REPUBLIC OF SOUTH AFRICA

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

CASE NO: 49594/2021
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
30 JUNE 2022

In the matter between

MENLYN MAIN INVESTMENT HOLDINGS (PTY) LTD	**FIRST PLAINTIFF**
GOVERNMENT EMPLOYEES PENSION FUND	**SECOND PLAINTIFF**

and

CHRISTO MENLYN (PTY) LTD t/a TURN & TENDER CENTRAL SQUARE	**FIRST DEFENDANT**
PETER CHRISTOFORAKIS	**SECOND DERENDANT**
MYRON CHRISTOFORAKIS	**THIRD DEFENDANT**
ANTHONY CHRISTOFORAKIS	**FOURTH DEFENDANT**
CHRISTOS TZELLIOS	**FIFTH DEFENDANT**

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] This is an opposed application for summary judgment, brought after delivery of the defendants' plea.

[2] The plaintiffs' cause of action arises from a written lease agreement, concluded on 19 September 2016, between the plaintiffs, as the lessor, and the first defendant as lessee, in terms of which certain business premises were let to the first defendant at a total basic monthly rental of R126,615.72, together with the cost of utilities (the agreement).

[3] On 19 October 2021, the plaintiffs instituted the action against the first defendant as the lessee, and the second, third, fourth, fifth and sixth defendants as sureties and co-principal debtors, in terms of a deed of suretyship concluded in September 2016, for payment *in solidum* of arrear rentals, up to and including October 2021, in the sum of R2,450,218.88, interest thereon, and costs, as well as an order for ejectment of the first defendant from the leased premises (claim 1). The plaintiffs' second claim is for payment of damages.

[4] The defendants defend the action and a plea has been filed, subsequent to which the plaintiffs brought the present application. An affidavit in support of the application for summary judgement has been filed and the defendants filed an affidavit opposing summary judgment.

[5] The defendants *in limine* contend that the plaintiffs' affidavit in support of summary judgment does not comply with the requirements of rule 32, premised on three grounds, which I propose to consider before turning to the defendants' defence on the merits.

***In limine* points**

No affidavit on behalf of the second plaintiff

[6] The rule 32(1) affidavit is deposed to by Francois Roos, who states that he is a director of the first plaintiff, and in that capacity, he deals with the day-to-day

management and affairs of the property and in particular the leased premises. He further states that in his capacity as such, the claims of the plaintiffs fall under his control and that he is in control of the records and documents relating to the claim, and that he accordingly has personal knowledge of those records and the facts relating thereto, as well as the amounts owing by the defendants to the plaintiffs.

[7] The defendants contend that the affidavit is not deposed to on behalf of the second plaintiff. Accordingly, so the argument goes, it does not comply with rule 32(2)(b), which provides that the affidavit shall be made on behalf of the plaintiff, which applied to the present matter, requires both plaintiffs to do so. The contention is short-lived: the deponent states specifically that he is in control of all records and documents pertaining to the plaintiffs' claims, and furthermore deals with the management and daily running of the affairs relating to the property and the leased premises. These allegations have not been challenged and must accordingly be accepted. The only purpose an affidavit by the second plaintiff possibly could have served, was to provide confirmation of the allegations made by the deponent. There does not seem to be any reason, and none has been advanced, why the absence of corroboration must be regarded as fatal in regard to compliance with rule 32(2)(b).

[8] There is no merit in the contention, and it is accordingly rejected.

[9] But, a further objection came to the fore, with reliance on an allegations in the defendants' affidavit resisting summary judgment, that an announcement had been made 'on or about 18 August 2021' that the second plaintiff has acquired the controlling share of Central Square, including the leased premises, from which the conclusion is drawn that the first plaintiff therefore 'has assigned all its right, title and interest in the lease agreement with the first defendant to the second defendant (sic)'. (I accept that a typing error has been made and that it should read, to the second 'plaintiff')

[10] The contention now raised is that the first plaintiff, having assigned its right, title and interest in the lease agreement, has been stripped of its *locus standi* in this action and the absence of an affidavit by the second defendant, therefore is fatal. The inferences drawn do not transcend speculation, but even assuming that the

rights were assigned, does not render any sustainability to the contention. The plaintiffs pecuniary claim is in respect of arrear rentals up to and including October 2021, the second plaintiff still has *locus standi*, and, as counsel for the plaintiffs has correctly pointed out, the legal proposition that title is not required for letting out property, applies. The contention accordingly fails.

The absence of verification of the causes of action

[11] The deponent to the plaintiffs' affidavit in support of summary judgment swears positively to and verifies 'the facts, causes of action and amounts set out in the summons, the particulars of claim and this affidavit'.

[12] Counsel for the defendant submitted that deponent did not go as far as to verify the claim for a liquidated amount or ejectment. The contention overlooks the wording of the verification I have referred to in the previous paragraph: facts, causes of actions and amounts. They clearly, by specific reference, include a claim for a liquidated amount and ejectment.

[13] The plaintiffs, correctly so, did not pursue the application for summary judgment in respect of the damages claim (claim 2).

The evidence contained in certain paragraphs of the affidavit inadmissible having regard to rule 32

[14] The defendants contend that the evidence set out in paragraphs 7.5, 7.6 and 7.8 of the plaintiffs' affidavit, together with annexures CF1 and CF2 thereto, are irregular, inadmissible and ought to be struck out.

[15] It must be remembered that, in terms of the amended rule 32, the application for summary judgment must be made after delivery of the defendant's plea. The question arising concerns the plaintiff's entitlement to comment, explain or adduce evidence on the merits of the defendant's plea. In the paragraphs referred to, the deponent comments on, and responds to the defendants' defence raised in the plea, which is premised on *vis major,* resulting from the Covid-19 pandemic lockdowns

which they allege, released the first defendant in total or in part from the obligation to pay rental.

[16] The deponent in response to the defence pleaded, avers that the first defendant, although not obliged to do so in terms of the agreement, *ex gratia* grant full rental deductions, which are set forth in two letters, copies of which are attached as CF1 and CF2. He then goes on to refer to, comment on, and attach a statement of account reflecting the total of rental amounts charged and utilities raised for the period since lockdown commenced, and payments received in respect thereof, as CF3. Finally, he concludes that the first defendant, on the defendants' own version, to which I shall revert, was in arrears with payment of rentals.

[17] In terms of rule 32(2)(b):

> 'The plaintiff shall, in the affidavit referred to in subrule (2)(a), 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.'

As counsel for the plaintiff correctly contended, the plaintiff is required to go further than a formalistic affidavit and explain, albeit briefly, why the defendants' defence does not raise a triable issue, by engaging with the contents of the plea, which may, and in the present matter did, require setting out of supplementary facts with reference to and attachment of documents in confirmation thereof (*See Absa Bank Limited v Mphahlele NO* and Others (45323/2019, 42121/2019) [2020] ZAGPPHC 257 (26 March 2020)). The defendants have attached a statement reflecting payments of rentals, allegedly 'in an amount more than what the first defendant was obliged to pay', based on the defence pleaded. The plaintiffs, accordingly, could only meaningfully explain by way of refence to, explanation of, and attachment of the documents I have alluded to. As such, no new evidence was introduced.

[18] It follows that the objection to the content of paragraphs referred to, cannot be sustained.

The defendants' defence on the merits

[19] The defendants rely on the absolute and/or partial impossibility of performance in terms of the agreement, resulting from the Covid-19 pandemic. They allege that, having regard to the imposition of alert levels in terms of the Disaster Management Act 57 of 2020, the plaintiffs were prevented from providing full occupation, use and enjoyment of the leased agreement, and the first defendant prevented from enjoying and having full occupation, use and benefit of the leased premises. The defendants further plead that as a result, the first defendant is only liable for payment of part of the rental and other costs, as set out in the agreement, at a rate of 7% of the first defendant's turnover generated in respect of the business it conducted, known as 'Turn and Tender' restaurant. As I have alluded to, the statement reflecting the rentals paid, based on the 7% turnover of the business, is attached to the plea and the allegation is made that an overpayment had in fact been made.

[20] Counsel for the plaintiffs advanced compelling arguments in support of the contention that the defendants are not entitled to rely on *vis major*, and that they were always obliged in terms of the agreement, to make payment in full of the rental and associated utilities. This being an application for summary judgment, I have decided to confine the issue to whether the defendants were and are in arrears based on their own version, thus accepting the entitlement to a reduction in the amount of the rentals payable, to equal to 7% of the turnover derived from the restaurant business.

[21] After having heard arguments in the matter and during my deliberations for the purpose of delivering judgment, I requested counsel for the plaintiff to furnish this court with the necessary detailed calculations, based on the documents before this court, in support of the plaintiffs' contention that the first defendant, on the defendants' own version, was in arrears with payment of its obligations. I simultaneously indicated that counsel for the defendants was entitled to respond thereto.

[22] Both counsel obliged, for which I express my gratitude. The calculations prepared, together with an explanatory note thereto, submitted by counsel for the

plaintiffs, undoubtedly show that the first defendant, in fact, was in arrears on the defendants' own version. In sum, the calculations show a shortfall of R277,299.76, for the period January to March 2020, and thus prior to the Covid-19 total lockdown. Post lockdown, and having applied the defendants' 7% formula, the arrears amount to R259,194.74. In respect of 2019, the amount of R486,282.84 was short paid. The total arrears, in respect of these periods, accordingly amount to R963,900.38.

[23] Counsel for the defendants, although lamenting the challenges in analysing counsel for the plaintiffs' 2-page spreadsheet, in different colours, and the 4-page explanatory note thereto, did not contest the calculations. Counsel notwithstanding, submitted that 'one cannot decipher, even from the convoluted calculations made by plaintiffs, whether the first defendant was in arrears regarding the payment of rental and other imposts, to this day'. I am unbale to agree. No arguments or, perhaps for that matter, calculation glitches of any sort, in support of the contention were advanced, nor was I able to discover any flaws in the calculations.

[24] The amount claimed by the plaintiffs, in my view, is accordingly readily ascertainable and capable of speedy and prompt ascertainment, which is the nub of the concept of 'a liquidated amount in money', which is a pre-requisite for the granting of summary judgment.

The court's residual discretion

[25] It follows that the defendants have failed to make out a bona fide, sustainable defence to the plaintiffs' claim for payment and ejectment. It remains to consider whether this court, in the exercise of its discretion, should refuse summary judgment and allow the matter to proceed to trial. Counsel for the defendants submitted that the importance of the matter to both sets of parties, and the nature of the defence raised by the defendants, ought to convince me to exercise my discretion in refusing summary judgment. I am enjoined to exercise my discretion judicially, upon a consideration of all the facts and circumstances before this court. I have come to the conclusion that the factors relied upon, are not sufficient for me to exercise my discretion in favour of dismissing the application for summary judgment.

Order

[26] In the result, I grant the following order:

1. Summary judgment is granted against the first, second, third, fourth and fifth defendants, jointly and severally, the one paying the other to be absolved, for:

1.1 Payment in the sum of R2,450,218.88.

1.2 Interest on the amount in paragraph 1 above, at the rate of 9% pa, from 2 October 2021, to date of final payment.

2. Ejectment of the first defendant, and/or anyone claiming occupation through the first defendant, from the leased premises, described as Shop 74 (measuring approximately 462m^2) (incorporating outside seating measuring approximately 54m^2 (incorporating 2 parking bays), Menlyn Maine, A [....]1 A [....] 2, situated on erf [....] Menlyn Ext 11, [....] Waterkloof Glen Ext 2, Erf [....] Menlyn Ext 3, Province Gauteng, Gauteng.

3. Costs of suit on the scale as between attorney and client.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

COUNSEL FOR PLAINTIFFS	***ADV JG DOBIE***
PLAINTIFFS'ATTORNEYS	***REAAN SWANEPOEL INC***
COUNSEL FOR DEFENDANTS	***ADV MC ERASMUS SC***

DEFENDANTS ATTORNEYS	***MARK EFSTRATIOU INC***
DATES OF HEARING	***26 MAY 2022***
DATE OF JUDGMENT	***30 JUNE 2022***