REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2020/35445

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED YES
4 May 2022

In the matter between:

FREESTONE PROPERTY INVESTMENTS (PTY) LIMITED **Plaintiff**

and

PETABYTE TELECOMMS (PTY) LIMITED **First Defendant**
(Registration Number: 2015/281290/07)

SULAIMAN SOUMA **Second Defendant**
(ID Number: [....])

Heard: 24 January 2022
Judgment: 4 May 2022

JUDGMENT

MOVSHOVICH AJ:

Introduction

1. This is an application for summary judgment in respect of rental payments alleged to be due and payable in terms of a written commercial lease agreement concluded between the plaintiff and the first defendant. The second defendant is sought to be held jointly and severally liable with the first defendant by virtue of a suretyship which is alleged to have been concluded between the plaintiff and the second defendant.

2. The combined summons dated 2 November 2020 claimed an amount of R304,594.64 in arrear rental, ejectment of the first defendant and occupiers of the commercial premises at Unit 26, Midline Business Park, Corner Le Roux and Richards Drive, Midrand, Gauteng ("**the premises**") as well as interest from the date of summons and costs on an attorney-client scale.

3. The prayer for ejectment has been abandoned on account of it now being common cause that the first defendant vacated the premises in September 2020. The summary judgment application had also reduced the monetary claim to R247,204.39 as a result of the premises not having been occupied in October and November 2020. The plaintiff persists with its claim for interest and costs on an attorney-client scale.

4. The defendants filed a plea and affidavit opposing summary judgment. The bases for their opposition are as follows:

4.1 an *in limine* point to the effect that the variance between the amount claimed in the summons and in the summary judgment application is fatal to the success of the latter, as the deponent to the affidavit supporting summary judgment had not "verified" the amount alleged to be owing in terms of the particulars of claim as as ostensibly required by the Uniform Rules;

4.2 the first defendant vacated the premises in September 2020 and is thus not liable for any amounts in October and November 2020;

4.3 the first defendant paid a R48,607.93 deposit to the plaintiff, which remains in the plaintiff's possession, which should be set off against any claim by the plaintiff;

4.4 that COVID-19 and consequent government-imposed restrictions from March to late June 2020 constituted *force majeure* events and suspended the obligation to pay rental;

4.5 in relation specifically to the second defendant, the latter denies the execution of the suretyship. He states that he was not aware of the clause in the lease agreement purporting to be a suretyship undertaking. The second defendant avers that he was ambushed and any signature of his is an excusable error. In any event, the second defendant contends that the alleged suretyship was not signed but simply innocently initialled by him and thus does not comply with section 6 of the General Laws Amendment Act, 1956, which sets forth certain formalities for a binding suretyship agreement. Finally, the second defendant contends that he is married in community of property and his wife's written consent was required, but not obtained.

5. The first defendant appeared to accept that it may be liable for certain rental amounts – in respect of the period July to September 2020. In this regard, the plea specifically calculated that amount at R81,383.20.

6. The affidavit resisting summary judgment sought the dismissal of the summary judgment application with punitive costs, as well as an order in terms of rule 32(9) of the Uniform Rules staying the action pending payment in terms of the claimed costs order.

Key principles

7. The summary judgment procedure is, as the name suggests, a summary process to weed out sham defences whose objective is to delay the enforcement of the plaintiff's rights. In this regard, the procedure is not intended to shut out a defendant from defending an action where there are triable issues.[1] The bar is a low one for a defendant to pass so as to resist summary judgment, but it is not non-existent. As stated by the Supreme Court of Appeal there must be "*sufficient disclosure by a defendant of the nature and grounds of [its] defence and the facts upon which it is founded*". The defence must also be "*bona fide and good in law*".[2]

8. The recent changes to rule 32 have not altered the basic substantive requirements for a summary judgment application. As stated by Binns-Ward J in *Tumileng Trading CC v National Security and Fire (Pty) Ltd*[3] "*has the defendant disclosed a bona fide (i.e. an apparently genuinely advanced, as distinct from sham) defence?...A defendant is not required to show that its defence is likely to prevail. If a defendant can show that it has a legally cognisable defence on the face of it, and that defence is genuine and bona fide, summary judgment must be refused. The defendant's prospects of success are irrelevant.*"

<u>*In limine* point</u>

9. I deal first with the *in limine* point raised by the defendants. Essentially, the defendants contend that the deponent to the plaintiff's affidavit in support of summary judgment did not verify the amount claimed by the plaintiff, because the amount claimed in the particulars of claim and in the affidavit are different. There is no merit in this contention. The deponent provided a full calculation showing how the new amount was calculated which was effectively done by deducting from the R304,594.64 claimed in the particulars of claim the rental and municipal rates for the now – uncontentious – October and November 2020 period.

10. Thus, all that the plaintiff was doing was abandoning a part of its existing claim and calculating the difference. This seems to me to be entirely logical and

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[1] *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA), paras [31] and [32].

[2] *Ibid*, para [32].

[3] 2020 (6) SA 624 (WCC), para [13].

permissible, and is not in contravention of the requirement to verify the cause of action and amount claimed in terms of rule 32(2)(6).

Merits

11. The defence set forth in 4.1 above has been rendered academic as the plaintiff concedes that no amounts are chargeable for October and November 2020, and in fact its affidavit in support of the summary judgment application calculates the amount alleged to be due on that basis.

12. In relation to the *force majeure* defence, the plaintiff contends that the defendants have failed to set forth the material facts on which they rely and that on the basis of what has been pleaded the defendants have not disclosed a defence sustainable in law.

13. The affidavit resisting summary judgment must be read in conjunction with the plea. The plea states that the COVID-19 regulations prevented business operations and movements for non-essential service providers such as the first defendant. The first defendant thus could not use the premises for the purpose for which they were let – viz to operate its trading business and satisfy rental obligations from the proceeds. The first defendant also stated that the plaintiff did not fulfil and could not have fulfilled its obligations under the lease to place the first defendant in possession of the premises for the purposes for which they were let.

14. The first defendant noted in its opposing affidavit that the plaintiff giving it a 50% discount on its rental for April 2020 was a recognition of *force majeure* circumstances.

15. The plaintiff contends that it made specific allegations in its affidavit in this application that the first defendant utilised the premises for storage of telecommunication items and that telecommunications was an essential service during lockdown, and that the premises therefore were "*utilised…throughout for the purpose for which it was [sic] let, whether it traded or not*".

16. It is so that not every part of every averment made by the plaintiff is addressed expressly by the defendants. But the defendants make it clear that they deny that the purpose of the lease was storage (as opposed to trading) and that the purpose was given effect. They allege that the purpose was "*rendered redundant*". These averments should also be understood in light of the allegations already made in the plea, as set forth above. The opposing affidavit also separately reconfirms the defendants' defences in the plea.

17. The plaintiff contends, further, that even if the facts as pleaded are accepted, they do not amount to a defence in law. I do not propose to deal in detail with the authorities relied on by the plaintiff in this regard.

18. Essentially, the plaintiff contends that performance must be absolutely impossible before a party will be excused from performance. And as the premises could continue to be used for storage, the impossibility was not established. The plaintiff also avers that some significance should be attached to its uncontroverted averment that "*telecommunications*" was an essential service.

19. I do not think that at the summary judgment stage, it is either useful or possible to assess the nuanced presentations of the parties' legal cases on the merits. It is an accepted legal principle that impossibility can be both temporary and partial, and lead to (i) a termination or suspension of legal obligations; and (ii) an exercise of a value judgment by the trial court as to the appropriate remedy.[4] It seems to be clear that the defendants' version is that the premises could not wholly or in material part be used during the hard COVID-19 lockdown. Even if telecommunications was an essential service, this does not necessarily mean that there was no *force majeure* situation. And if the premises could only be partly or temporarily used, that does not necessarily mean that the full rental was due. That may be a matter for evidence and value judgment by a trial court. In any event, the plaintiff's case was not based on any calculated reduction in this regard.

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[4] *World Leisure Holidays (Pty) Ltd v Georges* 2002 (5) SA 531 (W).

20. Moreover, if the defendants are right about the plaintiff's inability to make the premises available as envisaged under the lease, then the *exceptio non adampleti contractus* may come into play.

21. As such, in my view, for the period March to June 2020, the defendants' pleaded defence is sufficient to resist summary judgment.

22. In respect of the defence set forth in 4.3 above, the plaintiff correctly points out that clause 7.4 of the lease states that the deposit is to be refunded to the first defendant as soon as it has vacated the premises and has completely discharged all of its obligations under the lease. The clause also states that the deposit may not be used to set off any amounts payable by it. The plaintiff in its affidavit stated that one of the obligations which the first defendant was required to fulfil was to reinstate the premises. But no allegation has been made by the plaintiff that the premises have not been reinstated or that any amount is claimable in this regard. That bald averment thus does not take the matter much further. It seems to me that the application of clause 7.4 is thus only relevant in the context of the alleged failure by the first defendant to pay the amounts claimed in the combined summons.

23. The defendants do not issuably dispute the applicability of clause 7.4 but simply contend that the deposit amount falls to be deducted from the amount claimed. As a matter of logic, and for the purposes of the summary judgment stage of the proceedings, I must accept that once the payments I find to be due by the first defendant are made, the first defendant would immediately be able to reclaim the full amount of its deposit. I think it would be straining the bounds of formalism to find that summary judgment should be granted without making provision for a deduction of the deposit in the final calculation. Such a deduction will not, however, constitute a final finding that the amount of the deposit is indeed repayable to the first defendant at that stage (or at all). That issue and any other matters concerning the deposit will remain questions for trial court to resolve in due course.

24. In respect of the second defendant's defences, it seems to me clear that they give rise to triable issues and are genuinely advanced. The conclusion of the suretyship is *bona fide* disputed, either because it was not actually signed, formed no

part of the consensus between the parties or was signed in circumstances of justifiable error. There is assuredly a legal basis for these types of defences, and whether they are applicable will depend on a close analysis of all the circumstances. As held by the English Court of Appeal over six decades ago: "*I quite agree that the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.*"[5]

25. Of course, I (need) come to no final conclusions as to whether the alleged suretyship is one of such odious or forbidding clauses. The principle articulated above, however, applies with even greater force in South African jurisprudence, given the public policy dictates underlying our law of contract.

26. Similarly, the second defendant's other defences are not patently devoid of merit. They involve mixed questions of law and fact which it is plainly not the task of a court sitting in summary judgment to resolve.

27. In all circumstances, the second defendant must be given leave to defend all the claims made against him.

28. This leaves us with the question as to the (admitted) liability of the first defendant in respect of the period July to September 2020, and rates (but not rent) in relation to the earlier period.

29. The plea averred that an amount of R81,383.20 was due. No calculations were proffered to explain how that amount was reached. At the hearing of this application, I thus asked the parties to perform a calculation deducting the disputed amounts for April to June 2020 and October to November 2020, as well as the deposit. Those agreed calculations were sent to my registrar after the hearing.

30. The calculation was as follows:

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[5] *J Spurling Ltd v Bradshaw* [1956] EWCA Civ 3; [1956] 2 All ER 121 (CA).

30.1	the claim amount in the Particulars of Claim	304 594,64[6]
30.2	less October rental	(27 949,55)[7]
30.3	less November rental	(27 949,55)[8]
30.4	less October municipal rates	(601,67)
30.5	less November rates	(601,67)[9]
	Subtotal in respect of October, November rental and rates	R57 102,44
30.6	Less 50% of April's rental	(13 974,78)[10]
30.7	Less May rental	(27 949,55)
30.8	Less June rental	(27 949,55)
	Subtotal – April, May and June rental	R69 873,88
30.9	Less deposit	(48 607,93)[11]
		129 010,39

6 See page 001-9 and balance on Annex "B", page 001-37.

7 See Annexure "B", page 001-37.

8 See Annexure "B", page 001-37.

9 See page 001-37.

10 See page 008-51 (50% of the rental having been deducted already – see page 008-51).

11 See lease schedule, age 001-12 (under deposit/bank guarantee).

31. The calculations make sense, and in view of my findings above, I intend to make use of them in the order, except that under the lease agreement, the deposit is only repayable after full payment is made and such deposit (while held by the lessor) does not bear interest in terms of the lease agreement. The order will need to reflect a modification to deal with the above.

Costs

32. A court is empowered to make such an order as to costs as may seem just (rule 32(9)). This is over and above the inherent discretion which the courts have in respect of costs orders.

33. Insofar as the case against the first defendant is concerned, it is unclear why the first defendant opposed the application to the extent of the amount admitted in the plea (R81,383.20). That seemingly undisputed amount increased in the calculation jointly submitted by the parties. On the other hand, the first defendant successfully resisted summary judgment on several basis as set forth above.

34. Taking account of all the circumstances, it would be just for the first defendant to bear 25% of the plaintiff's costs of its summary judgment application against the first defendant.

35. The position is different in relation to the second defendant. It seems plain to me that the plaintiff should have anticipated that leave to defend will be granted, having regard to the contents of the second defendant's plea. I cannot make a finding, however, that the plaintiff in fact knew that the second defendant would be granted leave or that the application was an abuse of process. Having regard to all the circumstances, however, I do not think that the second defendant should have been made to engage in an interlocutory process when his defences were known and, *prima facie*, good or at least arguable in law and on the facts.

36. Taking account of all the relevant circumstances, in my view an award of costs on the ordinary party-and-party scale to the second defendant satisfies the requirements of justice.

Order

37. I thus make the following order:

37.1 The first defendant shall pay the plaintiff an amount calculated in the following manner:

37.1.1 R 177,618.32 plus interest thereon at 9% per annum, compounded monthly, from 2 November 2020 to the date of final payment ("**the calculated total**");

37.1.2 from the calculated total, the amount of R48,607.93 is to be deducted on the date of final payment and the difference between the calculated total and R48,607.93 is to be paid to the plaintiff;

37.2 save to the extent finally decided in this judgment, the first defendant is granted leave to defend;

37.3 the first defendant shall bear 25% of the plaintiff's costs of its summary judgment application against the first defendant;

37.4 the application for summary judgment against the second defendant is dismissed with costs;

37.5 the second defendant is granted leave to defend.

Hand-down and date of judgment

38. This judgment is handed down electronically by circulation to the parties or their legal representatives by email and by uploading the judgment onto Caselines. The date and time for hand down of the judgment are deemed to be 14:40 on 4 May 2022.

VM MOVSHOVICH

ACTING JUDGE OF THE HIGH COURT

Plaintiff's Counsel:	JG Dobie
Plaintiff's Attorneys:	Reaan Swanepoel Incorporated
Defendant's Counsel:	M Leshabane
Defendant's Attorneys:	Ndaba H E Incorporated
Date of Hearing:	24 January 2022
Date of Judgment:	4 May 2022