements.

22. A surety's liability arises directly from the suretyship contract and is contingent upon the principal debtor's failure to satisfy the debt. In Botha[6] the court, by way of example to illustrate the principle, reiterated that once the suretyship is properly executed and the principal debtor defaults, the surety is liable for the debt as stipulated in the agreement.

Procedural aspects of the application

23. Having reviewed the plaintiff's application for summary judgment, I am satisfied that all procedural requirements under rule 32 of the Uniform Rules have been duly complied with. The plaintiff has filed the necessary affidavit, verifying the cause of action and asserting that the defendant lacks a bona fide defence.

The application for summary judgement was served in accordance with the rules, and no procedural irregularities have been raised or identified. With the plaintiff having satisfied the procedural prerequisites, the focus of the court's inquiry then shifts to consider whether the plaintiff has pleaded a cognisable and sustainable case and thereafter the defendant's response is considered.

The defences raised and the responses thereto

25. The defendant has raised several defences in response to the plaintiff's claim. I could distil more or less the following

defences.

26. First, the second defendant asserts that he lacks knowledge regarding the computation of the amounts claimed by the plaintiff. This defence challenges the accuracy of the plaintiff's accounting and suggests that the second defendant is unable to verify the sums claimed. The defence hinges on a general denial of knowledge rather than a substantive challenge to the figures presented.
27. Secondly, the second defendant relies on an alleged verbal agreement purportedly concluded between the plaintiff and the first defendant, represented by the second defendant. The second defendant asserts that, under this verbal agreement, the plaintiff agreed to absolve the defendants from liability under the lease agreement in exchange for the first defendant vacating the property. The terms of this alleged agreement included allowing the subtenants to remain on the property under new rental agreements directly with the plaintiff and foregoing any claims for arrears or damages against the first defendant and by extension the second defendant.
28. The third defence involves the defendants' claim that "improvements" were made to the rental property. The second

defendant suggests that these improvements were part of the negotiations leading to the agreement and that the plaintiff's

failure to account for these improvements should be considered in evaluating the amounts claimed.

29. The plaintiff highlighted the following difficulties with the defences raised:

29.1 Firstly, regarding the defendant's assertion of lacking knowledge about the computation of the amounts claimed, the plaintiff argues that this defence is fundamentally flawed. The plaintiff has provided a detailed statement of account, outlining every debit and credit, including rental charges, rates, taxes, and payments made by the defendant. This level of detail should have enabled the defendant to either admit or specifically dispute the amounts claimed. Instead, the defendants' claim of ignorance, without any substantiated evidence or direct challenges to the figures, appears to be a mere tactic to delay proceedings rather than a legitimate defence. The court, as the plaintiff contends, should view this as an insufficient response that fails to meet the standard of a bona fide defence as required by rule 32(3)(b).

29.2 Secondly, the plaintiff addresses the defendants' reliance on an alleged verbal agreement that purportedly absolved the defendants from any liability under the lease agreement. Ms Nel argued, consistent with the papers, that this defence is not only implausible but also unsupported. The plaintiff highlights that the alleged agreement lacks commercial sense, as it would involve the plaintiff writing off substantial sums—over R 3 million—without

receiving anything of value in return, such as vacant occupation of the property. The plaintiff thus contends that the defence is contrived and does not raise a genuine issue for trial.

29.3 Lastly, the plaintiff points out the inconsistencies within the second defendant's opposing affidavit, particularly concerning the alleged verbal agreement. The affidavit lacks the specificity and coherence necessary to establish the existence of this verbal

agreement. The affidavit fails to provide key details, such as the terms of the subtenants' rental agreements or the legal basis for the termination of those agreements. The plaintiff asserts that the vague and contradictory nature of the second defendant's

statements further undermines the credibility of the defence, suggesting that it is not bona fide but rather an attempt to obfuscate the issues and delay the inevitable judgment.

30. In conclusion, the plaintiff argues that the defences raised by the second defendant do not meet the threshold required to resist summary judgment. The defences are either vague, implausible, or unsupported, thereby failing to establish a bona fide defence that would justify the second defendant being granted leave to defend.

Evaluation

31. Upon examination, the defences raised by the second defendant fall short of the benchmark. The second defendant's claim of lacking

knowledge about the calculation of the amounts owed is unsubstantiated and devoid of specific factual allegations. The second defendant failed to pinpoint any particular discrepancies or errors in the plaintiff's detailed statement of account, nor does he

offer an alternative accounting or framework to challenge the plaintiff's figures. Such a generalised denial, lacking in specificity, does not satisfy the requirement of a bona fide defence as it does not engage with the plaintiff's allegations.

32. Furthermore, the second defendant's reliance on an alleged verbal agreement that purportedly absolved him from liability is equally deficient. The defence is predicated on vague assertions without the support of concrete evidence or documentation. Critical details such as the terms of the alleged agreement, the circumstances under which it was purportedly concluded, and any corroborative communications are conspicuously absent. In *Breitenbach*, the court emphasised that a defence based on allegations of an oral agreement must be presented with clarity and particularity to be considered bona fide. The second defendant's failure to meet this standard renders the defence untenable.
33. Additionally, the invocation of property "improvements" as a defence also lacks the requisite detail and substantiation. The second defendant does not delineate the nature, extent, or value of these alleged improvements, nor does he elucidate how they impact his obligations under the lease agreement. Without such information, the court is unable to assess the materiality or substance of this claim. As per the principles outlined in *Standard Bank of SA Ltd v El-Naddaf and Another 1999 (4) SA 779 (W)*, a defence that is speculative or lacking in factual grounding does not qualify as bona fide.

The claim for rectification

34. Although, there is no attack on the statutory requirements of the surety document, the court is satisfied that the suretyship agreement in question complies with all the necessary statutory requirements as outlined in the General Law Amendment Act 50 of 1956. The agreement is embodied in a written document that clearly identifies the creditor, the principal debtor, and the second defendant as the surety. The document has been duly signed by the second defendant, and the terms of the suretyship are sufficiently clear and unambiguous, ensuring that the obligations of the surety are properly articulated.
35. Consequently, the court was satisfied that the suretyship agreement is valid and enforceable, binding the second defendant to the debt of the first defendant.
36. The plaintiff also seeks rectification of the suretyship document to correct the erroneous reference to the date of "5 December 2020" to the correct date of "5 December 2019." This discrepancy arose from a clerical or typographical error, as the correct date of the lease agreement and the suretyship should reflect "5 December 2019." The intention of the parties was clearly to bind the second defendant as surety and co-principal debtor for the obligations of the first defendant under the lease agreement that was concluded on "5 December 2019."

37. The plaintiff should succeed with its rectification claim based on the legal position as pronounced in PCL Consulting[7].
38. In PCL Consulting, the court emphasised that rectification is not a separate cause of action but rather a necessary correction to ensure that the written agreement accurately reflects the true agreement between the parties. The SCA held that if the need for rectification arises from a common mistake and the rectification sought is not disputed, the court can grant summary judgment based on the agreement as rectified. This principle supports the plaintiff's position, as the error in the date of the agreement from "5 December 2020" instead of the correct date of "5 December 2019" is clearly a clerical mistake that does not reflect the parties' true intention.
39. Similarly, in Standard Bank v Phillip the court granted rectification in a summary judgment context, where the issue was an incorrect domicilium address in the loan agreement. The court found that a rectification was necessary to reflect the correct address and that the mistake was a mere typographical error that both parties recognised. The court in that matter concluded that rectification did not affect the essence of the plaintiff's claim and thus could be granted summary judgment.
40. Applying these principles, the plaintiff's request for rectification in the current case should succeed. The mistake is minor, does not alter the substance of the agreement, and both parties are aware of the correct date on which the agreement was concluded. Therefore, rectification should be granted, allowing the plaintiff to proceed based on the corrected agreement.

Conclusion

41. In light of the foregoing, the defences proffered by the second defendant are neither bona fide nor sufficient to raise a triable issue for leave to defend to be granted.
42. The plaintiff is therefore entitled to judgment against the second defendant.
43. The second defendant's liability in this matter arises directly from his role as surety for the first defendant's obligations under the lease agreement. By signing the suretyship, the second defendant unequivocally bound himself as co-principal debtor with the first defendant, thereby assuming joint and several liability for the debts owed to the plaintiff. Since the suretyship agreement, complied with all statutory requirements and is valid and enforceable the second defendant's attempts to challenge his liability through the defences raised have been found to be insufficient to prevent

judgement.

44. The application for summary judgment is accordingly granted, and the second defendant is held liable for the full amount claimed by the plaintiff, together with interest and costs as prayed for.

45. Judgment is therefore granted as follows:

- (1) Rectification of the date of the lease agreement referred to in the preamble of the Deed of Suretyship, annexed to the plaintiff's particulars of claim as annexure "POC3", by the substitution of the date "5 December 2020" with the date "5 December 2019".
- (2) Payment of the sum of:
 - (i) R 846 919.79 for the period of March 2021 to October 2021;
 - (ii) R 1 194 368.71 for the period of November 2021 to May 2022;
 - (iii) R 1 251 715.35 for the period of June 2022 to October 2022;
- (3) Interest on the aforesaid sums at the prevailing prime interest rate from time to time plus 2% per annum a tempora morae to the date of final payment.
- (4) Costs of suit on an attorney and client scale.

A MONTZINGER

Acting Judge of the High Court

Appearances: Applicants' counsel: Mr. E Nel (in person) Applicant's attorney: Rubenstein
Attorneys For second defendant: No appearance

[1] Tumileng Trading CC v National Security and Fire (Pty) Ltd 2020

(6) SA 624 (WCC) ("Tumileng Trading"),

[2] Maharaj v Barclays National Bank Ltd 1976

(1) SA 418 (A) ("Maharaj")

[3] Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009

(5) SA 1 (SCA)

[4] Breitenbach v Fiat SA (Edms) Bpk 1976

(2) SA 226 (T) ("Breitenbach")

[5] See Inventive Labour Structuring (Pty) Ltd v Corfe 2006

(3) SA 107 (SCA) for an exposition on this issue. ("Incentive Labour")

[6] Botha v Mibit and Another (2238/2021)

[2022] ZAECQBHC 9 (19 May 2022)

[7] PCL Consulting (Pty) Ltd v Tresso Trading 119 (Pty) Ltd 2007

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- (4) SA 68 (SCA). A similar approach was taken by the court in recent decision in *Standard Bank of South Africa v Phillip and Another* [2023] ZAGPPHC 1210 (30 October 2023) (“*Standard Bank v Phillip*”)
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