

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 72084/2015

Date of hearing: 2 February 2016

Judgment Delivered: 12 February 2016

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

PRETORIA HEBREW CONGREGATION – SCOPUS HEIGHTS

Plaintiff

and

MPALE INVESTMENTS HOLDINGS (PTY) LTD

First Defendant

GEORGE MAANDA NEGOTA

Second Respondent

J U D G M E N T

MAKGOKA, J

[1] This is an opposed summary judgment application. The plaintiff instituted action against the defendants for payment of R321 793.48 for rental and other charges. The action is pursuant to a written lease agreement concluded between the plaintiff and the first defendant on 25 October 2010 in respect of certain commercial property situated in Pretoria. The lease agreement was for the period 1 December 2010 to 31 January 2016. The second defendant bound himself as surety and co-principal debtor with the first defendant in respect of the lease agreement.

[2] The plaintiff alleges that the first defendant breached the terms of lease agreement by failing to pay rental and other related charges, resulting in arrear rental accumulating to R321 793.48. In support of this, the plaintiff relies on a running balance statement and a certificate of balance. The plaintiff, through its authorised agent, sent two notices of default on 9 January 2014 and 5 February 2014, respectively. In the latter letter the plaintiff indicated its intention to terminate the lease agreement within seven days, should the arrear rental not be paid. In an undated letter to the plaintiff's agent, in which reference is made to an earlier letter of 28 March 2014, the second defendant, on behalf of the first defendant, stated that because of the high rental, the first defendant was intending to close its business at the end of April 2014.

[3] The plaintiff further alleges that the first defendant failed to settle the arrears. The plaintiff issued and served a summons on the first defendant under case number 38041/2014 in which it sought to terminate the lease agreement. That action was subsequently withdrawn. The first defendant vacated the premises during August 2014. The plaintiff alleges that it had to effect necessary repairs to the leased premises in the amount of R5 974.24 in order to render the premises the premises in good order for re-occupation. The plaintiff secured a new tenant during April 2015.

[4] In an opposing affidavit deposed to on behalf of the defendants, the second defendant states that the first defendant admitted that as at date of service of summons, it was indebted to the plaintiff in the sum of R230 290.70. The second defendant attached to the opposing affidavit, a schedule of charges in which the opening balance as at 31 July 2014 is reflected as R171 527.28. To that, certain charges for water, electricity, interest, etc, are incrementally added, totalling to an

amount of R230 290.70. The second defendant further alleges that this amount has since been paid as follows: payments each on 1 August 2015, 23 November 2015 and 11 December 2015 in the amounts of R20 000, R45 000 and R61 921.18. An amount of R100 000 was designated as 'Appropriation of deposit on or about 03/09/2014', and R3 369.52 as credit for circuit breaker reduction. The second defendant says that the first defendant is still indebted to the plaintiff for interest to be calculated on the admitted amount, which the first defendant tendered payment thereof.

[5] Furthermore, the defendants allege that the plaintiff repudiated the lease agreement when it issued the summons in May 2014, referred to earlier. The defendants' defence to that action was that the plaintiff at that stage did not have *locus standi* as it had ceded its right title in respect of the property in which the premises are located, to First Rand Bank Ltd. This was raised in an affidavit resisting summary judgment in that action, as a result of which the plaintiff withdrew the action. By service of the summons under those circumstances, so assert the defendants, objectively displayed a deliberate and unequivocal intention no longer to be bound by the lease agreement, and thus repudiated it, which repudiation the first respondent accepted and vacated the premises in August 2014.

[6] The remedy of summary judgment is an extraordinary and drastic one, which has the hallmark of a final judgment in that it closes the doors of the court to the defendant and permits a judgment to be given without a trial. In *Dowson and Dobson Industrial Ltd v Van der Werf* 1981 (4) SA 417 (C) AT 419, it was noted that an ever increasing reluctance to grant summary judgment in the face of opposition, was evident from the South African courts. See also *District Bank Ltd v Hoosain* 1984 (4)

SA 544 (C) at 550, and *Standard Krediet Korporasie v Botes* 1986 (4) SA 946 (SWA). Therefore the court must always be reluctant to deprive the defendant of his normal right to defend, except in a clear case. See *Standard Bank of SA Ltd v Naude* 2009 (4) SA 669 (E) at 672C-676D.

[7] In the present case, the defendants' defence is premised on two grounds, one factual and the other legal. Factually, the amount owed to the plaintiff is placed in dispute by the defendants, and that much less was owed, which has been paid. The defendants also raise a point of law, namely repudiation of the agreement. In the nature of summary judgment, the plaintiff is not afforded an opportunity to reply to the defendants' assertions.

[8] I cannot see how it can tenably be argued that this is a clear case where the plaintiff is entitled to summary judgment. The issues between the parties can only be clarified and ventilated at the trial, after a full set of pleadings and discovery had been exchanged. I do not have to be satisfied at this stage of the veracity of the defendants' allegations. All I have to be satisfied about is whether the defendants have disclosed a defence, good at law, which if proven at the trial, would constitute a complete answer to the plaintiff's claim.

[9] For the above reasons, and considering the conspectus of all the relevant factors – the facts and the proper approach to applications for summary judgments, I am satisfied that the defendants have disclosed a *bona fide* defence to the plaintiff's claim. There is nothing inherently implausible about the defendants' version. As stated earlier, if established at the trial, it will be a complete answer to the plaintiff's claim. The defendants are therefore entitled to be granted leave to defend.

[10] In the result the following order is made:

1. Summary judgment is refused;
2. The defendants are granted leave to defend;
3. Costs are in the main action.



TM Makgoka
Judge of the High Court

Date of hearing: 2 February 2016

Judgment delivered: 12 February 2016

Appearances

For the Plaintiff: Adv. B.D. Stevens

Instructed by: Smit Jones & Pratt, Pretoria

For the Defendants: Adv. Sullivan

Instructed by: Stabin Gross & Shull, Johannesburg