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

Case no: 2021/55096

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

18.04.23

In the matter between:

TIFFANY-ANN BOESCH N.O.	First Plaintiff
VICTOR SCHROEDER N.O.	Second Plaintiff
NICHOLAS JOHN BATTERSBY N.O.	Third Plaintiff
IZAK JOHANNES SMIT N.O.	Fourth Plaintiff
and	
THE MASON AFRICA GROUP (PTY) LIMITED	Defendant

JUDGMENT (SUMMARY JUDGMENT]

This judgment is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading the signed copy to Caselines.

MOULTRIE AJ

[1] This matter arises out of the alleged breach of a commercial lease agreement. The plaintiffs, in their capacities as trustees of the PPS

Property Fund Trust, seek summary judgment against the defendant on:

(a) a monetary claim for payment in the sum of R1,219,034.73 comprising arrear rental, "*ancillary charges*",[1] interest, legal costs and VAT; and

(b) a claim for ejectment arising out of the defendant's alleged breach of a commercial lease agreement, which the plaintiffs purported to cancel in their combined summons, which was served on 30 November 2021.

[2] The calculation of the monetary claim is set out in an account attached as annexure D to the particulars of claim, from which it is evident that the total sum comprises amounts alleged to have become payable by the defendant during the period January 2020 to November 2021.[2]

[3] The defendant's defence, as contained in its plea (and counterclaim for a statement and debatement of the account), is essentially a denial that it was in breach of its payment obligations under the lease as at the date of the purported cancellation and an allegation that annexure D is incorrect. The defendant specifically alleges that:

(a) the monthly rentals were not payable monthly in advance as the plaintiffs allege, and that the agreement stipulates that they were only payable 60 calendar days after invoice;

(b) it was not a term of the lease agreement that the monthly rentals were payable without deduction or set off, as the plaintiffs allege;

(c) the defendant was excused from making payment under the

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[1] These ancillary charges are "*rental in respect of the balcony*", "*rental in terms of … basement parking bays*", "*pro-rata rates and taxes*"; "*electricity and water consumption charges (as metered)*"; "*sewer charges*"; and "*refuse removal charges*".

[2] I note for the sake of completeness that the plaintiffs also advance a claim for damages arising from the alleged breach of the lease agreement, but do not seek summary judgment in respect of this claim.

lease agreement for the period 27 March 2020 to 31 May 2020 due to supervening temporary impossibility of performance of the terms of the contract because the plaintiffs were prevented by operation of the regulations promulgated in response to the COVID-19 pandemic from tendering occupation of the premises to the defendant during that period;

(d) the parties had in any event agreed that no rental would be payable under the lease agreement for the period of April 2020 to June 2020 (although this is pleaded in the form of an "*offer*" by the plaintiffs to "*waive their right to recover rental*" during this period, which offer had been accepted by the defendant);

(e) the Plaintiffs failed to perform their reciprocal obligations under the lease in relation to the proper maintenance of the leased premises;

(f) the amount claimed by the plaintiffs "*includes charges which are … at variance with the agreed upon terms of the Lease Agreement"*, and it is pleaded in particular that Annexure D is incorrect respect of:

i. diesel recovery charges;

ii. common area electricity, water and sewerage consumption charges;

iii. rental of parking bays;

iv. increases in assessment rates;

v. "*the electricity and water consumption of which the Defendant is allegedly responsible for a proportionate share*";

vi. electricity and water consumption charges for periods when

the defendant's offices were closed;

vii. interest accrued on the defendant's deposit since 2014; and

viii. interest on charges that were not due (which I presume refers to the charges referred to in (i) to (vi) above).

[4] The defendant also pleads that even if it was indeed in breach, the plaintiffs did not duly cancel the lease because they failed to comply with the requirements in the (rectified) lease agreement to regarding the delivery of a breach notice.

[5] The defendant resists the summary judgment application on the following four grounds:

(a) the plaintiffs' affidavit in support of summary judgment does not "*identify any point of law relied upon and the facts upon which the plaintiff's claim is based"* as required by Rule 32(2)(b)*;*

(b) the affidavit does not "*explain briefly why the defence as pleaded does not raise any issue for trial*" as required by Rule 32(2)(b);

(c) the plaintiff's monetary claim is not a liquidated amount in money as required by Rule 32(1)(b); and

(d) the affidavit resisting summary judgment should satisfy me as required by Rule 32(3)(b) that the pleaded defences to the plaintiffs' monetary claim and claim for ejectment are *bona fide*.

<u>Have the plaintiffs identified the points of law and facts upon which their claims are based?</u>

[6] With regard to the first ground of opposition relating to the need for the plaintiff to "*identify any point of law relied upon and the facts upon which the plaintiff's claim is based",* I respectfully agree with the approach

adopted by Binns-Ward J in *Tumileng.*[3] Since summary judgment may only be sought under the amended rule after the delivery of a plea, it may be assumed by the plaintiff that the defendant does not contend that the particulars of claim are either excipiable or non-compliant with the requirements of rule 18 as to particularity. As such, in order to meet the requirement of identifying the points of law and facts upon which the claim is based, a plaintiff seeking summary judgment is required to do no more than "*confirm what should already be apparent from their pleaded case*", which they may do "*as succinctly as possible*" – even by means of a "*formulaic mode of expression if it serves the purpose*".[4]

[7] In the current matter, paragraph 4 of the affidavit in support of summary judgment not only contains the required "*formulaic*" confirmation of the facts and conclusions of law pleaded in the particulars of claim (the deponent swears to and verifies "*both the facts as well as the causes of action and amounts set out in the Plaintiffs' Particulars of Claim*"), but paragraph 5 goes further, and sets out the factual basis of the claim. I am therefore satisfied that the plaintiffs have complied with the requirement to identify the facts and legal basis upon which their claim is based, and that the first ground of opposition identified in paragraph 7(a) above does not avail the defendant.

Have the plaintiffs explained why the pleaded defence "*does not raise an issue for trial*"?

[8] As for the second ground of opposition identified in paragraph 7(b) above, and the requirement to "*explain briefly why the defence as pleaded does not raise any issue for trial*",[5] I also respectfully agree with the holding in *Tumileng* that while a plaintiff is required to engage with the content of the plea, it must do so not for the purposes of showing that

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3 *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC).

4 Id. paras 18 - 20.

5 The requirement was evidently introduced in view of the fact that summary judgment may now only be sought after the delivery of a plea.

the merits or prospect of success of the defence are weak (which is not relevant for the purposes of summary judgment), but for the purposes of substantiating the plaintiff's averment that the defences are not *bona fide*.[6] Although this undoubtedly requires a plaintiff to deal pertinently with any defences and allegations positively raised in the plea, this requirement cannot in my view be so onerously interpreted as to require the plaintiff to demonstrate that the defendant's bare denial of an allegation in the particulars of claim is not *bona fide*. In the case of such denials, plaintiffs are in no better position under the amended rule than they were under the rule as previously formulated. It must be recalled that Rule 32(3)(b) makes it clear that it is the defendant that must satisfy the court (but not prove) that it has a *bona fide* defence to the action, by disclosing fully the nature and grounds of the defence and the material facts relied upon therefor (i.e. "*facts which, if proved at trial, will constitute an answer to the plaintiff's claim*").[7]

[9] As such, the technical ground of opposition regarding the content of the plaintiff's affidavit raised in paragraph 7(b) above only avails a defendant in circumstances where the plaintiff has failed to engage pertinently with the positive averments contained in the plea. If the plaintiff has done so and has sought to substantiate its averment that the defence is not *bona fide*, its affidavit would be technically compliant, and the summary judgment application will not fail on this basis but may still be dismissed if the defendant indeed satisfies the court that its defence is *bona fide*.

[10] Although the plaintiffs state in paragraph 8 of their affidavit in support of summary judgment that the defendant "*has not set out a defence which if proven at trial would amount to a defence to plaintiffs' claim and has not set out a defence which is* bona fide", the sole allegations made in substantiation of this averment are contained in paragraph 7 of the affidavit. While some of the positive allegations in the plea are indeed

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6 *Tumileng* (above), paras 21 – 23 and 40.

7 *Zephan (Pty) Ltd v De Lange* 2016 JDR 2263 (SCA) para 10.

dealt with, my view is that the plaintiffs have fatally (i) failed to substantiate its averment that the positive allegations that it does engage with are not *bona fide*; and (ii) altogether ignored a number of the defendant's pleaded defences.

[11] Firstly, although the plaintiffs concede that they indeed "*offered the defendant rental reduction in terms of a written variation to the lease agreement*", they allege that "*same was never signed by defendant*". The difficulty here is that the defendant did not make an allegation that the agreement in question was concluded by means of a signed written variation, and the plaintiffs make no allegation in either the (verified) particulars of claim or in the affidavit in support of summary judgment that any such agreement would have to be signed and/or in writing. There is thus no basis upon which to conclude that this defence is not *bona fide* or that it would not amount to a partial defence should it be proven at the trial.[8]

[12] Secondly, the plaintiffs allege that nothing in the agreement obliges them to account to the defendant. In my view, even if I assume not only that this is correct but that the defendant's allegation to the contrary is not *bona fide*, nothing turns on the issue, as I do not understand the defendant to allege that its alleged right to an accounting in itself constitutes a defence (either partial or complete) to the plaintiffs' claims.

[13] Thirdly, the plaintiffs allege that they "*are entitled to invoice the defendant for diesel as the defendant is obliged to make payment for amounts in respect of the supply of electricity which includes the diesel recovery*". While I do not exclude the possibility that this may indeed ultimately prove to be a correct interpretation of the agreement (and that the amount owing therefore may not ultimately have to be reduced by the

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[8] I do, however, accept the plaintiffs' contention that acceptance of the validity of this defence would result in a reduction of the amount owing of only R164,821.40 (plus interest thereon), and that this defence would not, on its own, constitute a complete defence to the plaintiffs' monetary claim and allegation of breach.

somewhat paltry amount of R3,131.33 on the plaintiffs' version), the plaintiffs do not identify any reason (for example any provision of the lease agreement) that might lead me to conclude that the defendant's allegation to the contrary lacks *bona fides*.

[14] The plaintiffs next allege that they "*are entitled to claim all other amounts having regard to the provisions of the lease agreement and that the defendant is obliged to pay its pro rata share of water and electricity*". Although the plaintiffs refer to clauses 3.2 to 3.5 of the lease agreement, which allows for water and electricity, sewer, refuse removal and "*other levies, imposts and charges*" to be charged on the basis of the defendant's "*proportionate share*"), they fail to engage with the true nature of the defendant's pleaded allegations – namely that the amount of the proportionate shares of the water and electricity charges captured in annexure D was incorrect. Again, the plaintiffs point to no basis upon which it might be concluded that this contention is not *bona fide*.

[15] While the plaintiffs refer to the defendant's contention regarding common area electricity, water and sewerage consumption charges, no attempt is made to suggest that the dispute in this regard is not *bona fide*. The plaintiffs simply seek to avoid the issue altogether by contending that "*even if the defendant is not liable for such charges*", the amount in question is trivial.

[16] The plaintiffs simply do not deal with the defendant's remaining pleaded contentions (i) that the monthly rentals were only payable 60 calendar days after invoice; (ii) that it was not a term of the lease agreement that the monthly rentals were payable without deduction or set off; (iii) regarding supervening temporary impossibility of performance; (iv) regarding the alleged non-performance of the reciprocal obligation to maintain the premises; (v) regarding the amounts charged in respect of rental of parking bays; (vi) regarding incorrect allocation of increases in assessment rates; (vii) regarding charges for electricity and water consumption for periods when the defendant's offices were closed; and

(viii) interest on the defendant's deposit. There is no basis to doubt that the defendant's reliance on any of these defences for its contention that it is not in breach of its payment obligations under the lease agreement is not *bona fide*.

[17] To conclude on this aspect, although I accept that the plaintiffs' affidavit adequately puts the *bona fides* of the defendant's allegation of failure to comply with the formal requirements for the delivery of the breach notice into dispute,[9] that cannot constitute an effective basis on which to substantiate the plaintiff's averment that the defendant's defence to the claim of ejectment is not *bona fide* in the absence of any allegations in the plaintiff's affidavit that could justify a conclusion that the defendant's pleaded contention that it was not in breach of its payment obligations lacks *bona fides*.

Conclusion and costs

[18] In view of the conclusion that I have reached that the plaintiffs did not in their founding affidavit comply with the requirement in Rule 32(2)(b) to "*explain briefly why the defence as pleaded does not raise any issue for trial*" in the sense of substantiating their averment that the pleaded defence is not *bona fide*, it is not strictly necessary for me to consider the defendant's remaining grounds of opposition.

[19] I do however note that I do not consider that the plaintiffs' monetary claim can be said to be one for a liquidated amount in money, as contemplated in Rule 32(1)(b). A liquidated amount in money is an amount which is either agreed upon or which is capable of speedy and prompt ascertainment or, put differently, where ascertainment of the amount in issue is a mere matter of calculation.[10]

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[9] They do so by (i) referring to annexure E to the particulars of claim and a response received thereto from the defendant showing that it had been received; and (ii) alleging that there is no requirement in the lease to serve the notice on the defendant's chosen *domicilium*.

[10] *Botha v Swanson & Co (Pty) Ltd* 1968 (2) P.H. F85; *Tredoux v Kellerman* 2010 (1) SA 160 (C) para 18, approved by the Supreme Court of Appeal in *Blakes Maphanga Inc v*

[20] Had the plaintiffs' claim been limited to payment of the arrear basic monthly rentals, rental in respect of the balcony and rental in respect of the basement parking bays (all of which are pleaded by the plaintiffs with reference to an initial rental amount escalating at an identified rate per annum compounded yearly on each anniversary of the commencement date of the lease), then I would have little difficulty accepting that it is one for a liquidated amount in money.

[21] However, the speedy and prompt ascertainment of the amount owing even in these limited respects has been rendered impossible by the fact that the fixed rental charges have been 'lumped together' in the same account with a range of other charges, some of which the plaintiffs themselves contend were to be calculated by methods that are not pleaded (even if it may be assumed that such methods were agreed), and others of which (such as legal fees)[11] in respect of which nothing at all is pleaded regarding their means of determination. This is compounded by the fact that it appears from annexure D that such payments as were made by the defendant were not allocated solely to the rental amounts but were partly allocated to the amounts calculated on the basis of unpleaded methodologies. This in turn renders it impossible in my view to speedily and promptly calculate the amount of interest owing on the arrear rentals – especially in circumstances where the pleaded interest rate is a variable one, linked to the prime overdraft rate charged from time to time by Standard Bank. The consequence of all of this is that I find myself unable to identify any portion of the plaintiffs' claim that is capable of speedy and prompt ascertainment with accuracy.

[22] It follows that the application falls to be dismissed. I can see no reason why the plaintiffs should not be ordered to pay the defendant's costs on the usual scale.

Outsurance Ins Co Ltd 2010 (4) SA 232 (SCA) para 17.

[11] cf. *Tredoux v Kellerman* 2010 (1) SA 160 (C) para 18.

[23] The application for summary judgment is dismissed with costs.

RJ Moultrie AJ

Acting Judge of the High Court

Gauteng Division, Johannesburg

APPEARANCES

For the plaintiffs: JG Dobie instructed by Reaan Swanepoel Attorneys

For the defendant: BH Steyn instructed by Schindlers Attorneys