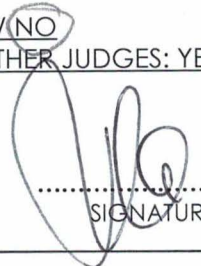


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 24943/2021

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	<u>REVISED.</u>
<u>8/9/2022</u> DATE	
 SIGNATURE	

In the matter between:

REDFINE PROPERTIES LTD

Plaintiff/Applicant

And

PHB HEALTH CC t/a SWITCHPLAYGROUND

First Defendant/Respondent

CLAIR-ANN DALLY

Second Defendant/ Respondent

JUDGMENT

MAKUME, J:

[1] This is an application for Summary Judgment for payment of the amount of R1 803 787.78 as well as the eviction of the Respondent from certain business premises.

- [2] The parties concluded a lease agreement during the year 2017. Respondent has fallen into arrears with payments. The Respondent says the terms of the lease were amended and accordingly denies being indebted to the Applicant (Plaintiff) in the said amount or at all.
- [3] The second Defendant admits having signed a deed of suretyship binding herself as surety and co-principal debtor in favour of the Plaintiff for payment of any amount which may be due by the first Defendant to the Plaintiff. The second Defendant maintains however that in view of the amendment of the lease agreement she has been discharged from any liability as a surety.
- [4] In amplification of their plea in relation to second and third claims the Defendants say that the Plaintiff concluded a lease agreement with a third party entity subsequent to the cancellation agreement with the Defendant and that it is that third party who is now occupying the premises. They deny being indebted to the Plaintiff.
- [5] On the 25th November 2021 after receiving the plea the Plaintiff filed this application for Summary Judgment in which it claims payment of the sum of R1 803 789.78 as well as for eviction of the Defendant from the leased commercial premises. The claim in respect of damages is not being pursued.
- [6] In the affidavit resisting Summary Judgment Ms Clair-Ann Dally says that the lease was cancelled by agreement on the 7th October 2020 when a third party Fit-Block took over the lease. The Defendants have attached to the affidavit a copy of a cancellation agreement that was signed by only the Defendant on the 7th October 2020.
- [7] The issue in this matter is whether the original lease agreement was cancelled and substituted by a new agreement. It is common cause that only the Defendant signed that agreement. It is not clear why the Plaintiff did not sign. It is also correct that the so called new lessee namely Fit-Block is run by the second Defendant. It was only a change of name. The second Defendant is in control of the company Fit-Block.

COMMON CAUSE ISSUES

[8] The following are common cause issues:

- 8.1 That the Plaintiff and Defendant concluded a lease agreement during the year 2017. The first Defendant was represented by the second Defendant.
- 8.2 The lease was to run for a period of 60 months terminating in October 2022.
- 8.3 The second Defendant executed a deed of suretyship binding herself as surety and co-principal debtor in favour of the Plaintiff for any amount which may be due by the first Defendant to the Plaintiff.
- 8.4 During or about February 2020 the first Defendant started experiencing financial problems and engaged the Plaintiff in negotiations with the intention to reduce the amount of rental payable.
- 8.5 The negotiations resulted in a document purportedly drafted by the Plaintiff which is attached to the Defendant's affidavit resisting Summary Judgment. The document is marked "OA2" and is titled "Cancellation Agreement Incorporating an Undertaking to Pay." It is dated 7th October 2020 and is signed only by the Defendant.
- 8.6 There is an email dated the 22nd September 2020 marked annexure "OA1" which emanates from one Sheri Neuwerth from Redfine the Plaintiff. In it the writer instructs the second Defendant to make alterations to the cancellation document to indicate the date of first payment of the reduced amount to be October instead of September. In particular, the writer says:

2.4.4.1 the first instalment in the amount of R7 294.67 (Seven

Thousand Two Hundred and Ninety-four Rands and Sixty-seven cents)

- [9] I am satisfied that there were negotiations that led to the document titled cancellation agreement. The difficulty is that neither of the parties have told this Court why did the Plaintiff not sign the document. As proof of the negotiations I have taken into consideration what the Defendant has pleaded in its paragraph 3 wherein details as contained in the unsigned cancellation agreement are set out. What is however, strange and unexplained is what the Defendant says at paragraph 3.2.6 of its plea which reads as follows:

“3.2.6 The Plaintiff failed to perform in terms of the cancellation agreement by failing to provide the Defendant with correct banking details, statements and invoices since the inception of the cancellation agreement.

3.2.7 Accordingly the first Defendant has been unable to perform in terms of the agreement which performance is hereby tendered.”

- [10] It is clear that the cancellation agreement did not take effect not necessarily because it was not signed but because the Defendant failed to make payment. The excuse that the Defendant did not have the Plaintiff's banking details is not correct because the Defendant has since the inception of the lease agreement made payment into a bank account provided to it by the Plaintiff there is no indication that the bank details had in the meantime changed.
- [11] In any case the Plaintiff's banking details appear on the lease agreement signed in 2017
- [12] It is accordingly understandable why the Plaintiff addressed a letter of demand to the Defendant in February 2021 calling up the Defendant to make payment of arrears in terms of the 2017 agreement as it was the only agreement that

had been signed. Secondly the Defendant had also failed to make payment in terms of the cancellation agreement.

- [13] The Defendant's further defence is that it is not in occupation of the leased premises but that a different company in occupation. If that is the case the Defendant should have moved an application to join that company as a co-defendant. It failed to do so. That so called third party entity has no agreement with the Plaintiff and is occupying the leased premises illegally.
- [14] I am satisfied that the Plaintiff has made out a case for eviction of the Defendant and any other person or persons or entity that are in occupation of the leased premises through the Defendant.
- [15] In its affidavit opposing Summary Judgment the Defendant disputes charges levied in respect of the electricity bill. The Defendant says that during lockdown when no non-essential business was allowed to operate she disconnected the main power switch. She was however, surprised that the bill in respect of electricity consumption kept on being raised even though there was no usage. She telephoned the Plaintiff and received no response.
- [16] It will be recalled that total lockdown due to Covid-19 took effect from the 27 March 2020. The invoice attached as POC 3 indicate that despite what the Defendant says electricity bill was charged on the same basis as in the month when there was no lock-down.
- [17] When the parties negotiated it was agreed that some form of remission be granted and that rental be reduced due to the effect of covid-19 hence the figures that are indicated in the unsigned cancellation agreement. According to the Defendant the Plaintiff agreed to reduce the arrears rental by 50%.
- [18] Having said so what remains to be decided is whether the Plaintiff is entitled to payment of the amount claimed in the particulars of claim or to a lesser amount. Rule 32(3) (b) requires that the Defendant satisfies the Court by affidavit that it has a *bona fide* defence to the action. In **Breitenbach v Fiat (EDMA) BPK**

1976 (2) SA 226 (T) at 2279 Colman J held that what is required by Rule 32(3)(b) is for a Defendant to set out in its affidavit facts if proved at the trial will constitute an answer to the Plaintiff's claim.

[19] In **Joob Investments (Pty) Ltd v Stocks Mavundla AEK Joint Venture 2009 (5) SA 1 (SCA) at 119012D** the SCA held that the procedure in Summary Judgment is not intended to deprive a Defendant with triable issues or a sustainable defence.

[20] The version of the Defendant cannot be simply ignored on the basis that the cancellation agreement was never signed. This makes it not possible to determine the exact amount due by the Defendant to the Plaintiff. The defence raised by the Defendant regarding the arrears and non-payment can best be decided by the trial Court after having had the benefit of evidence to be presented orally by both parties. In the result I am persuaded that as far as it concerns the amount owing there are triable issues. I am guided also by the principle that where there is doubt Summary Judgement should not be granted.

[21] The Plaintiff is entitled to costs as it succeeded in obtaining an eviction order against the Defendant.

[22] In the result I make the following order:

1. The first Defendant and all those claiming occupation through the first Defendant are hereby ordered to vacate the commercial leased premises known as First Floor Shop 12, Posthouse Link, Cnr of Main and Posthouse Streets, Bryanston, Johannesburg, Gauteng forthwith failing which the Sheriff or his deputy is authorised to evict the Defendant and all those occupying through the Defendant from the premises.
2. Leave to Defend is granted to the Defendants in respect of the Plaintiff's claim for payment of the amount of R1 803 789.78 (One Million Eight

Hundred and Three Thousand Seven Hundred and Eighty-Nine Rands and Seventy-Eight cents) being in respect of arrear rental.

3. The second Defendant is likewise granted Leave to Defend the claim for payment of the sum of R1 138 958.50 (One Million One Hundred and Thirty-Eight Thousand Nine Hundred and Fifty-eight Rands and fifty cents) in respect of the terms of the suretyship agreement.
4. The Defendants are ordered to pay the taxed party and party costs of this application.

Dated at Johannesburg on this 8 day of September 2022



M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING	:	24 AUGUST 2022
DATE OF JUDGMENT	:	SEPTEMBER 2022
FOR PLAINTIFF	:	ADV DOBBIE
INSTRUCTED BY	:	MESSRS ANDREW GROENEWALD INC
FOR DEFENDANT	:	ADV K REDDY
INSTRUCTED BY	:	MESSRS SWANEPOEL VAN ZYL INC