

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

CASE NO: **2020/18058**

REPORTABLE YES
OF INTEREST TO OTHER JUDGES NO
REVISED

In the matter between:

PETERSEN, IZAK SMOLLY (ID No. [....])
N.O. in his capacity as trustee of MERGENCE
AFRICA PROPERTY INVESTMENT TRUST (IT No. 11263/2006) First Plaintiff

ASMAL, RIDWAAN (ID No. [....]) N.O. in
his capacity as trustee of MERGENCE AFRICA
PROPERTY INVESTMENT TRUST (IT No. 11263/2006) Second Plaintiff

AZIZOLLAHOFF, BRIAN HILTON (ID No.
[....]) N.O. in his capacity as trustee of
MERGENCE AFRICA PROPERTY INVESTMENT
TRUST (IT No. 11263/2006) Third Plaintiff

JUNKOON, JUJDEESHIN (ID No. [....])
N.O. in his capacity as trustee of MERGENCE
AFRICA PROPERTY INVESTMENT TRUST (IT No.
11263/2006) Fourth Plaintiff

and

BOCHUM FOODS (PTY) LIMITED t/a ROMAN'S PIZZA

BOCHUM

(Registration No. 2018/372299/07)

First Defendant

ELIZABETH RONELL UYS (ID No. [....])

Second Defendant

Case summary : summary judgment – amended Uniform Rule 32(2) – “reading in” approach in the case of Tumileng Trading CC v National Security and Fire (Pty) Limited 2020 (6) SA 624 (WCC) to be followed in this Division – defence pleaded must raise a genuine issue for trial – Plaintiff’s supporting affidavit drafted within the context of the deponent’s knowledge and content of plea that has been delivered – pleaded defence must be bona fide - Defendants required to place facts before the court at summary judgment stage, if a genuine defence is being advanced and cannot complain if the court is left in a position in which it is unable to find a reasonable basis to find that such Defendants have a bona fide defence – summary judgment granted.

Jurisdiction – Section 21 of the Superior Courts Act 10 of 2013 – jurisdiction over all causes arising within this Division’s area of jurisdiction – cause of action originated within the court’s area of jurisdiction – choice of domicilium citandi et executandi in itself not sufficient to establish jurisdiction – court has jurisdiction as lease agreement was concluded (offer accepted) in its jurisdiction, suretyship was concluded (offer was accepted) in its jurisdiction and payment (performance) takes place in an area over which this Division has concurrent jurisdiction – principle of causa continentia applicable.

JUDGMENT

FRANCK AJ:

[1] The Plaintiffs applied for summary judgment against the Defendants, jointly and severally, the one paying the other to be absolved in respect of claim 1, as prayed for in the Particulars of Claim for the following relief:

[1.1] Payment of the amount of R91 375,60;

[1.2] Interest on the above at the prevailing prime rate as from time to time (as at December 2020, 7.25% per annum) plus 2% per annum, compounded monthly, *a tempore morae* from date of service of summons to date of final payment;

[1.3] Ejectment of the First Defendant or anyone claiming occupation through the First Defendant from the commercial leased premises situated at Shop 101, Ground Floor, Bochum Plaza, corner Dendron & Blouberg Roads, Bochum Extension 3, Limpopo (measuring approximately 60 square metres);

[1.4] Costs of suit on the scale as between attorney and client together with disbursements so incurred and such collection commission as the Plaintiffs are obliged to pay its attorneys;

[1.5] Further and/or alternative relief.

[2] It is common cause between the parties that, the First Defendant no longer occupies the commercial leased premises and as such, the Plaintiffs do not persist in seeking an order in terms of prayer 3 relating to ejectment.

[3] Plaintiffs issued summons against the Defendants on 23 July 2020. Their cause of action is based on a written agreement of lease entered into between the Plaintiffs and First Defendant on 8 October 2018 at Rosebank, Gauteng. The claim against the Second Defendant is based on a deed of suretyship. In their Particulars of Claim, the Plaintiffs plead that this court has jurisdiction to entertain this action as the whole cause of action arose within the jurisdictional area of this court.

[4] The Plaintiffs claim that the First Defendant absconded from the commercial leased premises during or about 30 April 2020 whereas, the Defendants allege,

according to their plea, that the First Defendant vacated the premises pursuant to a valid cancellation of the lease agreement, which cancellation occurred on 3 June 2020.

[5] The Plaintiffs claim summary judgment in respect of claim 1 of their Particulars of Claim for the abovementioned amount which consists of arrear rental up to and including July 2020. If regard is had to the calculation of claim 1 as contained in Annexure “D” to the Particulars of Claim¹, the period for arrear rental is calculated from February 2020 to July 2020.

[6] Plaintiffs’ claim 2 relates to pre-estimated liquidated damages, in respect of which the Plaintiffs do not claim summary judgment, calculated from 1 August 2020 to 31 July 2021. In the Application in support of summary judgment reference is made to claim 2, stipulating that leave to defend should be granted in respect of this claim.

[7] The Defendants filed a plea dated 7 September 2020, in respect of which the following defences were raised:

[7.1] The monetary value of the Plaintiffs’ claim fall within the jurisdiction of the Magistrate’s Court and summons should have been issued out of the Magistrate’s Court.

[7.2] The Gauteng Local Division, Johannesburg, does not have jurisdiction to adjudicate on this cause of action as:

[7.2.1] the First and Second Defendants’ *domicilium citandi et executandi* is in Groblersdal, in Limpopo Province;

[7.2.2] the lease agreement and surety were concluded in Groblersdal, in Limpopo Province;

[7.2.3] the commercial leased property is located in the Limpopo Province;

[7.3] The Defendants validly cancelled the lease agreement on 3 June 2020 as a result of a misrepresentation made by the Plaintiffs to the Defendants, which misrepresentation was made either negligently, fraudulently or innocently that the First Defendant would have direct access to a neighbouring taxi rank to whose clientele the First Defendant “*would have been able to render its products to, which, factually was not the position*”.

[7.4] In the alternative to its defence based on misrepresentation, the First Defendant pleaded that it gave its intention to the Plaintiffs to terminate the lease agreement on 21 days’ notice in terms of the Consumer Protection Act No. 68 of 2008 (“the Consumer Protection Act”) as the nett asset value of the First Defendant is less than R2 000 000,00. No specific section of the Consumer Protection Act is referred to by the Defendants.

[7.5] The Defendants also relied on *vis major* caused by the Covid-19 pandemic and the national state of disaster declared by the State President as the First Defendant was unable to trade for the period April and May 2020.

[8] The Defendants admit the following in their plea:

[8.1] the description of the Defendants;

[8.2] the Second Defendant signed the lease agreement on behalf of the First Defendant;

[8.3] the terms of the lease agreement accord with Annexure “C” to the Particulars of Claim;

[8.4] the First Defendant was granted beneficial occupation of the leased premises;

[8.5] the Second Defendant signed the suretyship, which suretyship accords with Annexure “E” and contains the terms as set out in Annexure “E” to the Plaintiff’s Particulars of Claim;

[8.6] that the provisions of the National Credit Act No. 34 of 2005 do not have application in this matter by virtue of Section 8(2)(b) of the National Credit Act.

[9] In terms of Uniform Rule 32(2), as amended, any Plaintiff, applying for summary judgment, shall *“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”*.

[10] In the matter of **Tumileng Trading CC v National Security and Fire (Pty) Limited²**, (“the Tumileng Trading case”) the court adopted a *“reading in”* approach to the (amended) rule as follows:

“[21] The requirement that the plaintiff’s supporting affidavit should explain briefly why the pleaded defence ‘does not raise an issue for trial’ is of more interest. It cannot be taken literally, for a plea that did that would be excipiable, and there is no indication that the amended summary judgment procedure is intended as an alternative to the exception procedure. For the reasons given later with regard to the cases before me, I consider that the amended rule 32(2)(b) makes sense only if the word ‘genuinely’ is read in before the word ‘raise’ so that the pertinent phrase reads ‘explain briefly why the defence as pleaded does not genuinely raise any issue for trial’. In other words, the plaintiff is not required to explain that the plea is excipiable. It is required to explain why it is contended that the pleaded defence is a sham. That much is implicit in what the Task Team said in para 8.3 of its memorandum. The position would have been made clearer had the words ‘does not make out a bona fide defence’ been used. That would have made for a more clearly discernible connection between the respective requirements of subrules (2)(b) and (3)(b). That there be such a connection is necessary if the amended rule as a whole is to be workable.

[22] What the amended rule does seem to do is to require of a plaintiff to

consider very carefully its ability to allege a belief that the defendant does not have a bona fide defence. This is because the plaintiff's supporting affidavit now falls to be made in the context of the deponent's knowledge of the content of a delivered plea. That provides a plausible reason for the requirement of something more than a 'formulaic' supporting affidavit from the plaintiff. The plaintiff is now required to engage with the content of the plea in order to substantiate its averments that the defence is not bona fide and has been raised merely for the purposes of delay.

[23] It seems to me, however, that the exercise is likely to be futile in all cases other than those in which the pleaded defence is a bald denial. This is because a court seized of a summary judgment application is not charged with determining the substantive merit of a defence, nor with determining its prospects of success. It is concerned only with an assessment of whether the pleaded defence is genuinely advanced, as opposed to a sham put up for purposes of obtaining delay. A court engaged in that exercise is not going to be willing to become involved in determining disputes of fact on the merits of the principal case. ...

[40] However, does the fact that the bones of a triable defence have been made out in the plea mean that summary judgment must be refused? The answer is clearly 'no'! The reason for the negative answer is that the enquiry is not whether the plea discloses 'an issue for trial' in the literal sense of those words, it is whether the ostensible defence that has been pleaded is bona fide or not. As discussed earlier, that that is the relevant enquiry in a summary application follows from the rule-maker's decision to leave subrule 32(3) substantively unamended. If one were to apply the amended rule differently, it would be impossible to marry the requirement of a plaintiff apparently posited by subrule 32(2)(b) (viz showing that 'the defence as pleaded does not raise any issue for trial') with what is demanded of a defendant in terms of subrule 32(3)(b) (viz showing that its defence to the action is bona fide, ie that its ostensible defence is not a sham). The

respective supporting and opposing affidavits would pass each other like ships in the night if one were to understand the notion of 'issue for trial' in subrule 32(2)(b) as denoting something different from a 'bona fide defence' within the meaning of subrule 32(3)(b).

[48] ... If a defendant fails to put up the facts that it obviously should have been able to do were it advancing a genuine defence, it cannot complain if the court is left in a position in which it is unable to find a reasonable basis to doubt that it does not have a bona fide defence."

DEFENDANTS' DEFENCES

[11] In the matter of **Raumix Aggregates (Pty) Ltd v Richter Sand CC and another and similar matters**³, and with reference to the amended Rule (dealing with the issue of retrospectivity), it was stated that the purpose of a summary judgment application is to allow the court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine triable issue, thereby conserving scarce judicial resources and improving access to justice. Once an application for summary judgment is brought, the applicant obtains a substantive right for that application to be heard, and, bearing in mind the purpose of summary judgment, that hearing should be as soon as possible. That right is protected under s 34 of the Constitution.

[12] The approach followed in the Tumileng Trading case, was followed in the Gauteng Division in the matter of **Saglo Auto (Pty) Ltd v Black Shades Investments (Pty) Ltd**⁴.

[13] The Defendants' defences listed above, will be dealt with individually, in terms of the approach as set out in the Tumileng Trading case.

Magistrates' Court jurisdiction

[14] It was indicated to the court at the hearing of this matter that the Defendants will not proceed with their defence that the action should have been launched in the

Magistrate's Court as a result of the quantum of the Plaintiffs' claims. This is as a result of the judgment in the matter of **The Standard Bank of SA Limited and Others v Thobejane and Others** (38/2019 and 47/2019) and the **Standard Bank of SA Limited v Gqirana NO and Another** (999/2019)⁵

Jurisdiction of Gauteng Local Division, Johannesburg

[15] In terms of Section 21 of the Superior Courts Act 10 of 2013:

[15.1] a division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within its area of jurisdiction; and

[15.2] a division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction if the said person resides or is within the area of jurisdiction of any other division.

[16] The First Defendant made an offer to lease to the Plaintiffs, which written offer was accepted by the Plaintiffs at Rosebank on 26 August 2018.⁶

[17] Clause 24.2 of the offer to lease stipulates that *"Upon acceptance signified by signature hereof by the Lessor this offer will become a binding agreement of lease upon the terms and conditions contained herein read mutatis mutandis with the Lessor's standard terms and conditions of lease..."* which the First Defendant agreed to sign in terms of Clause 24.3 of the offer to lease.

[18] Pursuant to the acceptance of the offer, the agreement of lease attached as Annexure "C"⁷ was concluded between the parties. The agreement of lease was signed by the First Defendant on the 11th of September 2018 and accepted by the Plaintiffs on the 8th of October 2018.⁸

[19] In terms of the agreement of lease, the Plaintiffs' physical address is stipulated as Centurion. The Plaintiffs' counsel argued at the hearing of this matter that, the Gauteng Local Division and Gauteng Division have concurrent jurisdiction in

respect of Centurion. This was not disputed by the Defendants. In terms of Government Gazette 39601 published on the 15th of January 2016 such concurrent jurisdiction exists. Payment takes place to the Plaintiffs, in Centurion.

[20] The commercial property is situated in Limpopo. The *domicilium citandi et executandi* of both Defendants are in Limpopo.

[21] It was argued on behalf of the Plaintiffs that there were sufficient jurisdictional aspects situated in the jurisdiction of the Gauteng Local Division, in order to establish that this Court has jurisdiction to entertain the action and to hear this application for summary judgment.

[22] A High Court has jurisdiction if the cause of action arose within its jurisdiction, which includes the conclusion or performance of the agreement.⁹

[23] “A ‘cause arising’ is not to be confused with a cause of action, and, to determine what a ‘cause arising’, is also to determine of what the court may take cognisance, if one is driven back to the common-law jurisdictional principles.”¹⁰

[24] There must be a sufficient connection between the suit and the area of jurisdiction of the court concerned, so that disposing of the case by that court is appropriate and convenient.¹¹

[25] “Causes arising” referred to in Section 21(1) of the Superior Courts Act, (alternatively in Section 19(1) of the Supreme Court Act 59 of 1959), means any action or legal proceedings which, according to the law, had duly originated within the court’s area of jurisdiction.¹²

[26] The primary object of the above approach is to avoid an unnecessary proliferation of proceedings and the possibility of conflicting decisions on the same cause of action, between the same parties.¹³

[27] The choice of a *domicilium citandi et executandi* in itself, is not enough to establish the jurisdiction of the court.¹⁴

[28] The claim against the Second Defendant is based on a suretyship. Suretyship is a bilateral juristic act. It is a contract which arises from agreement between creditor and surety and it involves the acceptance of an offer communicated by the would-be surety to the creditor.¹⁵

[29] In terms of the principle of *causa continentia*, where a court has jurisdiction over part of the cause of action, considerations of convenience, justice and good sense justify it exercising its jurisdiction over the whole cause.¹⁶

[30] In the current matter, this court has jurisdiction as the lease agreement was concluded (the offer was accepted) in Rosebank, the suretyship was concluded (the offer was accepted) in Rosebank and payment (performance) takes place in Centurion (an area over which this court has concurrent jurisdiction with the Gauteng Division). Furthermore, considerations of convenience, justice and good sense justify this court exercising its jurisdiction over the whole cause of action in respect of both Defendants.

Cancellation of the lease

[a] Misrepresentation

[31] The Defendants plead in paragraph 11.2 that Plaintiffs misrepresented to the First Defendant *“either negligently, fraudulently or innocently, which representation goes to the root of the Agreement, that the Defendant will have direct access to a neighbouring Taxi Rank to whose clientele the Defendant would have been able to render its products to, which, factually was not the position.”*

[32] The Defendants rely on this alleged misrepresentation and state that the misrepresentation resulted in the cancellation of the lease agreement dated 3 June 2020.

[33] In the Plaintiffs’ affidavit in support of summary judgment, these averments are dealt with by the Plaintiffs by stating that:

[33.1] The purported representation is not a representation insofar as it

relates to a future fact and in fact it is contained as a term of the lease agreement, the term being purely that the First Defendant would be entitled to trade at the taxi ranks.

[33.2] The Plaintiffs never prevented the First Defendant from trading at the taxi ranks.

[33.3] The fence that was erected had been erected some time ago and was not erected by the Plaintiffs. The Plaintiffs could never have been aware of the erection of such fence nor had any control thereof as the Plaintiffs are not the owners of the taxi rank.

[33.4] Such representations are in any event excluded by the provisions of the lease agreement and there is no basis to suggest that the Plaintiffs could or should possibly have been aware of the fact that the taxi rank was going to be fenced off.

[34] In the Defendants' affidavit resisting summary judgment, the Defendants simply repeat the contents of paragraphs 10 and 11 of their plea. The only averment that is added relating to the alleged misrepresentation is that, had the Defendants known that the First Defendant would be physically separated from the taxi rank, the First Defendant would not have entered into the lease agreement.

[35] The Defendants do not deal with the averments contained in the Plaintiffs' affidavit in support of summary judgment, nor does it provide any particularity to the court regarding a timeline relating to the conclusion of the lease agreement and the erection of the fence at the taxi rank. The Defendants chose not to deal with averments made by the Plaintiffs relating to the fact that:

[35.1] the Plaintiffs were unaware that a fence would be erected;

[35.2] the Plaintiffs did not erect the fence;

[35.3] the Plaintiffs do not own the taxi rank;

[35.4] that no misrepresentation was made and that any misrepresentations are excluded by the terms of the lease agreement.

[36] In order to avoid summary judgment, and in order to advance a genuine bona fide defence, the Defendants should have provided the court with sufficient facts and information. Anaemic and repetitive statements do not enable the court to come to the Defendants' assistance in order to establish that they have a *bona fide* defence.

[37] In terms of clause 35.1 of the agreement of lease¹⁷

"This lease incorporates the entire agreement between the landlord and the tenant and no alteration, consensual cancellation or variation hereof shall be of any force or effect unless it is in writing and signed by both the landlord and the tenant who hereby acknowledge that no representations or warranties have been made by either the landlord or the tenant, nor are there understandings or terms of the lease, other than those set out herein."

[38] In the offer to lease, referred to hereinabove, a note is inserted in paragraph 28 that states *"Landlords consent to sell taxi pizzas in and around the taxi rank"*.

[39] Neither the offer to lease nor the agreement of lease contain any undertakings by the Plaintiffs to ensure access to the taxi rank.

[40] As a result of the contents of the lease agreement, the Defendants are not in a position to rely on an innocent or negligent misrepresentation. Furthermore, the Defendants have set out no averments upon which a fraudulent misrepresentation can be claimed by them.

[41] In order to rely on a fraudulent misrepresentation, the Defendants would have to aver that:

[41.1] A representation was made by the Plaintiffs or the Plaintiffs' agent.¹⁸

[41.2] The representation was fraudulent. This would necessarily

involve knowledge by the Plaintiffs that the representation was false.¹⁹

[41.3] Such fraudulent representation induced the Defendants to enter into the lease agreement.²⁰

[41.4] If damages are claimed, that the damages were suffered as a result of the fraud.²¹

[41.5] If reliance is placed on a fraudulent non-disclosure, facts giving rise to the duty to disclose must be set out. It is also necessary to show that the duty to disclose was deliberately breached in order to deceive.²²

[42] When dealing with this aspect in argument, the court was referred to paragraph 11 of the Defendants' plea in which no averments are made to sustain a defence of fraudulent misrepresentation.

[b] Consumer Protection Act, Force Major and Locus Standi

[43] The Plaintiffs alleged in their affidavit in support of summary judgment that the First Defendant, being a company, is not entitled to the benefit of the provisions of Section 14 of the Consumer Protection Act and as such is not entitled to give notice to cancel the lease agreement. This averment was not dealt with by the Defendants in their affidavit resisting summary judgment, the contents of this paragraph simply being baldly denied *"as far as it is inconsistent with what is stated in this Affidavit"*.²³

[44] In paragraph 12.5 of the Defendants' plea, it is pleaded that the First Defendant gave the Plaintiffs notice of its intention to terminate the lease on 21 days' notice in terms of the provisions of the Consumer Protection Act 68 of 2008 ("the Consumer Protection Act") on the basis that the First Defendant's net asset value is less than R2 million.

[45] In terms of the Consumer Protection Act:

[45.1] *"consumer"* includes a juristic person.²⁴

[45.2] “*juristic person*” includes a trust as defined in the Trust Property Control Act 57 of 1988.

[46] In terms of Section 5(2)(b), the Consumer Protection Act does not apply to any transaction in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the minister in terms of Section 6. The current threshold is R2 million.²⁵

[47] Section 14 of the Consumer Protection Act deals with the expiry and renewal of fixed-term agreements. In terms of Section 14(2)(b)(i)(bb) it is possible for consumers that are parties to fixed term agreements, to cancel such agreement by giving the supplier 20 business days’ notice in writing (not 21 days). However, in terms of Section 14(1), this section does not apply to transactions between juristic persons regardless of their annual turnover or asset value. As such, the First Defendant was not entitled to utilise the provisions of Section 14(2)(b)(i)(bb) to terminate the lease agreement, as the lease agreement was concluded between juristic persons (within the definition of the Consumer Protection Act).

[48] The Consumer Protection Act was not dealt with in the Defendants’ heads of argument and I was not referred to any case law to the contrary.

[49] Another defence that was mentioned in the affidavit resisting summary judgment, but not pursued in argument or mentioned in the Defendants’ heads of argument, was that of the Plaintiffs’ *locus standi*. The Defendants allege that the Plaintiffs do not have *locus standi* due to the fact that they are cited in their capacities as trustees of the Mergence Africa Property Investment Trust but although identified as such trust in the lease agreement, is described in the lease agreement as a company duly registered and incorporated in accordance with the company laws of the Republic of South Africa.

[50] The Defendants claim that this proves that the Plaintiffs lack *locus standi* or that rectification of the agreement is necessary. I disagree. Mergence Africa Property

Investment Trust is sufficiently identified in the lease agreement as the Landlord. It is stated in paragraph 1 of the agreement of lease that the landlord is Mergence Africa Property Investment Trust, including its successors in title and assigns. Its trust registration number is identified together with the VAT registration number and the four trustees are specifically identified with their identity numbers. Furthermore, letters of authority as well as a resolution passed by the trustees are attached to the lease agreement as Annexure “D” and Annexure “D1”.²⁶

[51] The reference to Mergence Africa Property Investment Trust as being a company on the first (cover) page of the lease agreement is a misnomer that does not oust the *locus standi* of the Plaintiffs nor require rectification.

[52] In answer to the averment made by the Plaintiffs that there is no basis to suggest that the First Defendant was released from its obligation under and in terms of the lease agreement as a result of *vis major*, as this is specifically excluded in terms of the lease agreement²⁷, the Defendants simply baldly denied such averment “as far as it is inconsistent with what is stated in this Affidavit”. *Vis major* is indeed excluded as a defence in terms of clause 22.1.1 of the lease agreement. The Defendants did not persist with this defence, as it is not dealt with in their affidavit resisting summary judgment and the allegations are simply denied by the Defendants.²⁸

[53] For the above reasons, I find that the lease agreement was not validly cancelled by the Defendants.

Defendants’ counterclaim

[54] No counterclaim has been pleaded by the Defendants. It is raised in paragraph 7 of the Defendants’ affidavit resisting summary judgment and as follows:

[54.1] The Defendants intend instituting a conditional counterclaim to be introduced via an amendment to the plea.

[54.2] The counterclaim is based on enrichment in the amount of

R512 614,57.

[54.3] The Defendants rely on three invoices in order to quantify the above amount. All of the invoices relate to the container, referred to in the lease agreement.

[54.4] The Defendants “*acting upon the misrepresentations made as alluded to before*”, which representations are not specified with any particularity as aforesaid, purchased and upgraded a container to be used as a vending stall on the premises.

[54.5] The stall was procured and manufactured specifically for the site and has been left on the premises where the Plaintiffs have used and in fact let same out to a third party.

[54.6] This benefit befalls the Plaintiffs at the expense of the Defendants and therefore the counterclaim will seek compensation.

[55] Despite the affidavit resisting summary judgment being deposed to on the 14th of December 2020, the Defendants have not attempted to amend their plea for the last 7 months. The merits of such a counterclaim are further dubious as both the offer to lease as well as the lease agreement state that:

[55.1] All building work involved in connection with the container will be for the Defendants’ account.

[55.2] It is specifically recorded that at the expiry or termination of the lease agreement, for whatever reason, the First Defendant will remove the container and make good any alterations to the existing premises, thereby returning the existing premises to the Plaintiffs in the same condition as when received, fair wear and tear accepted.²⁹

[56] This is, however, not an issue that needs to be decided at summary judgment stage, especially since such a counterclaim has not been pleaded by the Defendants. The Defendants will be at liberty to attempt to amend their plea to raise

such a counterclaim *vis-à-vis* Plaintiff's claim 2, as contained in the Particulars of Claim. Any potential counterclaim is not a bar to the granting of summary judgment.

CONCLUSION

[57] This court is vested with jurisdiction to entertain this action and accordingly, to determine the summary judgment application.

[58] Regarding the issues of cancellation of the lease agreement, which include allegations of misrepresentation, the Defendants did not fully disclose the nature and grounds of their defences and material facts relied upon. The defences raised by the Defendants do not genuinely raise any issues for trial, do not constitute *bona fide* defences and have been raised with a view to delay judgment in terms of claim 1. The Defendants were in a position to provide detailed facts relating to their defences, if the defences being advanced were genuine. This was, however, not done and this court is not in a position to find that the Defendants have raised *bona fide* defences that raise genuine issues for trial.

[59] In the circumstances, summary judgment should be granted in respect of Claim 1, in the Plaintiffs' favour and costs should follow the result. The scale of costs, is that of attorney and client together with disbursements to be incurred and collection commission incurred by the Plaintiff, as provided for in terms of the lease agreement.³⁰

[60] I accordingly make the following order in respect of Claim 1:

Summary judgment is granted against the First and Second Defendants jointly and severally, the one paying the other to be absolved for:

1. Payment of the amount of R91 375,60.
2. Interest on the above at the prevailing prime rate, as from time to time, plus 2% per annum, compounded monthly, *a tempore morae* from date of service of summons (6 August 2020) to date of final payment.

3. Costs of suit on the scale as between attorney and client together with disbursements so incurred and such collection commission as the Plaintiffs are obliged to pay its attorneys.

[61] In respect of claim 2, leave to defend is granted.

FRANCK, A J

Date of hearing : 19 July 2021

Date of judgment : 18 August 2021

Legal representation :

For Plaintiffs :	Adv J G Dobie
Attorneys :	Rooseboom Attorneys
For Defendants :	Advocate D A Cock
Attorneys:	Mark Efstratiou Inc

¹ CaseLines, paginated page 003-78 to 003-81

² 2020 (6) SA 624 (WCC)

³ 2020 (1) SA 623 (GJ) at [16]

⁴ 2021 (2) SA 587 (GP)

⁵ [2021] ZASCA 92 (25 June 2021)

⁶ Offer to lease, CaseLines 003-71 to 003-77

⁷ CaseLines, 003-17

⁸ CaseLines 003-26

⁹ **Roberts Construction Co Limited v Willcox Bros (Pty) Limited** 1962 (4) SA 326 (A) at 331-332 and 336-337

¹⁰ **Multi-Links Telecommunications Limited v Africa Prepaid Services Nigeria Limited** 2014 (3) SA 265 (GP)

¹¹ **Multi-Links Telecommunications Limited v Africa Prepaid Services Nigeria Limited** 2014 (3) SA 265 (GP) at [11]

¹² **Multi-Links Telecommunications Limited v Africa Prepaid Services Nigeria Limited** 2014 (3) SA 265 (GP) at [13]; **Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Limited** 2005 (6) SA 205 (SCA) at [11]

¹³ **Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Limited** 2005 (6) SA 205 (SCA) at [14]

¹⁴ **Geyser v Nedbank Limited and Others; In re Nedbank Limited v Geyser** 2006 (4) SA 544 (W) at 546 D – 547 E-F

¹⁵ **Jurgens and Others v Volkskas Bank Limited** 1993 (1) SA 214 (A) at 218-219

¹⁶ **Roberts Construction Co Limited v Willcox Bros (Pty) Limited** 1962 (4) SA 326 (A) at 337 and **Geyser v Nedbank Limited and Others : In re Nedbank Limited v Geyser** 2006 (4) SA 544 (W) at 546-547; **Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxusa and Others** 2001 (4) SA 1184 (SCA) at para [22]

¹⁷ CaseLines page 003-54

¹⁸ **Geary & Son (Pty) Limited v Gove** 1964 (1) SA 434 (A)

¹⁹ **Ruto Flour Mills (Pty) Limited v Moriates** 1957 (3) SA 113 (T)

²⁰ **Bill Harvey's Investment Trust (Pty) Limited v Orangezicht Citrus Estates (Pty) Limited** 1958 (1) SA 479 (A)

²¹ **De Jager v Grunder** 1964 (1) SA 446 (A)

²² **Gollach & Gomperts (1967) (Pty) Limited v Universal Mills & Produce Co (Pty) Limited** 1978 (1) SA 914 (A) at 924; **Ozinsky NO v Lloyd** 1992 (3) SA 396 (C) at 418

²³ paragraph 19 CaseLines 008-25

²⁴ See definition of "*person*" in Consumer Protection Act

²⁵ calculated in accordance with the schedule in GN294 in GG 34181 of 1 April 2011

²⁶ Agreement of lease, clause 1, CaseLines 003-18, Annexure "D" and "D1", CaseLines 003-61 to 003-62

²⁷ clause 22.1.1, CaseLines 003-44

²⁸ Defendants' affidavit resisting summary judgment, paragraph 19, CaseLines 008-25

²⁹ Lease agreement, clause 18.1, CaseLines 003-24; offer to lease, clause 30, CaseLines 003-76

³⁰ Particulars of Claim, paragraph 5.9, CaseLines 003-4