




IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
21/10/16 DATE	 SIGNATURE

Case Number: 49638/2016

In the matter between:

21/10/2016

GUY & GUY INVESTMENTS PROJECTS CC

Applicant/Plaintiff

and

TAU PHALANE INCORPORATED ATTORNEYS

Respondent/Defendant

JUDGMENT

SWARTZ AJ

- [1] This is an application for summary judgment that is opposed. The plaintiff/applicant claims payment of the sum of R197 773,11 plus interest at the rate of 15.5% per annum. The applicant as lessee entered into a written lease agreement with the owner of the leased premises as lessor. The applicant, as lessor, then entered into a sublease agreement with the respondent. The applicant and respondent entered into a written agreement of lease. The applicant's claim against the respondent is for payment of an amount equivalent to the monthly rental, for the period that it remained in occupation of the property after the agreement was cancelled. The applicant cancelled the lease agreement with effect from 1 November 2015, but the respondent remained in occupation of the property after the expiry of the notice period, namely 31 December 2015 until 31 March 2016. The rental for the three months amounts to R185 883,84. The electricity and services bill amounts to R11 889,27.

[2] The respondent does not deny that the parties have entered into the written lease agreement; the terms of the agreement; the amount of rental payable; that the agreement was cancelled; that the respondent had to vacate the premises by 31 December 2015 and that it remained in occupation of the leased premises until 31 March 2016.

[3] On 11 November 2015 the applicant addressed an email to the respondent in which, amongst others, the following is communicated:

"Be informed that the lease agreement between Guy & Guy B investment Projects and Zasm properties has been terminated with immediate effect from 1 November 2015 due to the persistent breach of its material term from inability to pay the rental timeously....I was also made aware of the fact that even the electricity account has remained in arrears for unreasonable period

....

The landlord has agreed to allow continued occupation of the property for limited period until the end of December 2015 on terms ..."

- [4] On the same day, the respondent responded to this email by addressing an email saying:

"I welcome the termination of lease and will only vacate the premises at the end of March 2016".

- [5] Clause 12.2 of the lease agreement entered into between the parties on 1 March 2014 stipulates as follows:

"While for any reason or on any ground the tenant occupies the leased property and the landlord disputes it's right to do so, until the dispute is resolved, whether by settlement, arbitration or litigation, the tenant shall (notwithstanding that the landlord may contend that this lease is no longer in

force) continue to pay (without prejudice to its rights) an amount equivalent to the monthly rental, or charges and operating costs provided for in the lease monthly in advance, on the seventh day of each month, and the landlord shall be entitled to accept and recover such payments, and acceptance thereof shall be without prejudice to and shall not in any way whatsoever affect the landlord's claim then in dispute ..."

- [6] In the affidavit resisting summary judgment, the deponent denies that he does not have a defence to the applicant's claim and that he entered defence solely for the purpose of delay. He raises various points *in limine*. In short, this relates to the claimed amount not being readily determinable and being illiquid; a contradiction of paragraph 14 of the particulars of claim relating to the period for which the rentals are claimed (January, February and March 2016), and the Certificate of Balance, stating that rentals are claimed for the period 1 March 2014 to 31 December 2015. Furthermore, that interest is claimed calculated at 15.5%. Furthermore, that the claim is excipiable on no less than seventeen grounds set out in a notice in terms of

Rule 23 (1). Over and above these points *in limine*, the respondent avers that he has a *bona fide* defence to the claim. He avers that this relates to claims for rental after the termination of the lease agreement; a claim for payment of the sum of R11 889,27 on the basis of enrichment without determination of which *condictio* it relies on and, included in the claim for R11 889,27 are amounts that the respondent is not obliged to pay.

[7] Rule 23 requires that, the affidavit opposing the application for summary judgment must disclose fully the nature, grounds and material facts relied upon by the defendant for his defence. The court must be satisfied that the defendant has a *bona fide* defence as fully outlined in the affidavit resisting summary judgment. The affidavit must disclose his defence and the material facts on which it is based with sufficient particularity to enable the court to find that he has a *bona fide* defence.


See: *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 422; *Central News Agency Ltd v Cilliers* 1971 (4) SA 351 (NC).

[8] In my view, the respondent does not raise any valid defence to the applicant's claim.

All the purported defences raised in opposition to the application for summary judgment are frivolous and amount to nothing more than a grasping at straws. Of particular importance is clause 12.2 of the agreement, discussed above, that clearly stipulates the respondent's obligation to continue paying monthly rental, other charges and operating costs provided for in the lease agreement. In his email response the respondent acknowledged the termination of the lease agreement and his unequivocal statement to remain in occupation of the leased premises until the end of March 2016. It follows that, him being in occupation of the premises obliges him to pay the rent and other charges. There is no merit in any of the defences raised and the respondent has entered defence purely for the purpose of delay.

[9] Accordingly, I find that a proper case has been made out for summary judgment together with interest *a temporae morae* at the prescribed legal rate. In the result, the following order is made:

1. The respondent is ordered to pay the applicant the amount of R197 773,11;
2. Interest on the amount of R197 773,11 at the rate of 9% per annum, *a*
temporae morae;
3. The respondent is to pay the costs on an attorney-own-client scale.

A handwritten signature in black ink, appearing to be 'E.L. Swartz', is written over a horizontal line. The signature is stylized with loops and a long horizontal stroke extending to the right.

E.L. SWARTZ

ACTING JUDGE OF THE HIGH COURT

CASE NO: 49638/2016

HEARD ON: 14 October 2016

FOR THE APPLICANT: ADV. H.M. BARNARDT

INSTRUCTED BY: Mathebula Attorneys

FOR THE RESPONDENT: ADV. K. KORFF

INSTRUCTED BY: Tau Phalane Incorporated

DATE OF JUDGMENT: 21 October 2016