REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2020/33237
REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: YES
REVISED YES
24 May 2022

In the matter between:

JUJDEESHIN JUNKOON
(ID NO. [....]) N.O. in his capacity as
Trustee of MERGENCE AFRICA PROPERTY
INVESTMENT TRUST (IT 11263/2006) **First Plaintiff**

RIDWAAN ASMAL
(ID NO. [....]) N.O. in his capacity as
Trustee of MERGENCE PROPERTY
INVESTMENT TRUST (IT 11263/2006) **Second Plaintiff**

PETERSEN, ISAK SMOLLY
(ID NO. [....]) N.O. in his capacity as
Trustee of MERGENCE PROPERTY
INVESTMENT TRUST (IT 11263/2006) **Third Plaintiff**

AZIZOLLAHOFF, BRIAN HILTON
(ID NO. [....]) N.O. in his capacity as
Trustee of MERGENCE PROPERTY
INVESTMENT TRUST (IT 11263/2006) **Fourth Plaintiff**

and

DAWID STEFANUS VAN DEN BERG CC t/a BALLBREAKERS
(REGISTRATION NO. 2002/062289/23) **First Defendant**

DAWID STEFANUS VAN DEN BERG

(ID NO. [....]) **Second Defendant**

Heard: 27 January 2022
Judgment: 24 May 2022

JUDGMENT

MOVSHOVICH AJ:

Introduction

1. This is an application for summary judgment brought by the plaintiffs (trustees of the Mergence Africa Property Investment Trust), the landlord, against:

1.1 the first defendant, the commercial tenant, for ejectment, arrear rental and interest; and

1.2 the second defendant, alleged to be a surety bound to stand good for the debts of the first defendant in terms of the lease.

2. The relevant leased premises are described as Shop 101 measuring approximately 599.80m^2 located at the Blackheath Pavilion at [....] P[....] Road, Blackheath, Randburg (Erf [....] Blackheath Ext 7) ("**the premises**"). In terms of the lease, "*the premises shall be used solely for the purposes of conducting a retailing business, specifically for the following uses: Pool Hall licensed to sell food, liquor and pool accessories and for no other purpose whatsoever*".

3. The principles pertaining to summary judgment are well settled, despite the recent amendments to rule 32. Essentially, the purpose of the procedure is to weed out plainly unmeritorious defences to claims at an early stage; it is not to prevent *bona fide* and arguable defences from being heard by the trial court, where they belong to be considered and decided.[1]

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

4. In the present matter, it is common cause between the parties that a lease agreement was concluded between the parties in 2018 ("**the lease**"). The plaintiffs contend that, in breach of the lease, the first defendant failed to pay monthly rental to the plaintiff between March / April 2020 and October 2020. As a result thereof, the plaintiff seeks to cancel the lease and claim ejectment and damages. The first defendant, on the other hand, avers that it was excused from making rental payments to the plaintiff as a result of *vis maior* occasioned by Covid-19 government regulations, and it not being able to trade from 27 March to 3 September 2020.

5. The first defendant pleaded that its rental should, in all the circumstances, have been subject to remission, such that it should only have made payment of 10% of its monthly turnover plus the cost of utilities. It further asserted that the plaintiffs' conduct constituted a repudiation which the first defendant accepted and cancelled the lease. The first defendant, however, averred that it was entitled to retain the leased premises as a result of a lien which it had in respect of the premises pursuant to improvements which it alleges to have made to the premises over the years, amounting to R219,152.55, which amount remained unpaid.

Application to strike out

6. Before embarking on an analysis of the above issues raised by the parties, I need to address a preliminary application by the defendants. The defendants seek to strike out parts of the supplementary founding affidavit of the plaintiffs. The paragraphs sought to be struck out: 12, 13.1, 13.4, 13.10 and 13.11.

7. The key question in determining whether to strike out passages of the founding affidavit is whether the evidence sought to be adduced is admissible and relevant to the issues in dispute.[2] The veracity of the evidence or prospects of success of the application are irrelevant. It should also be established by the party

[2] *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (2) SA 1 (CC), para [127].

seeking allegations to be struck out that it will be prejudiced should the allegations remain.[3]

8. The allegations made in the paragraphs sought to be struck are as follows:

"*12. Having regard to what is set out in the plea and the affidavits already filed, it is clear that the First Defendant continues to occupy the premises and continues to trade therefrom but is not making any payment in respect of such occupation.*

…

13.1 the First Defendant as seller of food and liquor was entitled to:

13.1.1 sell such food throughout the lockdown period;

13.1.2 trade in respect of liquor from at least June 2020;

…

13.4 the amounts charged in respect of the consumption charges were charges as measured and take into consideration the reduced usage of the First Defendant as a result of not trading for the period;

…

13.10 there is no basis to reclaim the amounts which have been paid consequent upon the First Defendant's occupation of the premises during the period in which it in any event acknowledges that it traded and for an amount which it was liable in terms of the lease agreement;

[3] *Beinash v Wixley* 1997 (3) SA 721 (SCA), 733 - 734.

13.11 furthermore, the First Defendant's conduct can never amount to an acceptance of repudiation as it has continued to trade in the leased premises and in the event of acceptance of repudiation, it was obliged to vacate the premises".

9. It seems to me that the amendments to rule 32, which dictate that a summary judgment application may only be launched after the delivery of the plea and must contain a brief statement "*why the defence as pleaded does not raise any issue for trial*" as well as "*the facts upon which the plaintiffs claim is based*" require a plaintiff to grapple substantively with the facts underlying its claim and the defence. In those circumstances, the plaintiff in the current proceedings can hardly be faulted for:

9.1 underscoring the continued occupation of the premises by the first defendant, which is essential to ejectment;

9.2 setting forth why the first defendant's business was not in fact adversely affected by the Covid-19 lockdown regulations;

9.3 explaining that the consumption charges are based on actual usage and thus did not charge more than *actually* consumed by the first defendant;

9.4 averring that amounts paid by the first defendant could not in law be recouped; and

9.5 seeking to explain why the first defendant is wrong to assert repudiation and why this in any event is of no assistance to the first defendant's defence to eviction.

10. In my view, these allegations are relevant and should not be struck out. But, in any event, there is no prejudice to the defendants if the allegations remain on record. It will have no material bearing on their conduct of this litigation.

11. The application to strike out thus falls to be dismissed with costs.

Ejectment

12. It is common cause between the parties (albeit for different reasons) that the lease is at an end. In those circumstances, I do not think it is open to the first defendant to resist that relief in a summary judgment application except, possibly, on the basis of the alleged lien. In this regard, in the absence of contractual provisions to the contrary, improvements to properties by lessees may result in claims against landlords, which might in turn found a right of retention. In broad terms, that is the "*right*" which is asserted by the first defendant in this case.

13. But such assertions face insuperable obstacles in the context of this lease. The defendants have not suggested that, or how, those impediments may be overcome. Clauses 14.1 and 14.2 of the lease regulate improvements and liens in the context of the premises.

14. Clause 14.1 prohibits alterations without prior written consent of the landlord. No such consent is alleged to have been given. Moreover, clause 14.2 expressly and unequivocally waives any claims of an improvement lien and acknowledges that the tenant will not acquire a right of retention / occupation of the property. Clause 14.2 provides thus:

"*It is expressly recorded that the tenant shall have no claim of whatsoever nature for any alterations or additions effected by the tenant to the premises, whether such improvements were effected with or without the landlord's consent. The tenant furthermore hereby expressly waives and abandons any improvement lien that it may have in respect of any alterations or additions made to the leased premises and expres-sly acknowledges that it shall have no right to occupy the leased premises pending the outcome of any legal or other dispute that may arise between the parties in respect of any alleged improvement lien. However, the tenant shall be liable to reimburse the landlord on demand for any and all costs incurred by the landlord In having such improvements or alterations removed and the leased premises reinstated on behalf of the tenant.*"

15. In these circumstances, the "*lien defence*" is unsustainable. There is no legal basis for the first defendant to keep (let above keep trading on) the premises. The first defendant falls to be ejected from the premises. I shall afford it seven calendar days from the date of the order to vacate the premises. Of course, this ejectment date in no way affects any claims for holding over or the like which the plaintiffs may be entitled to pursue on account of the premises not having been vacated earlier.

Arrear rental and charges

16. The question as to whether, and to what extent, the defendants may in law be liable to pay the plaintiffs arrear rental and charges is a more complex enquiry.

17. The defendants contend that the effect of the Covid-19-related regulations under the Disaster Management Act, 2002 was that the first defendant was wholly or partially prohibited from carrying on business at the premises and was prohibited from "*using, enjoying and beneficially occupying the premises as intended under the [lease]*". The defendants submit that the plaintiffs were at the relevant times from 27 March to September 2020 not in a position to give use and enjoyment of the premises to the first defendant.

18. The defence is this regard is based on alleged supervening impossibility of performance. In the answering and supplementary answering affidavits, the defendants set forth in detail the regulations (and different Alert levels thereunder) to explain why the first defendant was, in fact, unable to trade or severely restricted in the conduct of its business.

19. The plaintiffs, on the other hand, aver that the impossibility, to be legally relevant, must be absolute and should be assessed from an objective perspective, that the mere difficulty in making performance is insufficient to constitute impossibility, and that the impossibility must relate to actual *performance* of the contract and not the *objectives* which motivated the conclusion of the contract. The plaintiffs contend that the first defendant remained entitled to occupy the premises even if it was not entitled to trade at various points, and, as such, performance was not "*fully impossible*".

20. The plaintiffs also rely on several clauses which they aver disentitle the first defendant from relying on *vis maior*, including the following:

20.1 the first defendant would have no claim against the plaintiffs arising out of an act of God or unforeseen events (clause 22.1.1);

20.2 the first defendant would have no claim for damages or remission of rent related to the failure or interruption of services or statutory authority (clause 22.1.2);

20.3 the first defendant was not entitled to withhold or defer payment of rental (clause 22.1.3).

21. The lease does not contain specific provisions dealing in detail with *vis maior* situations, as one often finds in commercial agreements. The precise import of clause 22.1 is unclear. Clause 22.1.1 is focused on indemnifying the landlord from *claims* for loss or damage pursuant to, *inter alia*, a *vis maior*. It does not on its face appear to be directly in point.

22. Clause 22.1.2 does state that the first defendant shall have no claim (including for remission of rent) for "*any failure of or interruption in the amenities and services provided by the landlord and/or any statutory authority*", but it is not clear what is meant by "interruption" or "failure", what "amenities" or "services" are referred to or what is meant by "statutory authority", and whether this has anything to do with a *vis maior* situation of the kind caused by the Covid-19 pandemic and attendant regulations.

23. Clause 22.1.3 likewise is unclear as to whether it applies to a case where performance by the landlord or tenant is precluded, wholly or in material part.

24. While it is arguable that the above clauses may assist the plaintiffs, their contextualisation and interpretation cannot meaningfully (let alone conclusively) be undertaken in summary judgment proceedings. Much like on exception, it is often impossible to give definitive meaning to provisions whose full import, without the

benefit of oral evidence and proper contextualization, is not clear.[4] It is also worth recalling what the Court in *Tumileng Trading CC v National Security and First (Pty) Ltd* held in the context of summary judgment applications: "*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*".[5]

25. General legal principles governing *vis maior* situations may provide a basis for the defendants' defences. South African law recognises that impossibility can be both temporary and partial and lead to a termination or suspension of legal obligations, and an exercise of a value judgment by a trial court as to the appropriate remedy.[6] It is thus not correct to state that the impossibility must be absolute in every respect. The defendants have set forth in the affidavit resisting summary judgment how the use of the premises was precluded or severely impaired. It will be a matter for the trial court to determine how far use was impaired, what the significance of that is in the context of clause 22 properly interpreted and, to the extent that impossibility applies, how the court should exercise its value judgment contemplated in the authorities.

26. I take account of some of the older authorities raised by the plaintiffs which appear to circumscribe the circumstances in which remission of rental will be ordered or impossibility found in the context of landlord / tenant relationships.[7] But these authorities are not dispositive of the issue on the facts relating to Covid-19, the relevant (very specific) regulations and their impact on the performance of obligations in terms of the lease in this matter. This is all for the trial court to address in due course.

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[4] *Belet Industries CC t/a Belet Cellular v MTN Service Provider (Pty) Ltd* [2014] ZASCA 181 (24 November 2014).

[5] 2020 (6) SA 624 (WCC), para [13]

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

[7] For example, *Hansen, Schrader and Co v Kopelowitz* 1903 TS 707 and *Johannesburg Consolidated Investment Co v Mendelsohn & Bruce Limited* 1903 TH 286.

27. In all the circumstances, the first defendant must be given leave to defend in this regard. Given that the second defendant's defence in respect of liability in respect of arrear rentals is co-extensive with the first defendant's defence on the merits, the second defendant must likewise be granted leave.

Rectification

28. The plaintiffs also claim in the summary judgment application a rectification of the registration number of the first defendant in the lease, from 2002/06289/23 to 2002/062289/23. This aspect is not disputed or opposed and the relief sought will be granted.

Costs

29. The plaintiffs were partly successful in these proceedings. On the other hand, the defendants will be given leave to defend in other respects. I note that under clause 29.3 of the lease, "*[i]n the event of the landlord instructing its attorneys to take measures for the enforcement of any of the landlord's rights under this lease, the tenant shall pay to the landlord such collection charges, tracing fees and other legal costs, on an attorney and client basis, as shall be lawfully charged by such attorneys to the landlord, on demand made therefor by the landlord*."

30. I do not think that the clause is directly applicable in the current matter. While I intend to order the first defendant's ejection, this is done in the context of both parties accepting that the lease is at an end on the basis of diametrically opposed versions (cancellation by the plaintiffs or cancellation by the first defendant). As such, it would not be accurate to classify this relief as simply "*enforcement*" of the lease by the landlord.

31. It seems to me, taking all relevant circumstances into account, and in the exercise of my discretion as to costs, that:

> 31.1 the first defendant should be liable for 50% of the costs of the summary judgment application on the ordinary scale; and

31.2 the balance of the costs of the application should be costs in the cause of the action.

Order

32. I thus make the following order:

32.1 the first defendant and anyone claiming occupation through the first defendant are ejected from the premises described as Shop 101 (measuring approximately 599.8m^2), Blackheath Pavilion, [....] P[....] Road, Blackheath, Randburg, Gauteng with effect from 31 May 2022;

32.2 the lease is rectified in order to reflect the first defendant's registration number as "*2002/062289/23*" instead of "*2002/06289/23*", wherever same appears therein;

32.3 save as finally disposed of above, the defendants are granted leave to defend the action;

32.4 the first defendant is declared liable for 50% of the costs of the summary judgment application on the scale as between party-and-party;

32.5 the balance of the costs of the summary judgment application shall be costs in the cause of the action.

Hand-down and date of judgment

33. 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 16:00 on 24 May 2022.

VM MOVSHOVICH

ACTING JUDGE OF THE HIGH COURT

Plaintiffs' Counsel:	JG Dobie
Applicants' Attorneys:	Reaan Swanepoel Attorneys
Respondents' Counsel:	C Georgiades SC
Respondents' Attorneys:	Messina Incorporated
Date of Hearing:	27 January 2022
Date of Judgment:	24 May 2022