REPUBLIC OF SOUTH AFRICA

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

CASE NO: 18898/19

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

25 SEPTEMBER 2019 **FHD VAN OOSTEN**

In the matter between

FRIEDSHELF 113 (PTY) LTD	**PLAINTIFF**
and	
BAKSONS (PTY) LTD T/A BAKOS BROTHERS	**FIRST DEFENDANT**
RYAN FRANCIS BAKOS	**SECOND DEFENDANT**

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] This is an opposed application for summary judgment.

Amended Rule 32 of retroactive application?

[2] This matter was on the summary judgment court roll for hearing on 5 August 2019 but it was postponed to the opposed roll, commencing on 2 September 2019, for the sole reason that the estimated duration of the hearing would exceed the limit of one

hour provided for in para 9.12 of the Practice Manual, for the matter to be heard in the summary judgment court.

[3] Shortly before the hearing of this matter, on 16 August 2019, Grant AJ in this Division, delivered judgment in *First Rand Bank v Shabangu and Others* (GLD Case no 2018/43336) in which the learned judge held that the amended Rule of Court 32, must be applied to all pending summary judgment proceedings to be adjudicated after 1 July 2019, which is the effective date of the amendment. I accordingly requested counsel prior to the hearing of this matter, to consider and address the impact of the judgment on the hearing of the present matter. In response, counsel for the plaintiff and counsel for the first defendant submitted comprehensive and helpful heads of argument. No arguments in support of the judgment were advanced and counsel were *ad idem* in contending that the judgment was clearly wrong and ought not to be followed.

[4] At the commencement of the hearing before me, I was of the firm view that *First National Bank* was clearly wrongly decided and that I did not intend following it. No further arguments on this score were advanced and the hearing of the matter proceeded.

[5] While preparing the judgment in this matter, Siwendu J, on 3 September 2019 delivered judgment in *Standard Bank of SA Ltd v Rahme and Another* (GLD case no 17/46904 *et al)*, in which the learned judge considered the judgment in *First National Bank* and in a fully reasoned judgment, disagreed with the findings of Grant AJ. I am in respectful agreement with the reasons and conclusion arrived at by Siwendu J.

[6] I do not propose to add any further reasons for my disagreement with the judgment of Grant AJ, save for highlighting the apparent absurdity that would have resulted had I followed the judgment in the present matter. It is this: this matter was trial ready in all respects when it was postponed on 6 August 2019. The papers in the matter are substantial and the issues concern legal arguments. The interpretation and application of the principles regarding retroactiveness adopted by Grant AJ would have resulted in the compulsory removal of this matter from the roll simply to start it afresh once the defendants have delivered a plea, notably on the self-same papers and issues, which in principle, could never have been the intention

of the rule makers. In short, this matter serves as a telling example why the strong common law presumption against retroactive application of legislation ought to apply (see *Kaknis v Absa Bank Ltd and Another* 2017 (4) SA 17 (SCA) paras [65] – [67]; *Standard Bank* supra, paras [27] and [28]).

[7] Finally, on this aspect, it has come to my knowledge that the conflicting judgments referred to above, have been referred to the full court of this Division for final determination. I therefore do not consider it necessary to add anything further to what I have set out above.

The issues

[8] The plaintiff claims the ejectment of the first defendant from certain business premises pursuant to an alleged cancellation of a written lease agreement (the lease agreement) and as against the second defendant, in his capacity as surety and co-principal debtor of the first defendant, payment of the arrear rentals and ancillary charges up to May 2019.

[9] The lease agreement was concluded on 12 July 2017 and provided for a lease period from 1 January 2018 until 31 December 2025. The plaintiff relies in its particulars of claim, on a breach of the first defendant to pay the agreed monthly rentals due in terms of the lease agreement and its consequent cancellation of the lease agreement in the particulars of claim, annexed to the summons. The first defendant has at all times been and still is in occupation of the premises.

[10] The first defendant is presently in business rescue and has raised as the only defence to the plaintiff's claim, that it is presently in business rescue which it contends, disentitles the plaintiff to the relief sought by virtue of the provisions of Chapter 6 of the Companies Act 71 of 2008 (the Act). On 30 April 2019, the board of the first defendant adopted a resolution to commence business rescue proceedings as contemplated in s 129 of the Act. On 2 May 2019, the business rescue proceedings commenced, and the business rescue practitioners (the BRPs) were appointed. On 3 May 2019, the BRPs suspended all obligations of the first respondent in terms of *inter alia* the lease agreement, as provided for in section 136(2)(a) of the Act.

[11] The plaintiff did not obtain the BRP's written consent or the leave of the court to commence legal proceedings against the first defendant as is required in section 133(1) of the Act.

[12] Summons containing the cancellation of the lease agreement, was issued on 28 May 2019 and served on the first defendant on 30 May 2019.

[13] The second defendant joins forces with the first defendant regarding the business rescue defence but, in addition, relies on the defence of *iustus error* in regard to signing the deed of suretyship, to which I shall revert.

Statutory framework: Chapter 6 of the Act

[14] I turn now to deal with the relevant provisions of Chapter 6 by quoting the full provisions of those sections. The definition of 'business rescue' in s 128(1)(b) of the Act encompasses the purpose and aims of the procedure under Chapter 6 'to facilitate the rehabilitation of a company that is financially distressed, by providing for:

(i) the temporary supervision of the company, and of the management of its affairs, business and property;

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis, or if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company;'

[15] Section 133(1) provides:

'During business rescue proceedings, no legal proceeding, including enforcement action, against a company, or in relation to any property belonging to the

company, or lawfully in its possession, may be commenced or proceeded within any forum, except –

(a) with the written consent of the practitioner;

(b) with the leave of the court and in accordance with any terms the court considers suitable;

...'

[16] Section 134(1) provides:

'Subject to subsections (2) and (3), during a company's business rescue proceedings-

...

(c) despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property in the lawful possession of the company, irrespective of whether the property is owned by the company, except to the extent that the practitioner consents in writing.'

[17] Section 136(2)(a) provides:

'Subject to subsection (2A), and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may-

(a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that –

(i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and

(ii) would otherwise become due during those proceedings;

or

...'

[18] Section 136(3) provides:

'Any party to an agreement that has been suspended or cancelled, or any provision which has been suspended or cancelled, in terms of subsection (2) may assert a claim against the company only for damages.'

Evaluation: The plaintiff's claim against the backdrop of Chapter 6 of the Act

[19] The plaintiff's entitlement to validly cancel the lease agreement, once s 136(2)(a) had been invoked, lies the heart of the defence raised. This being a contractual right, valid cancellation can only occur in terms of the lease agreement once the first defendant has breached the agreement, either on the ground of having failed to pay the rentals or being put in business rescue. The cancellation, it is trite, must be communicated to the defaulting party (*Swart v Vosloo* [1965] 1 All SA 264 (A); 1965 1 (SA) 100 (A)).

[20] In *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) the Supreme Court of Appeal held that the cancellation of an instalment sale agreement, subsequent to the commencement of business rescue proceedings, does not constitute 'enforcement action' as contemplated in s 133(1) of the Act. Counsel for the first defendant placed reliance on the Court's references to s 136(2)(a) as follows:

> 'By invoking this provision the practitioner could prevent a creditor from instituting action and repossessing or attaching property in the company's possession.'

in countering the concerns raised by the appellants to the effect that the court's finding will nullify the aims of Chapter 6, and further the prominence and meaning attributed to s 136(2), as follows:-

> 'A further indication why the interpretation contended for by the liquidators is untenable is that it would render s 136(2) of the Act superfluous. In terms of the latter section the practitioner may during business proceedings entirely, partially or conditionally suspend any obligation of the company arising under an extant agreement. If, as the liquidators submit, s 133(1) already has the effect that rights and obligations are frozen upon the commencement of business rescue, there would have been no need for the legislature to incorporate s 136(2) in the Act.'

[21] Applied to the facts of the present matter, the plaintiff purported cancellation of the lease agreement in the summons on 30 May 2019, after the BRPs had invoked the provisions of section 136(2)(a) on 3 May 2019, falls within the ambit of s 136(2).

[22] Counsel for the plaintiff sought to overcome the possible intricacies arising from the cancellation of the lease agreement in the light of the business rescue

provisions, in contending the plaintiff's claim, in effect, is premised on a *rei vindicatio*, which so the argument went, results in the first defendant's occupation being *prima facie* unlawful merely on the allegation and proof that the plaintiff is the owner of the premises (*Graham v Ridley* 1931 TPD 476; *Chetty v Naidoo* 1974 (3) SA 13 (A)). The argument is misconceived. The formulation of the plaintiff's claim extends way beyond the mere allegations of ownership and the first defendant's occupation and possession which underpin a claim based on *rei vindicatio*. Indeed, the claim is premised on an alleged cancellation of the lease agreement which the plaintiff will be required to prove in order to succeed.

[23] In argument before me, the judgments in *Cloete Murray, Kythera Court v Le Rendez-Vous Café CC and Another* 2016 (6) SA 63 (GJ) and *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd and Others* 2016 (6) SA 501 (WCC) were hotly debated and opposing contentions advanced as to the interpretation and application thereof to the facts of the present matter and moreover relied on by plaintiff as authority for the proposition that it was not required to comply with the provisions of section 133(1).

[24] In the view I take of the matter, I do not consider it necessary to delve any deeper into the judgments, for the reasons that follow. The judgments all dealt with factual scenarios different from the facts of this matter and, as counsel for the first defendant have rightly pointed out, s 136(2) of the Act was not invoked at all in any one of them. In *Cloete Murray* the Supreme Court of Appeal dealt with the cancellation of an instalment sale agreement in a letter and the subsequent repossession and sale of the goods forming the subject matter of those agreements with the BRP's consent. In *Kythera Court* Boruchowitz J was concerned with a lease agreement that was cancelled prior to the institution of the eviction proceedings and in *Southern Value Consortium* the cancellation of the lease agreement was dealt with and finalised in an action prior to the institution of the eviction proceedings the court was required to adjudicate.

[25] The plaintiff heavily relied on the judgment of Van der Linde J in *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others* 2017 (4) SA 592 (GJ), for the proposition that upon s 136(2) being invoked, a creditor, in this case the plaintiff, where reciprocal contractual obligations are concerned, has the right to either rely on

the *exceptio non adempleti contractus* or the right to cancel the lease agreement based on a breach thereof. As opposed hereto, counsel for the first defendant contended that *BP* was wrongly decided in failing to take cognisance of the remaining provisions of Chapter 6 of the Act and in any event, being contrary the judgments in *Cloete Murray* and *Kythera Court*. I do not consider it necessary to express any final views on the opposing contentions. Suffice to say that the plaintiff has elected to cancel the lease agreement in the summons and that its cause of action is premised on such cancellation from which it follows that the dictum in *Cloete Murray*, referred to above, finds application.

[26] I accordingly conclude in holding that the first defendant has shown a bona fide defence entitling it to defend the plaintiff's action.

[27] An aspect that seemingly seems to have been overlooked is the nature of the application before me. I have been given the assurance by counsel that the issues now raised are capable of resolution only by way of legal argument which will remain thus once the matter comes up for trial. That may well be so but this being an application for summary judgment, this court is endowed with the residual discretion to grant leave to defend. I have carefully considered the provisions of the Act quoted above, the arguments presented as well as the prospects of the business of the first defendant being rescued, as fully dealt with in the answering affidavit. I am satisfied that in the exercise of my discretion, leave to defend ought to be granted.

The second defendant's defence

[28] The second defendant's defence as I have mentioned, is premised on *iustus error*. In a nutshell, it is not in dispute that clause 8.3.4 of the lease schedule to the lease agreement, containing a reference to a deed of suretyship as annexure 'D' thereto, has been deleted and a reference thereto has moreover been omitted in the index to the lease agreement. Notwithstanding these representations, a suretyship agreement was in fact signed by the second defendant and attached to the lease agreement. This undoubtedly lends support to the defence of *iustus error*, in that he was unaware that he was also appending his signature to a deed of suretyship which formed part of the bundle of documents presented to him for signature.

[29] Arguments in support of the defence and considerations against the application of *iustus error,* in the circumstances of this case, were advanced. Counsel for the second defendant took the *iustus error* defence one step further in submitting that *both parties* to the agreement, if regard is had to the deliberate deletion of the reference to the deed of suretyship and absence of reference thereto in the index, may well have laboured under a common mistake or error. The argument is not without merit, but I need not decide this issue finally at this stage. Suffice to say that the court eventually tasked to adjudicate the matter will be in the best position, having heard and considered all the evidence, whether *iustus error* did exist.

[30] I accordingly conclude that the second defendant has likewise satisfied the requirement of showing a bona fide defence to the plaintiff's claim.

Order

[31] In the result the following order is made:

1. The application for summary judgment is dismissed.
2. The first and second defendants are granted leave to defend the action.
3. The costs of the application for summary judgment shall be costs in the cause.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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PLAINTIFF'S ATTORNEYS	***REAAN SWANEPOEL ATTORNEYS***
COUNSEL FOR 1ST DEFENDANT	***ADV AJ DANIELS SC*** ***ADV C DE VILLIERS-GOLDING***
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COUNSEL FOR 2ND DEFENDANT	***ADV L HOLLANDER***
HEADS OF ARGUMENT ON BEHALF OF 2ND DEFENDANT	***PREPARED BY ADV WB PYE***
2ND DEFENDANT'S ATTORNEYS	***THOMSON WILKS INC***
DATE OF HEARING	***4 SEPTEMBER 2019***
DATE OF JUDGMENT	***25 SEPTEMBER 2019***