REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

Case no: 20818/2019

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

3 June 2021 .....

DATE **SIGNATURE**

In the matter between:

INVEST IN PROPERTY 48 (PTY) LTD Applicant

And

MAZWE FINANCIAL SERVICES (PTY) LTD Respondent

Delivered: This judgement was prepared and authored by the Judge whose name is reflected herein and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 3 June 2021.

JUDGMENT

BEZUIDENHOUT AJ:

[1] The application before me relates to a lease agreement and a claim by the applicant against the respondent for arrear rental in the amount of R 1 035 405-52, arrear Municipal utilities account in the amount of R 470 429-44, and damages to the property when the respondent vacated the property in amount of R 549 931-00.

THE APPLICATION

[2] In February 2015, the applicant and respondent entered into written lease agreement in terms of which the respondent leased from the applicant, what the respondent referred to, as a high-end residential property situated in Hyde Park, Johannesburg.

[3] In terms of the lease agreement the respondent was obliged to pay a deposit of R 200 000-00 and monthly rental in the amount of R 100 000-00 per month.

[4] The lease would endure for a period of 2 years.

[5] The respondent furthermore undertook to pay for all electricity, water, gas and other utilities consumed on the property as well as all charges/costs billed by the Body Corporate or Municipality related to sewer, and / or refuse disposal and so forth (COJ account) but not the rates.

[6] The respondent undertook to maintain the interior of the property and all improvements, fixtures and fittings, and to regularly clean the carpets, curtains, blinds, and furniture, floor coverings and tiles to ensure that the property is in good and clean condition during the period of occupancy.

[7] The respondent paid the deposit and took occupation of the property in February 2015.

[8] According to the respondent when it took occupation of the property the respondent experienced problems with the irrigation system, the indoor swimming pool leaked, the electrical system was faulty and there was a roof leak. According to the respondent it raised these issues with the applicant however the applicant did not resolve the issues.

[9] The respondent paid the R 100 000-00 monthly rental but in or about September /October 2016 the respondent commenced to pay rental in the amount of R 75 000-00 per month in what appears to be a remission of rent due to the defects in

the property not being repaired and the property thus not meeting the high standards the rent was, amongst others, an indication of.

[10] The respondent remained in occupation until August 2017, despite the lease terminating by efflux of time at the end of February 2017.

POINT IN LIMINE

[11] In its answering affidavit, the respondent raised a point in limine to the effect that the lease agreement that was concluded between the applicant and respondent was transferred into the name of Mazwe Investments (Pty) Ltd, which is an entity separate from the respondent. Accordingly, the respondent averred that the applicant had brought the wrong party before Court.

[12] The respondent pleaded that in December 2015, its representative directed correspondence to Gayle Nelson, from Etchells & Young, the property brokers who managed the property (the agent) and enquired whether the lease can be transferred into the name of Mazwe Investments (Pty) Ltd.

[13] On 14 December 2015, the agent reverted and indicated that she had spoken to the owner of the property, and he indicated that it was fine for her to change the invoice name to Mazwe Investments (Pty) Ltd and the invoices were thereafter issued in the name of Mazwe Investments (Pty) Ltd. The respondent alleged that the true respondent is Mazwe Investments (Pty) Ltd as the lease was transferred by consent.

[14] The applicant disputed that the lease was transferred from the respondent to another entity. The applicant contended that the name on the invoice was changed, and this had the effect that a third party facilitated payment of the monthly rental amount, the lease however remained intact between the applicant and respondent and was not transferred to a third party. The applicant pleaded that for the lease to be transferred to a third party the applicant, respondent and third party should have all agreed in writing to the transfer of the lease agreement from the respondent to the third party, which according to the applicant did not happen.

[15] I quote the email correspondence on which the respondent depends for its point in limine hereunder for clarity purpose.

[16] On 8 December 2015 the Respondent's representative forwarded an email to the agent in which he stated that: "*Currently the rental invoice and utilities are being made out to Mazwe Financial Services on a monthly basis, we would like to change this so that the rental goes to a different company: Mazwe Investments (Pty) Ltd and the utilities stay with Mazwe Financial Services.*"

[17] The agent responded to this email on 9 December 2015 stating that: "*Unfortunately we will not be able to do that as the lease agreement was signed in the name of Mazwe Financial. Sorry*".

[18] On the same date the Respondent then responded to the agent and asked: "*Please advise if we can change the lease agreement contract to that of Mazwe Investments in its entirety. Would this be possible*?"

[19] On 14 December 2015, the agent replied and stated that: "*I have spoken to Harry, he says it is fine for me to change the invoice name. I will do this on Monday as I am on leave this week.*"

[20] The respondent did not persist with this argument in its heads of argument but from the above it is evident that the parties did not replace the respondent for Mazwe Investments and the point in limine is dismissed.

PRESCRIPTION

[21] The respondent raised the issue of prescription. In this regard the respondent claimed that the application was launched in June 2019 and if regard is had to annexure B to the founding affidavit the arrears began to accumulate in June 2015, any debt which was due prior to June 2016, would have become prescribed as the rental was payable on a monthly basis.

[22] The Applicant in its replying affidavit stated that "There is no legal basis for prescription of the Applicant's claim for outstanding rental other than stating that such amounts were not claimed within 3 years, the Respondent fails to state on what legal basis these claims are to prescribe."

[23] The applicant went further and stated: "In any event, should any legal basis exist for such claims to have prescribed within 3 years, this claim could not have prescribed as prescription would have been interrupted when the Applicant filed action proceedings in 2016 claiming these amounts."

[24] In the heads of argument filed on behalf of the applicant the applicant without referring to authority repeated the fact that because summons was issued in 2016 and again in 2019 the serving of summons would have interrupted prescription. The applicant however failed to deal with the issue of it withdrawing both the actions without prosecuting them to finality and what effect that had on prescription.

[25] Counsel for the applicant argued from the bar that it is a trite principle in law that payments are set off against the oldest debt hence the portion of the arrear rental that accrued prior to May 2016 had not prescribed.

[26] Counsel for the respondent referred me to the matter of Standard Bank v Miracle Investments 67 (Pty) Ltd and another 2017 (1) SA 185 (SCA) where it was held that where payment is made in instalments, each constitute a separate cause of action. He also referred me to section 15 of the Prescription Act and more particularly to section 15(2) which in essence holds that where a creditor does not successfully prosecute its claim to final judgment, the running of prescription shall be deemed to not have been interrupted.

[27] Counsel also referred to the judgment of Cadac (Pty) Ltd v Weber-Stephen Products Company and others (2011) 1 All SA 343 (SCA) where it was held that the withdrawal of a summons to institute another action, meant that the 1st summons was not prosecuted successfully and hence it did not interrupt prescription.

[28] I have a difficulty with Counsel for the applicant's submission from the bar that the default position applied and that the payments received from the respondent were set off against the oldest debts; this was not the case the applicant made out in its pleadings and secondly it is not what annexure B to its founding affidavit reflected. In this regard the applicant had set of each payment as it was received from the respondent against the debt that was due for that month, where there was a difference between the debt due and the payment received, it remained as an outstanding balance for that month. On the face of annexure B, it does not appear that the applicant had applied the general principle that any monies received for rental would be used to settle the oldest debts first.

[29] On the facts pleaded the rental claims prior to June 2016 have prescribed and the rental amount claimed must be reduced with the amount of R 286 205-02.

RENTAL

[30] The respondent admitted that the monthly rental due under the lease agreement amounted to R 100 000-00 per month. The Respondent admitted taking

[35] "The respondent undertook to maintain the interior of the property and all improvements, fixtures and fittings and to regularly clean the carpets, curtains, blinds and furniture, floor coverings and tiles to ensure that the property is in good condition during the period of occupancy (clause 15.3.1 of the lease);

[36] The respondent destroyed the interior of the property and some furniture therein. The applicant is obliged to pay for such repairs at an amount of R 549 931-00. A copy of the quotation for the costs of repairs is attached and incorporated hereto as annexure D.

[37] The amount of R 549 931-00 is presently due, owing and payable which the respondent despite demand failed and / or refuse to pay, alternatively demand is made herewith."

[38] The respondent denied that it caused the damages as alleged and averred that it appears as if the applicant has upgraded the property and claimed same as damages from the respondent. The respondent denied the damages as contained in the quotation and dealt amongst others specifically with the DSTV, the swimming pool and so forth.

[39] The applicant in reply stated that: "The respondent vacated the premises overnight and failed to appear for an inspection of the property and therefore cannot

deny the damage it has caused to the property. An inspection was done, and the damages are real. The lease agreement is clear that the respondent is responsible for all damages caused to the property and must cover the costs thereof."

[40] The applicant attached as annexure D an invoice issued on its own letter head. The invoice is not addressed to anyone and does not have an invoice number or VAT number. On the invoice there is a table giving a description of the various maintenance and or repairs and or cleaning services that was executed at the property. In the righthand column there are values listed as costs.

[41] Counsel for the respondent in its heads of argument referred to various authorities indicating that where there are material disputes of fact, motion proceedings are not the appropriate avenue to follow to bring a litigants claim before Court.

[42] Counsel had also referred to the cases indicating that motion proceedings are not ideally suited for damages claims although there might be instances where such can be properly entertained.

[43] It is trite law that in application proceedings the affidavit filed in support of a claim or defence must contain both the facts and evidence on which such party relies to support its claim or defence. It is also trite that an applicant must make out its case

in its founding affidavit and include all the evidence and facts which will be necessary to sustain its claim in its founding affidavit.

[44] The applicant's founding affidavit fell far short of the requirement that all the facts and evidence upon which it bases its claim for the damages to the property must be contained in the founding affidavit, even the replying affidavit fell far short of being a proper response to the allegations raised by the respondent.

COJ CLAIM

[45] With the COJ claim the respondent contended that it made monthly payments and that the account the applicant attached included rates which was not an item that it was responsible to pay under the lease agreement. The applicant had not dealt with this contention and the applicant had furthermore only attached a statement with a balance to its papers.

[46] It is thus not possible to interrogate the COJ statement to assess what has been included in the amount claimed as outstanding and what was paid and what not.

TENDER

[47] The respondent, for the holding over period, 1 April 2017 to August 2017, it tendered rental of R 75 000-00 per month which equate to R 375 000-00 for the period. The respondent had set of the deposit it paid which, with interest, amounted to R

219 535-65. The amount the respondent thus tendered in respect of the holding over period amounted to R 155 464-35.

[48] In addition to the above the Respondent tendered to amount of R 100 000-00 towards the COJ account for the period 1 April 2017 to August 2017.

[49] The applicant accepted the respondents tender for the rental due for the period April 2017 to August 2017 as well as the tender of R 100 000-00 with regard to the COJ account for the period April 2017 to August 2017.

CONCLUSION

[50] Counsel for the applicant requested at the hearing that the issue of damages be referred to trail.

[50] The applicant in its replying affidavit stated that it was entitled to file and withdraw actions in consideration of legal advice it received. The applicant also stated that on a closer inspection of the respondent's reactions to its summonses, it was clear that the respondent had sought to delay the adjudication of the actions by filing frivolous exceptions over and over again. The applicant's allegations that these were frivolous exceptions borders on contempt as an order by this Court upheld the exception raised against the one summons the applicant issued and afforded the applicant an opportunity to correct its pleadings.

[51] The applicant claimed that it was justified to launch the current application as it was a more appropriate and expedient process in resolving the issues between the parties.

[52] The applicant furthermore indicated that it decided that motion proceedings would result in both parties having a speedy resolution as opposed to action proceedings, as there was no anticipated material dispute of fact.

[53] The applicant had twice issued summons and twice withdrawn same. On its own version it embarked upon these proceedings in order to ensure a speedy resolution of the issues in dispute between the parties. It thus had to ensure that it could meet its objective and include all the facts and evidence it relied upon before Court in its founding affidavit.

[54] The applicant was aware of the respondent's defences and was not taken by surprise by any of the defences raised by the respondent.

[55] Having regard to the applicant's response to the respondent's answers in relation to the damages claim it does not appear that the applicant has a lot more to offer than what is contained in the founding and replying affidavits.

[56] The applicants request that the issue of damages be referred to trail is denied.

WHEREFORE THE COURT ORDERS THAT:

1. The respondent's point in limine is dismissed;

2. The rental claim for the period prior to June 2016 has become prescribed and the applicants rental claim is reduced by R 286 205.02.

3. The respondent is to pay the applicant the following amounts as per its tender:
    a. The amount of R 155 464-35 for the rental period of March 2017 to August 2017, and

    b. The amount of R 100 000-00 in regard to municipal services for the period March 2017 to August 2017.

    c. Interest on the aforesaid amounts as from date of tender to date of final payment at the prescribed rate of interest.

4. The respondent is to pay the applicant R 200 000-00 which equates to the R 25 000-00 shortfall in the rental it short-paid for the period July 2016 to February 2017.

5. Interest on the aforesaid amount at the prescribed rate of interest as from date of service of the application to date of final payment.

6. The remainder of the applicant's claim is dismissed.

7. Each party to bear its own costs

J M BEZUIDENHOUT AJ
Acting Judge of the High Court

DATE OF HEARING : *1 March 2021*

DATE OF JUDGMENT : *3 June 2021*