

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

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| (1) | REPORTABLE: <b>NO</b>                  |
| (2) | OF INTEREST TO OTHER JUDGES: <b>NO</b> |
| (3) | REVISED:                               |

Date: **27<sup>th</sup> July 2021** Signature:

**CASE NO:** 22158/2019

**DATE:** 27<sup>th</sup> JULY 2021

In the matter between:

**TOWER PROPERTY FUND LIMITED**

Plaintiff

and

**PRIORITY TRAVEL (PTY) LIMITED**

First Defendant

**SWART, FRANCOIS**

Second Defendant

**Coram:** Adams J

**Heard:** 20 July 2021 – The ‘virtual hearing’ of the application was conducted as a videoconference on the *Microsoft Teams* digital platform.

**Delivered:** 27 July 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, being uploaded to the CaseLines system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 15:00 on 27 July 2021.

**Summary:** Application for summary judgment – defence being a denial of particular averment in the particulars of plaintiff's claim and the annexures thereto – requirements for summary judgment and for defences raised discussed – knowledge required of deponent to affidavit in support of application for summary judgment – summary judgment granted.

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## **ORDER**

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Summary Judgment is granted in favour of the plaintiff against the first and second defendants, jointly and severally, the one paying the other to be absolved, for: -

- (a) Payment of the amount of R204 320.97.
  - (b) Payment of interest on the amount of R204 320.97 at the prevailing prime rate, as from time to time, plus 2%, per annum, calculated from the due date (30 November 2018) to date of actual payment.
  - (c) Cost of suit.
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## **JUDGMENT**

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### **Adams J:**

[1]. This is an opposed application by the plaintiff for summary judgment against the first and second defendants.

[2]. The plaintiff's cause of action against the first defendant is based on a written commercial lease agreement ('the lease agreement') concluded between the parties on the 10<sup>th</sup> April 2017 in terms of which lease agreement the first defendant let from the plaintiff premises in Rosebank, Johannesburg, for the period from 15 March 2017 to 31 March 2022 – therefore for a period of approximately five years. The monthly rental payable by the first defendant to the plaintiff was agreed upon in the written lease agreement. On the 29<sup>th</sup> of November 2018, the plaintiff and the first defendant amended the lease

agreement by concluding a written addendum in terms of which *inter alia* the lease agreement was cancelled. The plaintiff's claim is in fact in the main grounded on the provisions of the addendum to the lease agreement. The plaintiff's cause against the second defendant is based on a guarantee by the second defendant in favour of the plaintiff, guaranteeing the first defendant's proper performance in terms of the lease agreement.

[3]. The addendum to the lease was in the nature of a compromise and a settlement agreement in terms of which the plaintiff and first defendant agreed to the cancellation of the agreement of lease with effect from the 30<sup>th</sup> of November 2018. The first defendant also undertook to vacate the commercial leased premises by the 30<sup>th</sup> of November 2018, and, in consideration for the early termination of the fixed term agreement of lease, the first defendant agreed to make payment to the plaintiff of all amounts then outstanding and payable to the plaintiff, which was expressly agreed upon in the sum of R56 690.01. Furthermore, as an early termination penalty, the first defendant expressly agreed to pay to the plaintiff an amount of R147 630.96 (inclusive of VAT).

[4]. Pursuant to and in terms of the addendum, the first defendant vacated the leased premises on the 30<sup>th</sup> of November 2018, but it however failed to make payment of the sums of R56 690.01 and R147 630.96. The plaintiff's claim is therefore for payment of these amounts, totalling R204 320.97, which, so the plaintiff avers, the first defendant is liable to pay to it in terms of the addendum.

[5]. In their plea, the first and second defendants admit that the first defendant entered into the lease agreement. The defendants however deny that they are bound by the lease agreement because, so it is pleaded in the plea, they have no knowledge regarding the capacity of the person who signed the lease agreement and the addendum on behalf of the plaintiff, to sign same on plaintiff's behalf. The defendants in particular placed in dispute the authority of the plaintiff's representative to represent the plaintiff.

[6]. As regards the plaintiff's case against the second defendant, the defendants plead that '[t]he suretyship was ... hidden, alternatively not apparent

by reason of the way in which it is incorporated in the Master Rental Agreement; was not clearly presented; was unusual; and would not normally be found in the Master Rental Agreement presented for signature.'

[7]. The second defendant therefore alleges that the suretyship and the terms thereof were never pointed out to him and that he never had the deliberate intention to enter into a suretyship contract. This means, so the second defendant alleges, that the conclusion of the suretyship amounts to *iustus error*, in addition to it not complying with the provisions of the General Law Amendment Act, Act 50 of 1956. Importantly, the defendants admit that the first defendant signed the lease agreement and the addendum thereto, which incorporate the guarantee.

[8]. With reference to the penalty amount payable by the first defendant in terms of the addendum, the defendants plead that the plaintiff is not entitled to payment of same as it constitutes a penalty in terms of Section 3 of the Conventional Penalties Act, Act 15 of 1962. The penalty stipulation represents, so the defendants aver in their plea, all future rental payments the plaintiff would have been entitled to and it is therefore out of proportion to the prejudice suffered by the plaintiff. The amount of the penalty therefore stands to be reduced.

[9]. Moreover, so the defendants plead, the plaintiff could and should have mitigated its damages. This the plaintiff failed to do, which means its damages have not been properly quantified.

[10]. I interpose here to demonstrate the fallacy in the contention by the defendants that the penalty stipulation in the addendum agreement is disproportionate to the damages which the plaintiff would potentially have suffered as a result of the breach of the contract by the first defendant and the subsequent cancellation. The lease agreement was cancelled with effect from the 30<sup>th</sup> of November 2018. That means that the lease agreement would have had another forty more months to run before its expiration. The average monthly rental, inclusive of the other ancillary charges, (based on the rental payable during 2021), was R32 194.15 per month, which translates into total

rental payable over the remaining period of the lease agreement amounting to R1 287 766. I am therefore at a loss to understand how it can be alleged by the defendants that the penalty of R147 630.96 is disproportionate to the potential damages which the plaintiff would have suffered as a result of the cancellation of the lease.

[11]. The defendants also plead that the plaintiff is in possession of a deposit paid by the first defendant to the plaintiff in the sum of R84 809.68, which, so the defendants allege in a Contingent Counterclaim, should be set-off against any claims by the plaintiff.

[12]. In its affidavit resisting summary judgment the defendants repeat these defences to the plaintiff's claim. Additionally, the defendants raise the point *in limine* to the effect that the deponent to the affidavit in support of the application for summary judgment does not have the requisite knowledge to depose to that affidavit. I now deal briefly with this legal point.

[13]. It is the case of the defendants that Ms Charlene Gray, who is the portfolio manager in the employ of the plaintiff's managing agent, does not have the requisite knowledge of the matters in issue, despite her say-so to the contrary, and therefore she is not, so the defendants contend, a person as contemplated in Rule 32(2) as she cannot 'swear positively to the facts verifying the cause of action and the amount, if any, claimed'.

[14]. The starting point as regards this issue is the fact that Ms Gray, under oath, confirms that she has the necessary knowledge of the issues in this matter. She swears positively to the facts and verify the causes of action of the plaintiff. In addition, she confirms that she had been mandated by the plaintiffs to depose to the affidavit in support of the application for summary judgment. She corroborates the foregoing by explaining that she, in her capacity as the portfolio manager, deal with the day to day running of the affairs of the plaintiff's business in relation to the property where the leased premises are situated. The plaintiff's claims against the defendants, so Ms Gray Avers, fall under her control and she has personal knowledge of facts and records relating thereto and the amounts owing by the defendants.

[15]. The defendants, as I indicated, dispute that Ms Gray is a person with the necessary knowledge of the facts in issue in this matter. The defendants in particular take issue with the fact that Ms Gray was not the person who signed the lease agreement or the addendum thereto.

[16]. There is no merit in this point, especially considering that the defendants admit that the lease agreement and the addendum were concluded between the plaintiff and the first defendant.

[17]. Furthermore, this point should be dismissed on the basis of the authority in *Kurz v Ainhirn*<sup>1</sup>, in which a liquidator made application for summary judgment for repayment of monies that had been misappropriated from a company some two years before his appointment as liquidator. The sole point in the opposing affidavit was that the liquidator could not have knowledge of the facts in question. I can do no better than to quote from the judgment in which Howard JP held as follows:

'In his opposing affidavit the defendant takes one point only: that inasmuch as the alleged causes of action arose out of events which occurred during the period 1990-1991 and the plaintiff had nothing to do with the affairs of the close corporation prior to his appointment as liquidator on 12 January 1994, he is not a person "who can swear positively to the facts" as required by Rule 32(2). He says that under these circumstances he is not obliged to satisfy the Court that he has a *bona fide* defence to the action, and indeed he makes no attempt to do so. He does not even deny the allegation that he misappropriated and stole the amount of R440 000.

... ..

I have to be satisfied that the plaintiff can and does swear positively to the material facts, not that he has complied with a given formula. In this case he not only asserts that he can swear positively to the facts, he does so and indicates the reason why he is able to do so, namely that he is a liquidator of the close corporation, having been duly appointed as such some nine months ago. As such he clearly had both the opportunity and the duty to obtain knowledge of the relevant facts from, *inter alia*, the documentary records of the close corporation and interrogation of the defendant. It is inconceivable that the plaintiff, who is an officer of the Court, would have instituted this action, based on serious allegations of misappropriation and theft of moneys, without establishing the

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<sup>1</sup> *Kurz v Ainhirn* 1995 (2) SA 408 (D)

facts through examination of the documentary records under his control and exercising his statutory power to interrogate the defendant and others involved in the transactions in question. Evidence of this nature would be admissible against the defendant and the plaintiff would obviously be able to swear positively to the facts thus established. There are accordingly good grounds for believing that the plaintiff can swear positively to the relevant facts and fully appreciated the meaning of his assertion to that effect in the verifying affidavit.

In his opposing affidavit the defendant states the obvious, that the plaintiff was not a witness to transactions involving the close corporation before liquidation, and draws from that fact alone the inference that the plaintiff cannot swear positively to the relevant facts. He thus excludes one possible source of knowledge which was never open to the plaintiff anyway, but does not even mention, let alone attempt to exclude, the obvious sources from which the plaintiff as liquidator could acquire sufficient knowledge to enable him to swear positively to the facts. This disingenuous affidavit does not serve to cast doubt on the plaintiff's averment that he can swear positively to the facts or his opinion that there is no bona fide defence.

I accordingly grant summary judgment against the defendant ...'

[18]. On the basis of this authority, with which I agree, the defendants' first preliminary point stands to be rejected. The point is that *in casu* Ms Gray not only asserts that she can swear positively to the facts, but also does so and indicates the reason why she is able to do so, namely that she on a daily basis deals with the business of the plaintiff relating to the property in question.

[19]. As for the other defences raised on behalf of the first defendant, namely that the addendum, which provides for a penalty which is disproportionate to the potential damages which would have suffered by the plaintiff, I have already demonstrated the fallacy in that argument. The Conventional Penalties Act therefore does not, in my view, assist the defendants. There is no merit in that defence.

[20]. As regards the claim by the defendants that the deposit should be set-off against the plaintiff's claim. On a proper interpretation of the addendum, there is no room for this contention by the defendants. The addendum, which was concluded between the parties, provides that the settlement amounts to be paid by the first defendant to the plaintiff would have been in full and final settlement

of all amounts due by the first defendant to the plaintiff. The defence of the first defendant on this basis is accordingly bad in law.

[21]. As far as the second defendant's defence of *iustus error* is concerned, the gist of his argument is that he was unaware that he was signing as a guarantor or as a surety. *Ex facie* the lease agreement, a Guarantee is clearly and unequivocally provided by the second defendant, and the terms and conditions of the guarantee are provided for in clause 11 of the lease. In a separate page the second defendant also specifically signed as a guarantor.

[22]. The second defendant contends that he was misled by the plaintiff. He further argued that the guarantee clause is inconspicuously recorded in the body of the agreement and not eye-catching, as it should be. The plaintiff had failed to draw his attention to the guarantee clause and he would not have bound himself had he been alerted to it. He did not expect that the guarantee would be embodied in the lease agreement and he did not notice it. His mistake, he claimed, which had been induced by the plaintiff, would have misled any reasonable person similarly circumstances.

[23]. The decisive question in a case such as the present was laid down in *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis*<sup>2</sup> as follows:

' . . . [D]id the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? . . . To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the last party misled thereby? . . . The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled? *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 (1) SA 978 (A) at 984D - H, 985G - H.'

[24]. Applying these principles *in casu*, I am not persuaded that the second defendant made out a case on the basis of *iustus error*. In my view, there is

<sup>2</sup> *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) at 119.



nothing inconspicuous about the guarantee clause and the guarantee itself, which is referenced on no less than three occasions in the lease. There is no evidence before me or an assertion that pressure was exerted upon the second defendant to sign. There is also no evidence to suggest that he was required to sign the document in haste and under duress. He probably had ample opportunity to study the concise document and could not have overlooked the guarantee clause.

[25]. In my view, it was open to the second defendant, having perused the lease agreement, to delete the guarantee clause if he was not amenable to its terms or to make an appropriate endorsement at the foot of the document to signify his protestation.<sup>3</sup> This he did not do. Whether the plaintiff brought the guarantee clause to his attention or not is of no consequence regard being had to the simplicity of the lease agreement. In my view, the duty to inform the second defendant did not arise. In *Slip Knot Investments 777 (Pty) Ltd v Du Toit*<sup>4</sup> it was held:

'A contracting party is generally not bound to inform the other party of the terms of the proposed agreement. He must do so, however, where there are terms that could not reasonably have been expected in the contract. The court below came to the conclusion that the suretyship was "hidden" in the bundle, and held that the respondent was in the circumstances entitled to assume that he was not personally implicated. I can find nothing objectionable in the set of documents sent to the respondent. Even a cursory glance at them would have alerted the respondent that he was signing a deed of suretyship . . . Slip Knot was entitled to rely on the respondent's signature as a surety just as it was entitled to rely on his signature as a trustee. The respondent relied entirely on what was conveyed to him by his nephew through Altro Potgieter. Slip Knot made no misrepresentation to him, and there is no suggestion on the respondent's papers that Slip Knot knew or ought, as a reasonable person, to have known of his mistake.'

[26]. In my view, the second defendant has not demonstrated that the plaintiff knew or ought to have reasonably known of his mistake, if there was one. The plaintiff was entitled to rely on the second defendant's signature as guarantor as

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<sup>3</sup> *Steenkamp v Webster* fn 5 at 529G-H.

<sup>4</sup> *Slip Knot Investments 777 (Pty) Ltd v Du Toit* [2011] ZASCA 34; 2011 (4) SA 72 (SCA) para 12.

it did on his signature as the representatives of the first defendant. He signed the guarantee as a manifestation of his assent to it. He is therefore bound as such. His *iustus error* defence is not sustainable.

[27]. I am not satisfied that in their resisting affidavit the defendants have demonstrated a *bona fide* defence the plaintiff's claim. Summary judgment should therefore be granted against the defendants.

### **Costs**

[28]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*<sup>5</sup>.

[29]. On first principles the plaintiff is entitled to his costs. It was, however, argued on behalf of the defendants that the amount involved herein does not warrant the plaintiff having instituted the action in the High Court as the claim falls squarely within the monetary jurisdiction of the Magistrates Court. The plaintiff should therefore be awarded costs, so the defendants argue, on the Magistrates Court scale.

[30]. The flipside of the coin is that the agreement provides that the plaintiff, in the event of it instituting legal action against the defendants, are entitled to costs on the scale as between attorney and own client.

[1]. All things considered, I am of the view that an order on the High Court Scale as between party and party, shall be fair, reasonable and just to all concerned. Therefore, in the exercise of my discretion I intend granting such an order.

### **Order**

[31]. Accordingly, I make the following order: -

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<sup>5</sup> *Myers v Abramson*, 1951(3) SA 438 (C) at 455

- (1) Summary Judgment is granted in favour of the plaintiff against the first and second defendants, jointly and severally, the one paying the other to be absolved, for:
- (a) Payment of the amount of R204 320.97.
  - (b) Payment of interest on the amount of R204 320.97 at the prevailing prime rate, as from time to time, plus 2% per annum, calculated from due date (30 November 2018) to date of actual payment.
  - (c) Cost of suit.

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**L R ADAMS**

*Judge of the High Court*

*Gauteng Local Division, Johannesburg*

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HEARD ON:

21<sup>st</sup> July 2021 – in a ‘virtual hearing’ during a videoconference on the *Microsoft Teams* digital platform

JUDGMENT DATE:

27<sup>th</sup> July 2021 – judgment handed down electronically

FOR THE PLAINTIFF:

Advocate J G Dobie

INSTRUCTED BY:

Rooseboom Attorneys, Johannesburg

FOR THE FIRST AND SECOND DEFENDANTS:

Adv H Van der Vyver

INSTRUCTED BY:

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Johannesburg