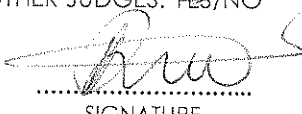


REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2013/8221

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
13/6/13	
DATE	SIGNATURE

In the matter between:

GUMEDE NYANGENI SAUL N.O

First Applicant

DE BRUYN BRIGITTE N.O

Second Applicant

PETERSEN ISAK SMOLLY N.O

Third Applicant

And

SALGADO INCORPORATED

First Respondent

FREITAS SALGADO MARIAEULALIA

Second Respondent

JUDGMENT

RATSHIBVUMO AJ:

1. **Introduction.** This is an application for a summary judgment which is opposed by the Respondents. The cause of action emanates from a lease agreement between the Applicants (lessor) and the first Respondent (lessee) allegedly entered into on 6 February 2012. The second Respondent bound herself as surety and co-principal debtor in respect of all debts that may be incurred from the said lease. Applicants issued summons against the Respondents claiming under the first claim, R89 138.34, being the arrears in the rental monies, interests at 15.5 % per annum, calculated from 2 January 2013; ejectment of the first Respondent from the premises in question and costs. In the second claim, the Applicant claims damages caused by the cancellation of the agreement in the amount of R128 938.50 calculated from 1 March 2013 to 28 February 2014.
2. When the Respondents entered notice to defend the claim, the Applicants brought about this application. The application for summary judgment is limited to the first claim. The second defendant proceeded to file an affidavit in opposing the application for summary judgment which changed the whole approach by the counsel for both sides when the matter was finally argued.
3. **The Defence.** The second Respondent denies that he entered notice to defend in order to delay the proceedings. She avers that there was not a valid lease agreement between the first Respondent and the Applicants. The first reason for this conclusion is that she claims the lessor failed to comply with the special conditions noted in the agreement whereby he was to replace the flooring, repair the ceiling, repair the blinds and also repair the air conditioners; something which he failed to do. The second reason is the clause in the agreement where it is stated that the agreement signed was just an offer to lease by the lessor which once signed and accepted by the lessor,

a more comprehensive Landlord's standard Agreement of Lease will replace such a contract, something that never happened.

4. The second Respondent further alleges that according to their records, rent is paid up with no arrears. She and the first Respondent refuse to pay for electricity until they are furnished with a detailed breakdown of all the charges incurred for their premises and the proportion of common areas. The last defence raised is a counterclaim she was considering launching against the Applicants over theft of her motor vehicle that was stolen while at the leased premises which she claims was due to the Applicants' gross negligence.

5. Counsel for the Applicant conceded when arguing that in light of the second Respondent's affidavit, there were many factual disputes which could only be dealt with by way of trial including the interpretation of the lease agreement. He however asked that the claim for ejectment should be granted while the rest of the claims are referred to trial. Counsel for the Respondent was opposed to this saying this could be a piecemeal adjudication scenario seeing that Claim 2 will in any event have to go to trial since it cannot be covered under Rule 32; which is undesirable.

6. **Issues for determination.** The court has to determine if the Respondents have put up a bona fide defence to the claim against them. Rule 32 (5) provides that if the defendant does not find security or satisfy the court as provided in paragraph (b) of subrule (3), the court may enter summary judgment for the plaintiff. 'Satisfy' does not mean 'prove'. What the rule requires is that the defendant set out in his or her affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim.¹ The

¹ *Wolhuterskop Beleggings (Edms) Bpk v Bloemfontein Engineering Works (Pty) Ltd* 1965 (2) SA 122 (O)

abandonment by the Applicant of the application as it stood in the papers suggests acknowledgement that the second Respondent raised a *bona fide* defence to the claims. Whether the same can be proven is a different question that this court is not even called to consider at this stage of the proceedings.

7. **Ejectment.** The next question is whether the request by the Applicant to grant the ejectment part of the application should be granted. While the second Respondent raised a number of defences to the claim of the rental monies, she did not put up a single defence in respect of ejectment claim. One would have expected the second Respondent to raise a defence that entitles her to occupy the premises such as ownership, valid lease that entitles her to occupy the premises, etc.² The second Respondent however confirms the averments by the Applicant that there is currently no lease agreement between them, albeit, for different reasoning. The Applicant claims cancellation of a lease agreement whereas the Respondent claims that it was never there in the first place. The question as to why there is no lease agreement (whether there is no lease owing to the cancellation by the Applicants or it was just not there *ab initio* as claimed by the second Respondent), is not for this court to consider at this stage.

8. If there is no valid lease that entitles the Respondents to remain in occupation of the leased property, and they allege no right or defence that entitles them to remain there; I do not see any reason why the application for ejectment should not be granted. Counsel for the Respondent argued against the ejectment of the first Respondent, not because there is a *bona fide* defence or any other defence to the application for ejectment; but because it could cause a piecemeal adjudication of the case which is undesirable.

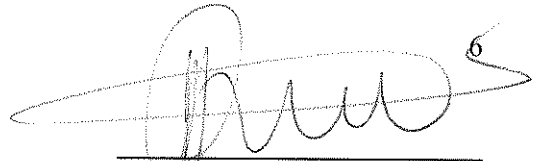
² *Jeffrey & others v Mellenpark Development (Pty) Ltd* [2003] JOL 11307 (T).

9. The other reason advanced by the counsel for the Respondents is that in granting the ejectment, the court may have to interpret clauses in the lease agreement, something unwarranted at the stage of summary judgment application. While I agree that courts have to try and avoid interpretation of the contracts at the stage of summary judgment application, I however do not see the basis on which the court could revert into the interpretation of the contract while both parties aver that there is currently no lease between them.³ The lease clauses in my view will become relevant in determining the date it ceased to exist or whether it ever existed in the first place.

10. For the reasons aforesaid, I am satisfied that the Respondents have put up a *bona fide* defence to the claim in rental monies. There is however no defence averred in respect of the application for ejectment. I therefore make the following order.

1. The Respondents are granted leave to defend in respect of prayer 1 and 2.
2. Ejectment of the first Respondent or anyone claiming occupation through the first Respondent from the commercial leased premises described as Office 2014 Second floor Finance House with one basement parking bay, 25 Ernest Oppenheimer Drive, Bruma, Johannesburg Gauteng is granted, with effect from 31 July 2013.
3. Costs of this application shall be costs in cause.

³See *Millman N.O v Klein* 1986 (1) SA 465 (C) at 473.



T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

Date Heard: 21 May 2013

Judgment Delivered: 13 June 2013

For the Applicant: Adv. JG Dobie
Instructed by: Reaan Swanepoel Attorneys
Saxonwold

For the Respondent: Adv. CC Ascar
Instructed by: Salgado Inc
Johannesburg