


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2020/33237

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED YES
6 June 2022	
Date	Signature

In the matter between:

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

First Applicant

DAWID STEFANUS VAN DEN BERG
(ID NO. 720124 5067 084)

Second Applicant

and

JUJDEESHIN JUNKOON
(ID NO. 630806 5162 084) N.O. in his capacity as
Trustee of MERGENCE AFRICA PROPERTY
INVESTMENT TRUST (IT 11263/2006)

First Respondent

RIDWAAN ASMAL
(ID NO. 720621 5138 088) N.O. in his capacity as
Trustee of MERGENCE PROPERTY
INVESTMENT TRUST (IT 11263/2006)

Second Respondent

PETERSEN, ISAK SMOLLY
(ID NO. 730303 5317 081) N.O. in his capacity as
Trustee of MERGENCE PROPERTY
INVESTMENT TRUST (IT 11263/2006)

Third Respondent

AZIZOLLAHOFF, BRIAN HILTON
 (ID NO. 630806 5162 084) N.O. in his capacity as
Trustee of Mergence Property
Investment Trust (IT 11263/2006)

Fourth Respondent

In re:

JUJDEESHIN JUNKOON
 (ID NO. 630806 5162 084) N.O. in his capacity as
Trustee of Mergence Africa Property
Investment Trust (IT 11263/2006)

First Plaintiff

RIDWAAN ASMAL
 (ID NO. 720621 5138 088) N.O. in his capacity as
Trustee of Mergence Property
Investment Trust (IT 11263/2006)

Second Plaintiff

PETERSEN, ISAK SMOLLY
 (ID NO. 730303 5317 081) N.O. in his capacity as
Trustee of Mergence Property
Investment Trust (IT 11263/2006)

Third Plaintiff

AZIZOLLAHOFF, BRIAN HILTON
 (ID NO. 630806 5162 084) 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. 720124 5067 084)

Second Defendant

Heard: 6 June 2022

Judgment: 6 June 2022

JUDGMENT

MOVSHOVICH AJ:

1. This is an application for leave to appeal against my judgment dated 24 May 2022, where I partially granted the plaintiffs' application for summary judgment. Part of the relief granted was an order for eviction, with effect from 31 May 2022, of the first defendant from the commercial premises it leased from the plaintiffs.
2. The leave to appeal application dated 31 May 2022 essentially grounds the defendants' prospects of success in the following central proposition. Clauses 14.1 and 14.2 of the lease (which deal with waiver of the right to retention and compensation in cases of improvement liens) did not survive the repudiation and cancellation of the lease, and whether the parties intended those clauses to survive requires oral evidence and proper contextualisation, which is for the trial court to consider and decide.
3. The first difficulty for the defendants is that the above defence is novel and is not foreshadowed in any papers filed in this matter. It forms no part of the defendants' answering or supplementary answering papers in the summary judgment application. The plaintiffs squarely raised the issue that any rights of retention in connection with a lien for improvements (or payment in respect of improvements) was waived by the first defendant in terms of clause 14 of the lease. This was the gravamen of paragraph 13.9 of the supplementary founding affidavit, *jurat* 28 June 2021. The defendants, in their supplementary answering papers, failed substantively to address this averment. They contented themselves with a bald denial. There is no suggestion that the defendants were raising a defence to the effect that clause 14 no longer existed and did not apply to any lien after the termination date of the lease, nor were any facts pleaded in this regard.
4. This averment also formed no part of the argument before me in the main hearing on summary judgment.

5. The allegation that there was extinction of clause 14 with effect from the termination of the lease, and that this had the effect of reviving a lien (or allowing reliance on a lien), is simply not an averment open to the defendants to raise at this late stage, not only in argument but also on appeal. Moreover, the defendants have nowhere articulated what the additional "*oral evidence*" or "*context*" would need to be led by them or how this would influence the proper interpretation of whether clause 14 survived and its effect.
6. In motion proceedings, the affidavits constitute the pleadings and the evidence, and it is incumbent on the party resisting summary judgment to set forth its defences in sufficient detail in the answering papers. As stated in rule 32(3)(b), "*such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor*". The defendants have simply failed to do so in relation to the defence which they now allege to have to clause 14 of the lease. This in itself is fatal to their application for leave to appeal. A failure to plead their case is destructive of its ability to rely on the defence.
7. But, in any event, it is unclear what effect this aspect can assist the defendants' case on the merits. The purported improvement lien on which the defendants rely would have been formed (or not formed) in 2018 and 2019, many months prior to the termination of the lease. Clause 14, on any version, would have been operative at that time, and it has not been disputed on the papers that, in its terms, the clause prevents any right of retention. Clause 14.2 also precludes any monetary claims in respect of improvements. A right of retention cannot "*revive*" after cancellation, after it has been contractually waived: that waiver is effective from the time that the improvements were incurred. The defendants have not proffered any legal authorities which suggest otherwise. Moreover, the defendants had already abandoned (in terms

of clause 14) any right to a monetary claim for improvements at the conclusion of the lease (and the time that they were incurred in 2018 and 2019). This is likewise fatal to the defendants' defence.

8. Moreover, to date, the defendants have not adverted to any facts or "*context*" they intend to rely on to ground their newly articulated defence.
9. The defendants aver that my findings in relation to the lien in the judgment of 24 May 2022 are inconsistent with my findings in relation to the claims pertaining to *vis maior* and arrear rental, to the effect that it is often impossible to come to definitive conclusions as to the proper interpretation of contractual clauses without oral evidence and contextualisation. It is not the law that in no circumstances may the Court in summary judgment proceedings interpret contractual provisions and grant summary judgment, and my judgment of 24 May 2022 does not suggest otherwise. The contentions about the survival of clauses 14.1 and 14.2 were not raised in the papers, and neither was any additional context pleaded by the defendants. But, ultimately, the interpretation of clauses 14.1 and 14.2 is not seriously disputed and was not even disputed in the leave to appeal application or written submissions supporting that application. In oral argument in the leave to appeal application, it was faintly suggested that the interpretation of those clauses may also now be in dispute, but the legal and factual basis for this submission was not made clear. In my view, and on the papers, their import is clear and unambiguous, and there is no reasonable prospect that another court would find otherwise (even if it is open to the defendants to raise this issue at this stage).
10. In all the circumstances, there are no reasonable prospects that an appeal court would come to a different conclusion and the application for leave to appeal falls to be dismissed.

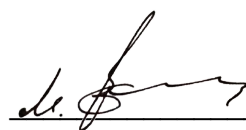
11. There is no reason to deviate from the usual rule pertaining to costs.

12. I thus make the following order:

12.1 the leave to appeal application is dismissed with costs.

Hand-down and date of judgment

13. 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 13:00 on 6 June 2022.



VM MOVSHOVICH

ACTING JUDGE OF THE HIGH COURT

Plaintiffs' Counsel: JG Dobie

Plaintiffs' Attorneys: Reaan Swanepoel Attorneys

Defendants' Counsel: R Bosman

Defendants' Attorneys: Messina Incorporated

Date of Hearing: 6 June 2022

Date of Judgment: 6 June 2022