SOUTH AFRICA / JUDGMENT

Billion Property Developments v Nevzomark (Pty) Ltd and Another (2023/104985) [2024] ZAGPPHC 1045 (13 October 2024)

[2024] ZAGPPHC 1045

COURT
North Gauteng High Court, Pretoria

BEFORE
Amien

CASE / FILE NUMBER
2023/104985

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IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
CASE NO: 2023/104985
(1)
REPORTABLE: NO
(2)
OF INTEREST TO OTHERS JUDGES: NO
(3)
REVISED: NO
DATE: 13/10/2024
In

the matter between:	Billion Property Developments Plaintiff And Nevzomark (Pty) Ltd First Defendant / Excipient Ali Ozer Second Defendant / Excipient

JUDGMENT

AMIEN AJ

Introduction

[1] This matter involves an application for an exception raised by the Excipients in terms of Rule 23(1) of the Uniform Rules of Court on the basis that the Plaintiff's Particulars of Claim lack the necessary averments to sustain a cause of action and should therefore be struck out with costs.

[2] The Plaintiff, Billion Property Developoments instituted proceedings against the Defendants, including the First Defendant namely, Nevzomark Pty (Ltd) and the Second Defendant namely, Ali Ozer acting as surety for the First Defendant. The Plaintiff claims that the Defendants breached their obligations arising from a written lease agreement entered on 9 March 2021 between the Plaintiff and the First Defendant and claims arrear rental in the amount of R1 619 233.05.

[3] The parties to the lease agreement are the First Defendant as the lessee and the Plaintiff as the lessor.

[4] The lease agreement is signed by one Zandile Kogo, acting in his capacity as Director of the Plaintiff and on behalf of the Plaintiff as lessor, and Ali Ozer, acting in his capacity as Director of the First Defendant namely, Nevzomark Pty (Ltd) and on behalf of the First Defendant as lessee.

[5] A deed of suretyship is annexed as “”Annexure C”” to the lease agreement.

[6] The lease agreement is duly dated and signed by representatives of the lessor and lessee, and witnesses. Each page of the lease agreement including the deed of suretyship is duly initialed by the representatives of the parties, and witnesses to the agreement.

[7] The lease agreement identifies the Second Defendant (Mr Ali Ozer) as a surety to the agreement in which his details are included namely, identity number, residential address (No. 1[...] F[...] Road, Norwood, 2117), profession as Director, telephone number, email address, and annual income.

[8] The lease agreement involves the leasing of premises namely, Shop No. 2[...], Forest Hill City, 6[...] F[...] B[...] Street, Monavoni, Pretoria West.

[9] The deed of suretyship comprises two pages. On the second page, it is blank where it says "Signature". However, both pages are initialed by Ali Ozer.

[10] The Defendants raise the following grounds for their exception to the Plaintiff's Particulars of Claim.

10.1. That the lease agreement is between the Plaintiff and the First Defendant, not between the Plaintiff and the Second Defendant. The Second Defendant also did not assign a domicilium citandi et executandi anywhere in the lease agreement.

10.2. That the suretyship agreement, which the Plaintiff relies on as its cause of action did not come into existence and any reliance on it is bad in law.

10.3. That the Plaintiff failed to plead compliance with the provisions of the General Law Amendment Act 50 of 1956 relating to the registration of the lease agreement as a long lease.

[11] The Second Defendant subsequently abandoned the third exception in para 10.3. above, so there is no need to address it.

[12] The second ground to the exception will be dealt with first, after which the first ground will be addressed.

Second ground to the Defendants' Exception

[13] The Defendants claim that the Plaintiff's cause of action against the Second Defendant is primarily based on a deed of suretyship that is not in existence because it was not signed by the Second Defendant.

[14] The Defendants contend that the suretyship agreement was initialed at the bottom by Ali Ozer but not signed by or on behalf of the Second Defendant, which is substantially non-compliant with section 6 of the General Law Amendment Act.

[15] Section 6 of the General Law Amendment Act provides:

"Formalities in respect of contracts of suretyship

No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety: Provided that nothing in this section contained shall affect the liability of the signer of an aval under the laws relating to negotiable instruments."

[16] Section 6 makes it clear that a deed of suretyship must be in writing and signed by the named surety or by someone who signs on the surety's behalf.

[17] The Defendants aver that the suretyship agreement was only initialed and not signed by the Second Defendant, therefore it is not valid and binding on the Second Defendant and cannot be relied upon by the Plaintiff as a cause of action.

[18] The Plaintiff avers that an initial qualifies as a signature and therefore the Second Defendant is bound as surety.

[19] In Van Niekerk v Smit and Others,[1] my learned brother Murray J in this division (the Transvaal Division as it then was) confirmed that a signature includes a signature by initials.

[20] Therefore, the initial of the Second Defendant on the deed of suretyship qualifies as a signature and it can be accepted that the Second Defendant signed the suretyship agreement.

[21] The Defendants argue that the surety must sign in their personal capacity and cannot be bound in their representative capacity.

[22] The Defendants contend that Ali Ozer's initial on the deed of suretyship was in his representative capacity as Director of the First Defendant and that he did not initial in his personal capacity.

[23] In Lategan and Another NNO v Boyles and Another,[2] my learned brother Le Roux J also in this division (Transvaal Provisional Division as it then was) found that a surety can be bound in their personal and/or representative capacities.

[24] I would like to add that through the caveat subscriptor rule relating to both the lease agreement and the deed of suretyship, the Second Defendant is deemed to have known that he was named as a surety for the lease agreement. By signing the lease agreement and attaching his initial to the deed of suretyship, he accepted the obligations arising from the suretyship agreement, which is accessory to the lease agreement.[3]

[25] Therefore, the Plaintiff's aversion that the lease agreement is between the Plaintiff and the First Defendant, not between the Plaintiff and the Second Defendant is moot. Although the lease agreement is between the Plaintiff and the First Defendant, by virtue of its accessory nature to the lease agreement, the deed of suretyship forms part of the lease agreement. So, by signing the deed of suretyship, the Second Defendant undertook to be liable for the debts of the First Defendant under the lease agreement.

[26] Having found that the suretyship agreement is valid and binding on the Second Defendant, it follows that the Plaintiff established a cause of action, which arose within the jurisdiction of this Court. Accordingly, the Plaintiff established this Court's jurisdiction over the Second Defendant.

First ground to the Defendants' Exception

[27] The Defendants claim that the Second Defendant did not assign a domicilium citandi et executandi anywhere in the lease agreement, and that the domicilium citandi et executandi as pleaded in para 1.3. of the Plaintiff's Particulars of Claim was not selected by him.

[28] The Plaintiff pleads as the domicilium citandi et executandi the residential address of the Second Defendant as named in the lease agreement, being No. 1[...] F[...] Road, Norwood, 2117.

[29] Consequently, the Defendants aver that by not pleading the Second Defendant's residential address, the Plaintiff did not establish this Court's jurisdiction over the Second Defendant through his residential address.

[30] Although the Plaintiff did not plead the address in para [29] above as the residential address of the Second Defendant, it is too formalistic to suggest that by naming the Second Defendant's residential address in the Plaintiff's Particulars of Claim albeit attributable to a domicilium citandi et executandi, is not sufficient to establish this Court's jurisdiction over the Second Defendant by way of his residential address. The latter is provided in the lease agreement as the residential address of the Second Defendant in his capacity as surety. That address is within this Court's jurisdiction.

[31] Therefore, the Plaintiff established this Court's jurisdiction through the cause of action and through the Second Defendant's residential address.

Order

[32] In the result, the Defendants exceptions are dismissed with costs.

W AMIEN

ACTING JUDGE OF THE HIGH COURT

PRETORIA

APPEARANCES:

Counsel for the Plaintiff: Advocate MJ Motsusi Instructed by: Ditsela Inc. Attorneys Attorney for the Defendants: S Bhyat

Judgment

number: 2023/104985 Date heard: 14 August 2024 Date of judgment: 13 October 2024

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date and time for the delivery is 13 October 2024.

[1] 1952

(3) SA 17 (T) at 25C-F.

[2] 1980

(4) SA 191 (T).

[3] Corrans and Another v Transvaal Government and Coull's Trustee 1909 TS 605 at 612.

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