IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: ***31 May 2021*** ***Signature***: *Z Majavu*

CASE NO: 21601/2020

This application was heard virtually on the *Microsoft teams* platform.

In the matter between:

IZANDLA PROPERTY FUND (PTY) LTD

[REG NUMBER:…] PLAINTIFF

and

AFRO ARCHITECTURAL CC FIRST DEFENDANT

[REG NO: ……..]

and

SERGE NZEMBELA SECOND DEFENDANT

[ID NUMBER:…..]

Coram: **Majavu AJ**

Heard: 13 May 2021

Delivered: 31 May 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, as well as by being uploaded to the *CaseLines* digital system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be **14h00 on 31 May 2021**.

Summary: Application for summary judgement. Defendant pleaded that it concluded lease agreement with a different party, thus plaintiff *non-suited*, also pleased *vis major* due to covid-19 pandemic and resultant lockdown restrictions, lack of beneficial use of the leased premises, defences not *bona fide* and not raising any triable issues, application granted with costs on attorney and own client scale.

ORDER

(a) The first defendant and second defendants are ordered to pay the amount of R 334 681, 95 to the plaintiff, the one paying the other to be absolved;

(b) The first defendant and second defendants are ordered to pay interest thereon at the rate of 9% *per annum* compounded monthly from 2 March 2020 to date of payment, the one paying the other to be absolved;

(c) The first and second defendants are ordered to pay costs on an attorney and own client scale, including the costs consequent upon the employment of counsel.

Majavu AJ

Introduction

Let me start off by expressing my gratitude to counsels for the detailed heads of argument, which I found very helpful.

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

[2] The plaintiff instituted action against the defendants in which its claim is based on the written lease agreement and deed of suretyship in respect of the second defendant, which was in turn opposed by the defendants. Subsequently, as per the amended rule 32, the defendant filed its plea, preceding the current application.

[3] The application for summary judgement is resisted by the defendants and the basis of the defence was set out in the accompanying affidavit, which mimics the grounds set out in the plea.

Brief factual matrix

[4] For the sake of convenience and ease of reference, the parties will be referred to as the plaintiff and defendant/s respectively.

[5] The central issue for determination, seem to me to be a resolution of the dispute regarding the true identity of the plaintiff, as the defendant takes the point

quite sharply. Simply put, the defendant asserts that the current plaintiff is non-suited as it is not the party with whom the defendant concluded the lease agreement, consequently, according to the defendant, there is no *lis* between it and the plaintiff. Firstly, the defendant boldly avers that it concluded a *tacit* lease agreement with Investec Property fund (Pty) Ltd ("Investec"), which is a distinctly separate entity from Izandla Property Fund ("Izandla"). The defendant also accepts that it concluded a lease agreement with the landlord, but omits to mention (in the plea paragraph 4, as they state in paragraph 5 of their heads of argument) *who that landlord is*, bearing in mind that it denies having concluded a lease agreement with the plaintiff (Izandla). Secondly, the defendant then pleads further that rental, which was due on its own admission, was not paid due to constraints as a result of covid-19 pandemic. Thirdly, it appears that the defendant further denies having been in occupation. Fourthly, there was a challenge regarding the jurisdiction of this court, which was later and correctly abandoned by the defendant. (emphasis)

[6] For convenience and flow of reading, I prefer to deal with the issues raised in paragraph 5 above before dealing with the applicable law in relation to summary judgement applications. On the face of it, there seems to be a veiled attempt to create a dispute of fact, however, I hold the view that even if such a dispute is present, it is not one which renders the resolution thereof impossible on the papers before me. To the contrary, that aspect (pertaining to the party with whom the defendants concluded a lease agreement) in my view, is capable of resolution without any need to resort to oral evidence. I will accordingly approach

the matter on that basis. The second and third issues would fall to be considered only in the event I were to dismiss the first point.

Wrong plaintiff point

[7] The defendant strongly asserts that it is not a party to any lease agreement with the plaintiff. The defendant makes the point further that *"far from admitting a lease with the plaintiff, on the contrary, the defendants' whole case is that they are not a party to the written lease agreement relied upon by the plaintiff and attached to the plaintiff's summons and particulars of claim herein"* (sic) They make it plain that the first defendant *"had a different lease agreement altogether. The contractual terms relied upon by the plaintiff for its alleged cause of action do not apply to the defendants. In the context of the present case, that is the crux of the matter" (sic)*. I agree with the defendants' counsel that, it is the crux of the matter, hence I sought to determine that aspect first, as I hereby do. (emphasis)

[8] A useful starting point would be to examine the impugned lease agreement closely and come to a conclusion regarding who were the executing parties and in respect of which property, then compare that with how the plaintiff's claim was particularized and juxtapose with the essence of the defendants' plea and basis set out in the affidavit resisting summary judgement.

Written lease agreement dated 15 July 2019

[9] On the very first page of the lease agreement, the parties have been clearly described as:

IZANDLAPROPERTY FUND (PTY) LTD -------- (Landlord) and duly represented by Nonhlanhla Mayisela

And

AFRO ARCHITECTURAL CC:----------(Tenant) and duly represented by Serge Nzembela ("Nzembela"). It is further noteworthy that both signatories on behalf of the parties expressly represented and/or warranted that they have been duly authorised to conclude this lease agreement, by virtue of resolutions of their respective entities. In this case, the resolution of the Board of Directors of the defendant expressly authorised Nzembela to conclude a lease agreement with the plaintiff and not any other party, least of all Investec.

[10] It is further self-evident and not in dispute, that the leased premises indeed relate to corner Nentabos & Botterklapper Street, Greenhill Village, Lynwood, Johannesburg. This corresponds with the description of the leased premises as pleaded in the particulars of claim.

[11] It is also further evident that the address chosen as a *domicilium citandi at executandi*, in respect of the landlord is care of company secretarial, Investec Ltd, 100 Grayston Dr, Sandton, and that of the tenant, is the same as the leased premises. Over and above that, the signatory to the same lease agreement, is the same person, Nzembela, who also stood *surety* on behalf of the tenant (Afro Architectural) in respect of the obligations arising out of this self-same lease agreement. In the deed of suretyship, Nzembela, expressly binds himself, jointly and severally with *Afro architectural CC* (who is described as the debtor) *in favour*

of Izandla Property Fund (Pty) Ltd (the creditor) pursuant to the same lease agreement attached to the particulars of claim, which is also signed by himself on behalf of the first defendant. On the face of these documents, there can be hardly any ambiguity regarding who the *actual parties* thereto are. (emphasis)

[12] I observed further that, at the top right corner of each page of the said agreement, an inscription is made as follows, *"Investec standard fund office lease, June 2016*". This appears to be a template for such lease agreements. It does not however suggest that the landlord (lessor) is to be accepted as Investec, as contended by the defendant. I therefore find that reference to Investec, either on the top right corner of all the pages of the lease agreement, as well as in the *domicilium* address, as well as the email address of the landlord is purely for administrative convenience. It cannot in all seriousness be elevated to being indicative of a party to this agreement. The parties have been clearly defined and I therefore find no reason to be persuaded otherwise.

[13] The lettable area of the lease premises, as recorded in clause 1.9 is approximately 2 87 m², with 7 open parking bays and 4 basement bays.

[14] This accords with the description or narration as stipulated in various invoices which were rendered to the defendant at the end of each month. Most importantly, to the extent that some invoices *were paid*, no issue can be raised by the defendant at this stage, regarding the accuracy or otherwise of the description or recordals in those invoices. For example, the tenant consolidated

account (see pages 119-120 annexed to the particular of claim) accords with the description as set out in the lease agreement.

[15] In the light of the above, I find that the plaintiff is indeed the correct and suitable party and consequently entitled to institute this action against the defendant. In the result, there is no merit in the defendant's contention, which it rightly describes as the crux of the matter, that the plaintiff is non-suited. It therefore follows axiomatically that such defence falls to be dismissed.

[16] With that aspect out of the way, the next defence to be considered is the Covid related one.

Covid-19 defence

[17] According to the defendant, the current Covid-19 pandemic creates a supervening impossibility of performance due to *vis major,* due to its extraordinary nature, as well as the fact that it is beyond the control of either of the parties. The defendant amplifies its assertion by referring to the lockdown regulations as set out in GN 313 of 2020 and issued on 25 March 2020 by the Minister of co-operative Governance and Traditional Affairs with effect from 27 March 2020. In terms thereof, its argues, businesses and other entities were obliged to cease operations, except for any businesses or entity involved in the manufacturing, supply or provision of an essential service. What this assertion ignores was that there was no directive for the cessation of all trading activities completely. What was restricted was movement to and from respective places of work. It was still permissible and indeed possible to continue, as far as possible and practical, with

the day-to-day operations of most businesses remotely and with the usage of available and enabling technology. It is unclear exactly on what basis, an entity that is involved in architectural designs could have been completely precluded from conducting some or portions of its commercial activities. Be that as it may, the lock down restrictions were imposed on a staggered and adjusted basis. For example, initially during lockdown level 5, there were stricter and more stringent prohibitions, which subsequently eased down to the current level 1. It is common cause that since around June 2020, the restrictions were eased significantly (to 4, 3, 2) and thus enabling most businesses to resume the full operations. That being the case, it is inexplicable why between June 2020 until when someone's was issued, the defendant was unable to meet its obligations in terms of the lease agreement.

[18] I am thus unpersuaded that the Covid-19 pandemic, without more, excused the defendant from its contractual obligations. The defendant does not indicate how its business was particularly affected to bring it within the ambit of its alleged impossibility of performance due to this *Act of God,* or what attempts it made to re-negotiate the terms with the plaintiff. It is clear why it did not do so, as it contends, quite strongly, that it did not conclude any lease agreement with the plaintiff. It therefore stands to reason that the alleged *vis major* is thus irrelevant and, logically, it therefore cannot be mounted as a defence to claim in which the defendant takes the view that the plaintiff is *non- suited*. This is a classic case of the defendant speaking through both sides of its mouth. This ground too, is unmeritorious and falls to be dismissed.

Denial of occupation defence

[19] Firstly, the defendant denied ever being in beneficial occupation at all after 27 March 2021. Notably, the *first* defendant does not indicate, to what extent, due to covid-19 it was unable to trade and operate from the leased premises and for how long. All that is said is that the *second defendant* was “stuck outside of the country and could not return” due to covid-19. That can never be accepted as a reason for the first defendant’s (without any explanation) failure and subsequent excusal from paying its rental in respect of premises which they were clearly occupying at all material times, until, at the very least, the issuance of the summons. Given the paucity of the explanation, I am unable to find that, on a balance of probabilities, the defendant does raise a triable issue or bona fide defence. In order for a *vis major* to be a valid defence, it must *demonstrably* have a direct impact on the actual possibility of performance. In this case, barring the reference to lockdown regulations, in a generalized fashion, ignoring that those were applied on a differentiated and adjusted approach (different levels 5 downwards to 1), as well the fact that the second defendant was stuck overseas, *no explanation* regarding the direct impact of the regulations and the possibility or otherwise of performance of contractual obligations is provided, either in the plea or the affidavit resisting summary judgement. In the result, I find that this ground too, is baseless and falls to be dismissed. In fact, the above mentioned defences are indeed inextricably linked, due to the fact that, it seems the reason for non-occupation, resulting in alleged lack of beneficial use, as the defendant would have us believe, is due to restrictions imposed by the regulations in terms of the Disaster Management Act (“the regulations”). This is patently false, as

restrictions came into operation on 27 March 2021, way after the commencement of the lease agreement, which I found to have been validly concluded between the parties *in casu.*

Rule 32

[20] As I indicated in the opening paragraph, what is before me is an application for summary judgement. The applicable rule is the amended rule 32[1]. In this case this claim is based on a lease agreement, which makes it a liquidated amount in money and needless to say, capable of being promptly ascertained.

[21] For purposes of this matter, *"rule 32 (2) specifically provides that a notice of application for summary judgement, must be accompanied by an affidavit made by the applicant or any other person who can swear positively to the facts verifying the cause of action and the amount, claimed and stating that in his opinion there is no bona fide defence to the action….."*. In this case, the required affidavit was filed by Ms Jacqueline Bisschoff. In it, she clearly explains how she came to have personal knowledge of the facts, as she is the relevant portfolio manager of a management company (Broll Porperty Management (PTY) LTD) acting on behalf of the plaintiff. The lease agreement is attached to the supporting affidavit which accompanies the application for summary judgement. Ms Bisschoff, has duly positively sworn to and verified the cause of action on which the claim is based, as well as computation of the amounts owing by the

[1] Rule 32 of the Uniform Rules of Court, rule 32 (1) (a) "where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgement on each of such claims in the summons as is only- (a) a liquid document ,and (b) and a liquidated amount in money

defendant, in this matter. She has further set out why in her view, she believes that the defendant has not raised a *genuine or bona fide* defence, which gives rise to any *triable* issue. Barring the technical contentions by the defendant with regards *to locus standi*, covid related (*vis major*) and lack of beneficial use of the leased property defences, on which I have already indicated that I am not persuaded, there is absolutely no indication by the defendant, as to what its true defence, on the merits would be, if any at all, which could have entitled them to proceed to trial at some future date. It is quite clear that the defendant has no defence; otherwise, it would have raised it to enable me to make an assessment regarding its genuineness, and not so much to make a final determination on its prospects of success. At this stage, I refer with approval to the *dictum* by Wallis J in the case *of Shackelton*[2]

> " *it will be bold for the defendant to limit his or her affidavit resisting summary judgement technical matters when they believe they have a good defence on the merits. They run the risk of having summary judgement granted if the technical differences rejected, as there would not have dealt with the merits of the plaintiff's claim*".

[22] I find this passage very apt *apropos* the current case. The defendant, quite *boldly* asserted that the *crux of the matter* and presumably the high watermark of its defence, is simply, the fact that the plaintiff lacks the necessary *locus standi*

[2] Shackleton Credit Management (Pty) Ltd v Microzne Trading 88 CC and Another 2010 (SA) 112 (KZNP)

to institute the action in the first place and the subsequent application for summary judgement. (emphasis).

[23] Having rejected the technical defences raised by the defendant, nothing is left of its purported to defence, neither are there any possible triable issues raised by the defendant, which would warrant the matter to proceed to trial.

[24] The novelty with regard to the amended rule, is the requirement that an application for summary judgement can only be proceeded with ***after*** the defendant has filed a plea. This is sound, as it enables the plaintiff to carefully assess the nature of the defence raised before it considers to bring an application for summary judgement. In this case, mindful of the cause of action and the fact that the claim is based on a lease, it seems self-evident that no genuine defence has been raised.

[25] The onus resting upon an applicant for summary judgement was aptly stated as follows by Bins-Ward J *inTumileng Trading CC v National Security and Fire (Pty) Ltd*[3]*:*

> *" 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 where 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*

[3] 2020 JDR 0747 (WCC)

is acceptable. It is required to explain why it is contended that the pleaded defence is a sham."

[26] *Put differently, the court is required to consider whether the defence raised by the respondent in its plea and affidavit resisting summary judgement, is a genuine defence or raises any triable issue or whether it is contrived, with the intention to delay the inevitable and undisputed liquidated debt or one capable of easy computation*. This presupposes a balancing act against the contentions by the plaintiff, weighed against those by the defendant. It is clear from both the plea and affidavit resisting summary judgement that the defendant is relying on an overly formalistic technicality, which has nothing to do with its *undisputed* indebtedness towards the plaintiff. If the defendant was serious in its denial of some form of contractual liability (flowing form a duly signed lease agreement) towards the plaintiff, it has not explained why it made payment of some months during the tenure of the now disputed lease agreement. All objective facts, lead to one inescapable conclusion, namely, that the defendant suddenly encountered a *Damascus road* experience and now seeks to resile from a duly and properly executed lease agreement.

[27] The practical effect of permitting the defendant in this case to proceed to trial, would simply be to delay the inevitable. It is either the defendant has raised a genuine defence at this stage of the proceedings, or it has not. None can be manufactured along the way to trial. If one were to borrow with approval, from the *dictum* of Bins-Ward J, I would say it is apparent that the defence mounted by the

defendant is a ***sham*** intended to delay the inevitable, in that, money is owed and is indeed due and payable the plaintiff. (emphasis)

[28] I fail to see what usefulness would be derived, if an unmeritorious case such as *this one*, were to be permitted to proceed to trial. If anything, it remains my considered view that, such would be an abuse of court processes. The courts, in the adjudication of disputes, generally frown upon overly formalistic and technical quibbles, which have nothing to do with the true merits of the case. This is a classic case where an end must be put to what could easily be a protracted litigation, wherein the defendant, clearly has no defence, whatsoever.

[29] I am fortified by and align myself fully with an observation which my sister Siwendu J makes in her separate judgement and opening gambit, in the combined matters of *Standard Bank, FNB, GMG Trust Company et al*[4],

> " *the object of summary judgement is to prevent the frustration and unreasonable delay of the plaintiff's claim by a non- triable defence. The value of the procedure for a plaintiff lies in obtaining an expedited judgement."* (Emphasis)

[30] Should this not be the case, the unintended consequence would be that a plaintiff, worthy of an expeditious (considering the fact that a plea has now been filed) judgement in its favour, could potentially be strung along by an errant defendant, having to further finance protracted and frivolous litigation. Needless

[4] see Combined cases under case numbers: 46904/2017, 27740/2018, 27741/2018, 3765/2019 and 1192/2018 and handed down on 3 September 2019.

to say, this also puts an undue strain on the already overstretched judicial resources. This cannot be countenanced.

Order

[30] In the result I make the following order.

[30.1] The first defendant and second defendants are ordered to pay the amount of R 334 681, 95 to the plaintiff, the one paying the other to be absolved;

[30.2] The first defendant and second defendants are ordered to pay interest thereon at the rate of 9% *per annum* compounded monthly from 2 March 2020 to date of payment, the one paying the other to be absolved;

[30.3] The first and second defendants are ordered to pay costs, on an attorney and own client scale, including the costs consequent upon the employment of counsel.

Z M P MAJAVU
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	13 May 2021
JUDGMENT DATE:	31 May 2021
FOR THE PLAINTIFF:	Adv JG Dobie
INSTRUCTED BY:	Reaan Swanepoel Attorneys
FOR THE DEFENDANT :	Adv BP Geach SC
INSTRUCTED BY:	Rina Rheeders Attorneys Inc.