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

CASE NUMBER: 2020/44118

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: YES
13 SEPTEMBER 2021

In the matter between:

LIBERTY GROUP LIMITED	First Applicant
TWO DEGREES PROPERTIES (PTY) LIMITED	Second Applicant
and	
LA KANDYAN TRADING (PTY) LIMITED **T/A MAYUR INDIAN CUISINE** **(Registration Number: 2012[....])**	First Respondent
FATHIMA AREEZA MOHAMED NIZAR **(Identity Number: [....])**	Second Respondent

JUDGMENT

DE WET AJ:

1. The applicants before the court are Liberty Group Limited, a public company with limited liability, the first applicant, and Two Degrees Properties (Pty) Ltd, a private company with limited liability, the second applicant (hereinafter referred to as the applicants).

2. The first respondent is La Kandyan Trading (Pty) Limited trading as Mayur Indian Cuisine, a private company, and the second respondent, is Fatima Areeza Mohamed Nizar, an adult female and director of the first respondent.

3. The applicants instituted action against the first respondent as lessee and the second respondent as surety, in which action the applicants claimed payment of the following amounts:

3.1. Claim A: An amount of R953 972,60 under and in terms of an acknowledgment of debt;

3.2. Claim B: An amount of R2 027 192,45 under and in terms of a lease agreement ("the lease agreement").

4. The first respondent and second respondent delivered a plea in which they essentially raise the following defences:

4.1. a special plea of *lis pendens*;

4.2. the first respondent was not able to commence trading on the intended date because of delays caused by the applicants;

4.3. the first respondent was denied access to the leased premises as a result of the national state of disaster which was declared following upon the covid-19 pandemic and the subsequent regulations published under the Disaster

Management Act, 2002, which were effective from 26 March 2020, and was only again allowed access to the premises in June 2020;

4.4. the first respondent could not obtain access in June 2020 because it lost possession of its business to Ramesh Nunna ("Mr Nunna") and Prasad Kotikela ("Mr Kotikela")("the partners") who also took control of the premises.

5. During or about March 2021 and upon the respondents having delivered their plea to the applicants' claim, the applicants brought an application for summary judgment in which they claim payment as follows:

5.1. R953 972,60;

5.2. interest on the amount in 5.1 at the rate of 7% per annum *a tempore morae* to date of final payment;

5.3. R2 027 192,45;

5.4. interest on the amount in 5.3 at the rate of 9% per annum, alternatively 7% per annum *a tempore morae* to date of final payment;

5.5. costs of suit on the scale as between attorney and client.

6. The respondents opposed the application for summary judgment and they filed an opposing affidavit in which they repeated the defences as contained the plea.

7. In addition, the respondents contend that the deponent to the affidavit in support of summary judgment, Mr Preston Gaddy ("Mr Gaddy"), does not have the personal knowledge necessary to depose to the affidavit in support of the application and further that he has not been authorised by the applicants to bring the application.

8. On 31 July 2019, the applicants *qua* landlords, and the first respondent *qua* tenant, entered into a written lease agreement in terms whereof the first respondent leased certain premises in the Nelson Mandela Square Shopping Centre for the purpose of conducting the business of a restaurant from the premises, under the name Mayur Indian Cuisine ("the restaurant").

9. The first respondent was obliged, in terms of clause 5.5 of the lease agreement, to make payment of all amounts due to the lessor monthly in advance, by no later than the first day of each month, without set-off or deduction for any cause whatsoever, free of exchange, bank commission and charges. The first payment of rental would be made on 1 September 2019.

10. The second respondent executed a deed of suretyship on 6 September 2019 in terms whereof she stood as surety and co-principal debtor for the amounts owing by the first respondent to the applicants.

11. On 18 February 2020 the first respondent executed an acknowledgment of debt in favour of the applicants in terms whereof *inter alia*:

> 11.1. The first respondent acknowledged that it was indebted to the applicants in the amount of R953 972,60 in lieu of arrear rental and other charges payable to the applicants in terms of the lease agreement ("the capital");
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> 11.2. The first respondent undertook to pay the capital in ten instalments of R95 397,26 each, the first instalment to be made on 7 March 2020 and then on each month thereafter as well as pay interest on each instalment at 2% above the prime rate;
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> 11.3. In the event that the first respondent fails to comply with its obligations under the acknowledgement of debt, the applicants were entitled to institute

proceedings for the immediate recovery of the balance of the debt, including interest at prime plus 2%;

11.4. The second respondent bound herself jointly and severally as surety and co-principal debtor with the first respondent in favour of the applicants for the capital as well as the agreed interest thereon.

11.5. The respondents undertook to pay legal costs on the attorney and client scale.

12. The respondents, despite demand, have failed to pay any of the instalments due in terms of the acknowledgement of debt.

13. The respondents have further failed to make payment of the amount of R2 027 192, 45 to the applicants in lieu of arrear rentals and charges under the lease agreement.

14. This summary judgement application is brought under the amended rule 32. Such rule, which came into effect on 1 July 2019[1], provides that:

"*(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only-*

(a) on a liquid document;
(b) for a liquidated amount of money;
(c) …
(d) …

together with any claim for interest and costs.

[1] The general approach to and application of the amended rule 32 was considered in Tumileng Trading CC v National Security & Fire (Pty) Ltd 2020 (6) SA 624 (WCC).

(2) (a) Within 15 days of the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.

(b) The plaintiff shall, in the affidavit referred to in subrule (2)(a), verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.

(3) The defendant may-

(a) …

(b) satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the facts that the defendant has a bona fide *defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.*"
(own emphasis)

15. In Standard Bank v Rahme & another 2019 ZA GPJHC 283 (3 September 2019) the court held that under the amended rule 32 the plaintiff/applicant had the duty to satisfy the court that the defendant/respondent had no defence on the merits, which appears to raise the bar and onus for securing summary judgment. The court has a discretion to refuse summary judgment. The court further has the jurisdiction, in terms of rule 32(6), to give leave to defend as to part of the claim and enter judgement against the respondents as to the balance thereof.

16. It is trite that summary judgment is an important means of preventing defendants who can demonstrate no *bona fide* defence from taking advantage of delays resulting from the matter going to trial.[2] Summary judgment is no longer regarded as an extraordinary remedy and strict compliance with the provisions of the amended rule 32 is required.[3]

17. It is against this background that the court must determine whether the applicants have discharged its onus and whether the respondents' defence, as pleaded and as appears in the affidavit opposing summary judgment, discloses a *bona fide* defence. The court, in Roestof *supra*, held as follows at page 498:

"*The papers as a whole must be looked at in order for a court to come to a conclusion as to whether leave to defend should be granted to a defendant or not. The function of a court should not be to protect dishonest defendants because the plaintiffs are less than perfect. Each case must be judged on its own facts.*"

18. It is trite, as had been held in Breytenbach v Fiat SA (Edms) Bpk [4] that the respondents are obliged in the affidavit opposing summary judgement to set out the grounds for their defence and the material facts upon which they rely with sufficient particularity as to disclose a *bona fide* defence and absence of sufficient particularity may indicate an absence of *bona fides* on the part of the respondents. A defence that is set out in a bald, vague or imprecise manner may result in a conclusion by the court that the respondents have dishonestly sought to avoid the dangers inherent in the presentation of a clear version. This may result in a finding that the respondents are not *bona fide* in their opposition to the summary judgement application.

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[2] Standard Bank of South Africa v Roestof 2004 (2) SA 492 (W) at 497F
[3] Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA)
[4] 1976 (2) SA 226 (T) at 228-229

19. Mr Goslett, for the respondents, relying on the judgment of Maharaj v Barclays National Bank Ltd [5], submitted that the application for summary judgment should fail as the deponent to the affidavit in support of the summary judgment, Mr Gaddy, is neither the plaintiff as envisaged in rule 32(2)(a) nor a person other than the plaintiff who can swear positively to the facts.

20. The respondents contend that Mr Gaddy does not confirm in his affidavit in support of the application for summary judgment that he can swear positively to the facts, as a consequence whereof the applicant does not comply with the requirements of rule 32(3)(2)(a).

21. Mr Goslett submitted that Mr Gaddy was not, subsequent to July 2019 and the conclusion of the lease agreement, involved in any dealings between the respondents and the applicants nor of Accelerate Real Estate Services (Pty) Limited ("JHI"). The person with whom the respondents dealt in regard to the lease agreement at all material times and accordingly who can swear positively to the facts is a Mr Peter Raggart, a leasing manager of JHI.

22. In answer to these contentions by the respondents, the applicant relied on the authority of the Supreme Court of Appeal in Rees & another v Investec Bank Ltd [6] where it was held that:

"As stated in Maharaj, 'undue formalism in procedural matters is always to be eschewed' and must give way to commercial pragmatism. At the end of the day, whether or not to grant summary judgment is a fact-based enquiry. Many summary judgment applications are brought by financial institutions and large corporations. First-hand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit on behalf of such financial institution or large corporation.

[5] 1976 (1) SA 418 (A)
[6] 2014 (4) SA 220 (SCA) at par 15

To insist on first-hand knowledge is not consistent with the principles espoused in Maharaj."

23. Mr Hoffman, for the applicants, countered and pointed out that JHI are the managing agents of the applicants. Mr Gaddy, who is employed by JHI, is the general manager of the Sandton precinct, he deals with all the tenants of the applicants and in particular the premises which are the subject matter of the lease agreement.

24. Both applicants are large corporations. Mr Gaddy informs that he has knowledge of the facts of the matter and that he is able to swear positively thereto as he is the general manager of the Sandton City precinct. The respondents' contention to the contrary is unduly formalistic. This point is not upheld.

25. The respondents submitted that there was no evidence that Mr Gaddy was authorised to bring the application for summary judgment. The respondents submit that Mr Gaddy was merely authorised to depose to the affidavit on behalf of the applicants. Absent a mandate to bring the application which would be evidenced by a resolution from either of the applicants confirming Mr Gaddy's authority to bring the application, the applicants and application are not properly before the court and on this ground too, the application should be dismissed.

26. Mr Hoffman submitted that it is not required that Mr Gaddy be authorised to depose to the affidavit in support of the summary judgment as it is not the deponent that is required to be authorised to depose to an affidavit but rather the institution of the proceedings that ought to be authorised. Mr Hoffman submitted that such challenge of authority to bring the proceedings should be made by the delivery of a notice in terms of rule 7 of the Uniform Rules of Court.

27. In Ganes & another v Telecom Namibia Ltd [7] the Supreme Court of Appeal held as follows:

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[7] 2004 (3) SA 615 (SCA)

"*[19] … The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to that affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. ….*"

28. The Supreme Court of Appeal specifically held that where proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of a party it should be accepted that the institution of the proceedings were authorised. In the event that such authority is to be challenged, the provisions of rule 7 provides a procedure to do so.[8] Accordingly, there is no merit in these submissions of the respondents.

29. The respondent raise various defences to the claims.

30. The respondents raised as first defence *lis pendens.*

31. In respect of the special plea of *lis pendens*, the Supreme Court of Appeal held in Socratous v Grindstone Investments 2011 (6) SA 325 (SCA) that:

"*South African courts are under severe pressure due to congested court rolls, and the defence of* lis alibi pendens *must be allowed to operate in order to stem unwarranted proliferation of litigation involving the same parties based on the same cause of action and related to the same subject-matter.*"

32. The respondents relied on the following facts to sustain such defence:

32.1. The applicants instituted an action against the respondents on the 4th of November 2019 under case number 19/40228 ("the first action");

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[8] Also see Eskom v Soweto City Council 1992 (2) SA 703 (W) at page 705F-I.

32.2. In the first action the applicants rely on substantially the same cause of action as they do in the present case, being the lease agreement and the surety of the second respondent;

32.3. The applicants issued the present action out of this court on 15 December 2020 whilst the first action remained pending between the parties.

33. The applicants join issue with the respondents in regard to the special plea and contend that in the first action the applicants claimed arrear rental and associated charges arising out of the lease agreement for the period October 2019 to November 2019, which period predates the acknowledgment of debt.

34. In this action, the applicants, in respect of claim A, rely on the breach of the acknowledgment of debt, which constitutes a different cause of action to that upon which the applicants relied in the first action. In respect of claim B the applicants rely on arrear rental and other charges due in terms of the agreement for the period April 2020 to November 2020, being a different period to the period in respect whereof the first action lay and a period subsequent to the period in respect whereof the respondents acknowledged their respective indebtedness to the applicants in the acknowledgement of debt.

35. In argument, Mr Hoffman, relied on Chemfos Ltd v Plaasfosfaat (Pty) Ltd[9] when submitting that the acknowledgement of debt was a separate cause of action and that the acknowledgement of debt, together with the undertaking to pay, gives rise to an independent and principal obligation. Accordingly, the lease agreement and the acknowledgement of debt each constitute a separate and distinct cause of action.

36. In addition to the foregoing, the applicants informed in the affidavit supporting summary judgement that they have withdrawn all their claims in the first action save for the claim for costs. This is common cause. Upon having done so, no claim founded on

[9] 1985 (3) SA 106 (A) at 115

the lease agreement for arrear rental and associated charges for the period October 2019 and November 2019 exists between the applicants and the respondents, be it in the first action or herein.

37. I find that there is no merit in the respondents' defence of *lis pendens.*

38. As second defence the respondents contend that the applicants failed to comply with their undertaking that they would assist the first respondent to timeously complete the renovation and set-up work for the business. They list various facts which according to the respondents demonstrate the applicants' failure to do as undertaken. This conduct of the applicants, so the argument of the respondents runs, resulted in the first respondent not being able to commence and conduct the business of the restaurant. Consequently, the respondents conclude that they are entitled to be excused from payment of the amounts due to the applicants under the lease agreement during the period of delay.

39. On a careful consideration of the contents of the respondents' opposing affidavit and the annexures thereto, specifically annexure "A14" being the attached summons and particulars of claim issued out of this court on 22 January 2021 under case number 21/2601, being in respect of an action between the first respondent and the partners the following is clear; the first respondent admits that it fell into arrears in respect of rental and charges, that it concluded the acknowledgement of debt with the applicants after negotiations between them and that it agreed to pay the amount of R953 972, 60 to the applicants.

40. There is no dispute before this court as to the validity and enforceability of the acknowledgement of debt or the amount claimed in terms thereof.

41. The applicants' claim A is not founded on the lease agreement but on the acknowledgement of debt. In Chemfos Ltd *supra* the Supreme Court of Appeal held on p 115 as follows:

“I turn to the question whether the admissions made on 13 June in fact gave rise to "independent and substantive" causes of action upon which the appellant could successfully sue for payment of the admitted debts - a question which the Court a quo *answered adversely to the appellant.*

In Adams v SA Motor Industry Employers Association 1981 (3) SA 1189, this Court was required to consider the situation which arises, according to law, when an existing obligation to pay the balance of the purchase price under a deed of sale has been followed by an acknowledgment of debt in respect of such balance. The issue related to the competence of the creditor to cede to a third party his claims under the deed of sale. Addressing himself to the general principles governing such a situation, JANSEN JA said (at 1198) that

> *"an acknowledgment of debt, provided it is coupled with an express or implied undertaking to pay that debt, gives rise to an obligation in terms of that undertaking when it is accepted by the creditor".”*

42. The admitted acknowledgement of debt herein, in which the first respondent admitted the debt and undertook to pay such debt in instalments, thus exists independent and as a principal obligation. The events relied on by the respondents all pre-date the acknowledgement of debt. The allegations of obstruction by or failure of the applicants to assist in timeously completing the renovations, as raised by the respondents, are no defence to the applicants’ claim A.

43. Accordingly, the applicants are entitled to judgment in the amount of R953 972,60.

44. The respondents assert that they received no use and benefit from the premises from 15 March 2020 to June 2020.

45. The respondents firstly contend that they could not legally access the premises as a consequence of the covid-19 pandemic, the hard lockdown which was effective from 26 March 2020 and the regulations published under the Disaster Management Act, 2002.

46. The respondents contend that these events constitute an intervening event of impossibility that excuses the first respondent from complying with its obligations in terms of the lease agreement, and as such it is a triable issue.

47. Mr Goslett relied on Flamman & Co v Kokstad Municipality[10] as well as Frajenron v Metcash Trading. [11] In Frajenron *supra* the court held as follows:

> "*[13] Our law on the impossibility of performance evolve on a similar footing. As noted above, it commenced with the dictum (quoted in 10 above) in Peters, Flamman & Co. By that dictum the two factors or circumstances that would excuse the non-performance are* vis major *and* casus fortuitous*. As the law evolved, it was clarified that not every* vis major *or* casus fortuitous *will excuse the non-performance. Facts specific to a case will determine whether the non-performance should be excused. These would include the nature, terms and context of the contract, the nature of the parties, their relationship and the nature of the impossibility relied upon. No party is allowed to rely on an impossibility caused by its own act or omission – there should be no fault or neglect on its part in the creation of the impossibility. The impossibility must be absolute and not relative and it must be applicable to everyone and not personal to the defendant, i.e. it must be objective.*
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> *[14] In terms of this rule an obligation to perform is discharged by a subsequent change of circumstances that were neither foreseeable nor foreseen. The reasoning underlying the doctrine is that the need or demand for*

[10] 1919 AD 427
[11] 2020 (3) SA 210 (GJ) pars 13 and 14

justice requires that the law excuses non-performance because not to do so would effectively be punishing a party that wants to, but cannot, perform its obligations through no fault or neglect of its own, and in conditions whereupon, by exercising reasonable and prudent care ab initio *it could never have foreseen that circumstances preventing it from performing would come to prevail. It is a valuable rule.*"

48. The respondents contend that once level 4 lockdown was lifted the first respondent could not operate the restaurant save under highly restrictive conditions. These conditions did however not restrict the respondents from completing whatever renovations were still required. The respondents counter by relying on a communication by JHI dated 5 June 2020 in which the first respondent was advised that it should obtain government approval prior to being granted access to the premises at that stage.

49. The respondents' evidence on this point is all but clear as on the first respondent's version in the particulars of claim in the partners action the first respondent pleads that it indeed had access to the premises during the period 18 February 2020 until 30 September 2020, during which period renovations were continued with and that it had paid to the applicants a portion of August 2020 rental and the full rental for September 2020.

50. Thereafter, the first respondent contends, it was denied access to the premises by Mr Nunna and Mr Kotikela, its partners, who had "hijacked its business".

51. Relying on these particular facts the respondents submit that they are excused from payment of the amount claimed in B, being the sum of the amounts claimed in terms of the lease agreement for the relevant periods. The legal basis for this argument of the respondents is the *exceptio non adimpleti contractus.*

52. The applicant, relying on Tudor Hotel Brasserie & Bar (Pty) Ltd v Hencetrade 15 (Pty) Ltd [12] submitted that in terms of clause 5.5 of the lease agreement, the parties had agreed that the rental shall be payable monthly in advance, thereby altering the normal position that rental is payable in arrear at the end of each period in the case of a periodical lease and after the lessor had fulfilled its obligation. The payment of rental by the first respondent in thus not contingent upon prior performance by the applicants.

53. In Tudor Hotel Brasserie & Bar *supra* the Supreme Court of Appeal held at [11] as follows:

"*The agreement that the rent was payable 'monthly in advance' had the effect of altering the usual position, that in the absence of contractual provisions, rent is payable in arrear at the end of each period in the case of a periodical lease, after the lessor has fulfilled his obligation. The lease agreement therefore altered the reciprocal nature of the obligations of the lessor and the lessee. The obligation of the lessee to make payment of the rent was no longer reciprocal to the obligation of the lessor to grant beneficial occupation of the premises to the lessee."*

54. Mr Hoffman in argument conceded that the absence of benefit to the first respondent may in certain circumstances give the first respondent a claim to partial remission of rental. Such claim for abatement of rental has however not been pleaded and such a claim has not been raised in a counterclaim.

55. There is merit in the respondents' submission that the hard lockdown may constitute an intervening event of impossibility that may excuse the first respondent from its contractual obligations to pay to the applicants the rental for the months of April 2020 and May 2020.

56. Mr Hoffman conceded, albeit reluctantly, that the respondents may be entitled to a remission of payment of the rental and charges for the months of April 2020 and May

[12] 793/2016 [2017] ZASCA

2020, being the months which, on the affidavits before the court, access to the premises was not possible due to the covid-19 regulations which were applicable to level 5 hard lockdown and level 4 lockdown. This was so as renovations to a restaurant do not constitute essential services.

57. In light of the foregoing, the respondents have raised a triable issue in respect of the applicant's claim for rental and other charges for the months of April 2020, a claim in the amount of R223 515,97, and May 2020, a claim in the amount of R222 088,40.

58. As fourth defence the respondents contend that they have lost possession of the premises. During June 2020 the first respondent contends, it was despoiled of the business by its partners, Mr Nunna and Mr Kotikela. The respondents contend that Mr Nunna and Mr Kotikela have taken over the business of the restaurant and have since June 2020 occupied the premises to the exclusion of the first respondent.

59. The contentions above ring hollow on considering the affidavit of the respondents and particularly the facts pleaded by the first respondent to sustain its claim for damages against the partners. As stated above, a copy of the summons and particulars of claim issued under case number 21/2601 is annexed to the opposing affidavit as "A14". In this action the first respondent *inter alia* claims damages as against its partners for breach of the partnership agreement. Such damages include the amount of R240 564,08 in lieu of rental paid to the applicants, which includes part payment of rental and charges for August 2020 and rental and charges for September 2020.

60. The first respondent pleaded in the partnership action that on or about 18 February 2020 it entered into a partnership agreement with Mr Nunna and Mr Kotikela. It is of significance that the first respondent in the partnership action contends that, in paragraph 18 thereof, the material terms of the partnership agreement include a provision that the first respondent remains the tenant of the Sandton premises (being the same premises as which are the subject matter herein) and that it would be obliged

to honour the terms of the lease to the landlord, being the lease agreement between the first respondent and the applicants herein.

61. It is further significant that the first respondent pleads in paragraph 22 of the particulars of claim in the partnership action, that it has complied with all its obligations in terms of the lease agreement, that it continued insofar as practically possible with the renovation work at the Sandton premises to set up Mayur Restaurant during the period from 18 February 2020 until 30 September 2020 notwithstanding the COVID-19 lockdown.

62. Further to the above, the respondents allege in the plea to the applicants' claim that the applicants have acquiesced to the first respondent's partners occupying the premises. In the affidavit resisting summary judgement the respondents contend that Mr Gaddy as well as the applicants are very well aware of the situation. In argument Mr Goslett submitted that the applicants may have acted in concert with the partners. He suggested that upon the partners being joined and discovery being made the respondents may be able to determine the true state of affairs and at such stage the respondents may perhaps be able to determine whether there could be any further defence against the claims of the applicants herein, arising out of the suggested knowledge.[13] Such vague suggestions of the possible existence of a defence which may in future be determined does not assist the respondents herein.

63. The applicants were aware of the dispute between the first respondent and its partners. There is no evidence before the court, and neither has it been pleaded, that there is a contractual or other relationship between the applicants and the partners. Save for the bald and vague allegations that the applicants were very well aware of the situation, being the occupation of the premises by the partners, and that the applicants' have acquiesced thereto, there are no facts upon which the respondents can rely when suggesting that there is something untoward in the applicants' knowledge of the

[13] See Breytenbach v Fiat SA (Edms) Bpk *supra* regarding the respondents' obligation to set out fully their defence as well the facts upon which they rely for such defence.

presence of the partners in the premises or the knowledge of the partnership dispute. The first respondent was entitled to occupation of the property and it was entitled to enforce such right against third parties, including its partners. It failed to take any steps to do so.

64. The respondents contend that Mr Nunna and Mr Kotikela ought to be joined to the action between the applicants and the respondents as they have a real and substantial interest in the outcome of the proceedings.

65. The respondents relied on the test for non-joinder as enunciated in ABSA Bank v Naude NO [14] where it was held that:

"*The test whether there has been a non-joinder is whether a party has a direct and substantial interest in the subject-matter of the litigation which may prejudice the party that has not been joined. In Gordon v Department of Health, KwaZulu-Natal it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interests of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined.*"

66. The dispute between the first respondent and its partners have no bearing on the contractual relationships between the applicants and the respondents or their respective obligations flowing from the lease agreement and the suretyship. There is no prejudice to Mr Nunna and Mr Kotikela should a money judgement be granted in favour of the applicants herein.

67. There is accordingly no merit in the respondents' submission of material non-joinder.

[14] 2016 (6) SA 540 (SCA)

68. Considering all the evidence before the court, the onus of the applicants, the duty of the respondents to set out the grounds for their defence and the material facts upon which they rely with sufficient particularity as to disclose a *bona fide* defence, I find that the respondents have not disclosed a *bona fide* defence insofar as claim B is concerned, save for that part of the claim that relates to rental and charges for April 2020 and May 2020.

69. As a consequence, I make the following order:

1. Summary judgment is entered against the first respondent and the second respondents, jointly and severally, the one paying the other to be absolved for:

1.1. payment of the sum of R953 972,60;

1.2. interest thereon at the rate of 7% per annum *a tempore morae* to the date of final payment in respect of claim A;

1.3. payment of the sum of R1 581 588,08;

1.4. interest thereon at the rate of 9% per annum *a tempore morae* to the date of final payment in respect of claim B;

2. The respondents are granted leave to defendant in respect of the applicants' claims for rental and charges for April 2020 and May 2020;

3. The respondents are directed to pay the costs of the application on the attorney and client scale.

A. DE WET

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

Heard:	19 August 2021
Judgment:	13 September 2021
Applicant's Counsel:	Adv. J.F. Hoffman
Instructed by:	Hadar Incorporated
Respondent's Counsel:	Adv. R. Goslett
Instructed by:	Dewey Hertzberg Levy Incorporated