



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: <input checked="" type="checkbox"/> YES/NO	
(2) OF INTEREST TO OTHER JUDGES: <input checked="" type="checkbox"/> YES/NO	
13/02/19	<i>Mgwala</i>
DATE	M GWALA

CASE NO. 23299/2018

In the matter between: -

ZETA DEMPSEY

FIRST PLAINTIFF

HERMANUS PETRUS DEMPSEY

SECOND PLAINTIFF

And



KIDEO ARK (PTY) LTD

FIRST DEFENDANT

ANTON GERRIT VAN ROOYEN

SECOND DEFENDANT

ELIZABETH JOHANNA VAN ROOYEN

THIRD DEFENDANT

JUDGMENT

GWALA AJ

1. The plaintiffs instituted an action against the defendants in which they claim payment of the sums of R 270, 000.00 and R 53, 000.00 in respect of claims A and B, respectively. The action is based on the alleged breach of contract.

The defendants filed an exception to the plaintiffs' particulars of claim on basis thereof that the particulars of claim lack averments necessary to sustain a cause of action. The plaintiffs opposed the exception.

2. The upshot of the allegations made in the plaintiffs' particulars of claim are, *inter alia*, the following: that on 19 October 2015 and at Boksburg they entered into a written lease agreement ("lease agreement") with the first defendant who, at the time of conclusion thereof, was represented by the second and the third defendants; that the plaintiffs leased a certain property situated at No 9A sett Street, Boksburg West, Johannesburg (the property) to the first defendant, that the first defendant agreed to pay rent in the sum of R53, 000.00, payable monthly in advance; that the first defendant would return the property in good condition at the end of the lease agreement, fair wear and tear excepted; that the lease agreement would terminate on 30 November 2020; that the first defendant took occupation of the property during March 2016.
3. The plaintiffs alleged that the lease agreement was subject to a suspensive condition that Anton Geritt Van Rooyen and Elizabeth Johanna Van Rooyen, the second and third respondents, respectively bound themselves to the lessor as surety and co-principal debtors for all obligations of the lessee to the lessor under the lease agreement as well as those arising in consequence of any termination thereof.

4. The plaintiffs further alleged that the defendants prematurely terminated the lease agreement in that on 02 February 2017, the defendants gave their notice of intention to terminate the lease agreement. The termination would be effective from 30 April 2017, the date on which the first defendant eventually vacated the property. The plaintiffs did not accept the early termination of the lease agreement. They contend that despite vacating the property, the defendants remained liable for rent until the date a new tenant was secured. Apparently, the new tenant was secured and took occupation of the property with effect from 01 June 2017 and in view thereof, the plaintiffs claim payment of the sum of R53, 000.00 for rental due for the month of May 2017.
5. The plaintiffs further claim payment of the sum of R270, 000.00. For this claim it is alleged that the defendants caused some damages to the property. As a result of these damages, the plaintiffs sold the property at a reduced price. It is alleged that the property was sold less R200, 000.00 than its market value.
6. Lastly, the plaintiffs alleged that prior to the transfer of the property in December 2017, the purchase who took occupation thereof with effect from 01 June 2017, paid occupational rent at a reduced amount in the sum of R40, 000.00 instead of the market related amount of R53, 000.00 per month. This too was alleged to be as a result of damages allegedly caused

to the property by the defendants.

7. As a result of the reduction in the rental amount, so it is alleged, the plaintiffs suffered damages in the sum of R70, 000.00 hence the claim of R270,000.00.
8. Essentially, there are three grounds of exception raised by the defendants. These are:- first, that the second plaintiff lacked the requisite *locus standi*; second, that the plaintiffs' particulars of claim do not make any allegation that the suspensive condition contained in the lease agreement was fulfilled; and, third, that whilst the plaintiffs allege that the second and third defendants bound themselves as surety and co-principal debtors to the first defendant in favour of the plaintiffs, the plaintiffs did not attach to their particulars of claim a written document signed by or on behalf of the second and third defendant containing the terms of the contract of suretyship as contemplated in terms of Section 6 of the General Law Amendment Act 50 of 1956 as amended.
9. I will deal first with the first ground of exception. The defendants contend that the second plaintiff was not a party to the lease agreement upon which the claim is founded. On that basis, there is no privity of contract between the second plaintiff and the first defendant. Therefore, the second plaintiff does not have a claim against the defendants and may not sue based on

the lease agreement to which he is not a party.

10. In essence, in respect of the first ground of exception the defendants' argument is that the second plaintiff may not enforce the terms of the lease agreement in court. He may claim any relief based on the lease agreement because it does not create any right for him since he is not a party thereto.
11. The approach to exception in which it is claimed that the impugned pleading does not sustain a cause of action is well established. The court is to take as true the allegations pleaded by the respondent and to assess whether they disclose a cause of action. A cause of action, in the case of a plaintiff, comprises —

 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'¹
12. To succeed in a no cause of action exception the excipient must demonstrate that on every reasonable interpretation of the pleading, and

¹ See: *Stolls v Garliecke and Bousfield* 2012(4) SA 415 at 421 para 10 H-422A

assuming all the pleaded allegations to be true, no cause of action is made out upon which judgment could be granted in favour of the plaintiff.²

13. When considering whether an exception should be upheld the pleadings are considered as a whole and one does not read paragraphs in isolation.³ For purposes of exception facts pleaded must be taken as correct.⁴

14. In this matter it is common cause that the second plaintiff did not sign the lease agreement. Same was entered into between the first plaintiff and the first defendant duly represented by the second and third defendant.

15. In its introductory clause the lease agreement states that:

*"Agreement of Lease entered into by and between
Zeta Dempsey ID No...*

from:

8 tenth Street Boksburg North

*who confirms that she is authorised to enter into this agreement by her
husband and co-owner of the property, Hermanus Petrus Dempsey
(herein after referred to as the "LESSOR")*

And

Kideo Ark (Pty) Ltd.

REG. No. 2014/286033/07

² See: *Lewis v Oneanate (Pty) Ltd* 1992(4) SA 811 (A) at 817F; SEE ALSO: *First national Bank of South Africa Ltd v Perry NO and Others* 2001(3) SA 960 at 965 para 6. See also *Erasmus Superior Court Practice* at D1-295.

³ See: *Nel NNO v McArthur* 2003 (4) SA 142 (T) at 149 F; See Also *Erasmus Superior Court Practice* at D1-295

⁴ See: *Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd* 1999(1) SA 624 (W) at 632C-D; *Robinowitz v Van Graan* 2013(5) SA 315 (GSJ) para.6

From:

9A Sett Street Boksburg West

Herein duly represented by:-

Antony Van Rooyen and Elizabeth Van Rooyen

Who confirm that they are authorised to enter into this agreement

(herein after referred to as the "LESSEE")

16. The lease agreement was signed on behalf of the first defendant by AG Van Rooyen and EJ Van Rooyen who signed in their respective capacities as *"DIRECTOR, SURETY, AND CO-PRINCIPAL DEBTOR[S] ON BEHALF OF THE LESSEE"*.
17. *Locus standi* is indeed one of the most fundamental requirements for any legal action undertaken. It is basically the right to institute action., It relates to the right or legal capacity of a party to sue or be sued, or a party's right to make a legal claim or seek judicial enforcement of a duty or a right.⁵
18. A person who claims relief from a court in respect of any matter must, as a general rule, establish that he has a direct interest in that matter in order to acquire the necessary right or standing to seek such relief.⁶
19. The test for determining locus standi was explained by the court in United

⁵ Black's Law Dictionary (7th edition) 1999

⁶ Cabinet of Transitional Government for Territory of South west Africa v Eins (522/86) [1988] ZASCA 32; [1988] 2 All SA 379 (A) (30 March 1988)

Watch and Diamond (Pty) Ltd v Disa Hotels Ltd⁷ as follows;

*"to establish that one has locus standi in judicio, one must show, ...
that he has an interest in the subject matter of the judgment or order
sufficiently direct or substantial..."*

20. As already pointed out the plaintiffs' claim is that the first defendant breached the lease agreement in that, *inter alia*, it did not return the property in good condition. As a result thereof they suffered damages such as the reduction in the purchase price and the occupational rental as well as the early termination of the lease agreement resulted in them losing rental for the month of May 2017. All these claims are based on the alleged breach of the lease agreement of which the second plaintiff was not a party.
21. The plaintiffs submit that the second plaintiff, as a co-owner of the property, has a direct and substantial interest in the matter and therefore was properly cited as a necessary party in this litigation. They submit further that because of the reduction in purchase price and occupational rent, which were as a direct result of the damages allegedly cause to the property by the defendants, the second plaintiff has suffered a direct financial loss. Therefore, so the argument goes, he has an interest as a person who was impacted upon directly by these factors.

⁷ 1972 (4) SA 409 (C) at 415A

22. The argument on behalf of the second plaintiff that he has *locus standi* because he is a co-owner of the property and that he equally suffered loss with the first plaintiff as a result of the damages allegedly caused to the property is not helpful for purposes of this exception. It does not go to the heart of the complaint by the defendants. The difficulty with the plaintiffs' argument is that the basis upon which it said that the second plaintiff has a direct and substantial interest in the matter is not pleaded anywhere in the particulars of claim.
23. Whilst the second plaintiff may have some or other claim against the defendants in relation to the property, such claim may not be founded on the lease agreement. The second plaintiff was indeed not a party to the lease agreement. The doctrine of privity of contract does not permit a situation where parties who are not privy to a contract to sue based on the contract they are not privy to.⁸
24. From the allegations as pleaded in the particulars of claim in this action the plaintiffs seek to enforce right in terms of the lease agreement. There is no other basis for the claim pleaded. Since the second plaintiff was not a party to the lease agreement, he has no right to enforce under that agreement. Consequently, I will uphold the exception in this regard.

⁸ *Cosira Developments (Pty) Ltd v Sam Lubbe Investments CC t/a Lubbe Construction and Others* 2011 (6) SA 331 (GSI) para 11 and 14

25. The defendants submitted that the second plaintiff's claim should be dismissed with costs. I am not convinced with this submission. At the very least it does appear from the lease agreement that the plaintiffs are married to one another. On that basis notwithstanding that it has not been pleaded, the second plaintiff would have some or other interest in the matter. It would be too drastic to dismiss his claim at this stage. Such a move will close the doors of the court on his face. It is indeed in order, and I intend to do so, to give the second plaintiff an opportunity, if so advised, to amend the particulars of claim to demonstrate the interest he may have in the subject matter. I am thus of the view that the usual order normally granted in cases of exceptions be granted in this matter as well.
26. The second and third ground of exception may be dealt with at once. They relate basically to the suretyship. The attack being that, first, the plaintiffs' particulars of claim lack an allegation that the suspensive condition contained in the lease agreement was fulfilled and, second, that a copy of the suretyship agreement was not attached to the particulars of claim.
27. Clause 20 of the lease agreement which is attached to the particulars of claim provides as follows:

"20 SURETYSHIP:-

The lease is subject to the suspensive condition that Anton Gerritt Van Rooyen ID... and Elizabeth Johanna Van Rooyen ID... bound themselves to

the LESSOR as surety and co-principal debtor for all the obligations of the LESSEE to the LESSOR under this lease, as well as those arising in consequence of any termination thereof".

28. In paragraphs 31 (for claim A) and 41 (for claim B) of the particulars of claim, the plaintiffs allege that the second and third defendants bound themselves as surety and co-principal debtors of the first defendant in favour of the plaintiffs. Of course, in view of the finding that the second plaintiff was not a party to the lease agreement, the second and third defendant could only bind themselves as surety and co-principal debtors in favour of the first plaintiff only.
29. It seems to me that the allegations made in paragraphs 31 and 41 of the particulars of claim are sufficient to plead fulfilment of the suspensive condition of the lease agreement and nothing more needs to be pleaded. I find thereof that the plaintiffs did allege the fulfilment of the suspensive condition of the lease agreement.
30. The lease agreement was signed by AG Van Rooyen and EJ Van Rooyen. They state that they were signing the lease agreement in their capacities as, *inter alia*, surety and co-principal debtors on behalf of the lessee. The suretyship agreement was embodied in the very lease agreement under clause 20 thereof. As the lease agreement is attached to the particulars of claim, so is the suretyship agreement since it forms part of the very same

lease agreement. It is an acceptable practice that the suretyship agreement is often embodied in the main or principal agreement as it is the case in this matter.

31. Accordingly, I am of the view that the plaintiffs did plead compliance with the suspensive condition and that the suretyship agreement is attached to the particulars of claim as part of the lease agreement. There is no merit therefore in the second and third grounds of exception and they cannot be upheld.
32. As with regard to the first ground of exception, I have already found that the particulars of claims lack averments necessary to sustain a cause of action for the second plaintiff only and that the plaintiffs should be given an opportunity to amend their particulars of claim, if so advised. Consequently, in respect of the first ground of exception, the exception shall be upheld. In respect of the second and third grounds of exception, the exception shall be dismissed.
33. This brings me to the question of costs. The defendants are indeed partially successful in so far as the first ground of exception is concerned. The plaintiffs, however, are equally successful in their opposition in so far as the second and third grounds of exception are concerned. If I were to award costs, I would award costs for the defendants in respect of the first ground of

exception and, in turn, award costs to the plaintiffs in respect of the second and third grounds of exception in respect of which they are successful. These costs should ordinarily cancel each other.

34. In the exercise of my discretion I am of the view that the appropriate order regarding costs should be that each party should pay its own costs.
35. In the circumstances I make the following order: -
- 35.1 The exception on the ground that the second plaintiff does not have locus standi is upheld.
- 35.2 The plaintiffs are given an opportunity to amend the particulars of claim, if so advised, within 15 days of this order.
- 35.3 The remainder of the exceptions are dismissed.
- 35.4 Each party to pay its own costs.



M. Gwala AJ

Acting Judge of the High Court of South Africa
Gauteng Division, Pretoria

Appearances:

For the Plaintiff:

Instructed by:

For the Defendant:

Instructed by:

Date of Hearing:

Date of Judgment:

Adv R Carvalheira

Hammond Pole Majole Attorneys

Adv CA Boonzaaier

Venter Attorneys

16 November 2018

13 FEBRUARY 2019