REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No.: 93172/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

28/05/2021

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DATE MNGQIBISA-THUSI J

In the matter between:

OZMIK PROPERTY INVESTMENTS Plaintiff

and

STARACOM PROPRIETARY LIMITED 1st Defendant

SRINIVISAN VENKANT KUMAR 2nd Defendant

JUDGMENT

MNGQIBISA-THUSI J

[1] In its application for summary judgment against the defendants, the plaintiff seeks an order in the following terms:

1.1 payment of the sums of R4,705,757.33 and R 369,242.67;

1.2 interest on the above-mentioned amounts at the rate of 12% per annum from the date of issuing of the summons to date of payment;

1.3 costs on an attorney and client scale.

[2] On 14 April 2005 the first defendant and a company known as Growth Point Properties Limited ("Growth Point") entered into a written lease agreement ("the agreement") over a Hotel situated at erf 1215 Arcadia, Pretoria. In terms of the agreement, the lease was to expire on 31 January 2015.

[3] The agreement contained, *inter alia*, a variation clause which provided that:

> "36.1 This document incorporates the entire agreement between the lessor and the lessee and no alteration, cancellation or variation hereof shall be of any force and effect unless it is in writing and signed by both the lessor and the lessee who hereby acknowledge that no representations or warranties have been made by either the lessor or the lessee, nor are there understandings or terms of lease other than those set out herein".

[4] The second defendant signed a deed of suretyship with Growth Point binding himself as surety and co-principal debtor for the debts of the first defendant.

[5] On 28 March 2013 the lease was renewed. On 8 May 2015 the parties concluded an addendum to the agreement which provided, inter alia, that the agreement would endure for the period 1 February 2015 to 31

January 2025. Further, the addendum set out the applicable basic rentals and related costs.

[6] According to the plaintiff, on 25 June 2015 ownership of the Hotel was transferred to the plaintiff after it purchased it from Growth Point. The defendants are disputing the sale of the Hotel and the cession of the lease agreement by Growth Point to the plaintiff.

[7] On 21 November 2019 the plaintiff's attorneys delivered a letter of demand on the first defendant for payment of the sum of R4,705,757.33. In this letter, the plaintiff stated, amongst others, the following:

> "Our client has considered the alternatives you presented to them but the suggestions are not viable and attractive enough to significantly reduce the outstanding arrears."

[8] On the same day, the second defendant, representing the first defendant, sent an email to the plaintiff in which he informed the plaintiff of his intention to close the Hotel by 31 December 2019. This date was subsequently extended to 30 January 2020.

[9] On 18 December 2019 the plaintiff effected service of summons on the defendants in which it sought payment of the amount of R5,075,757.33 plus interest and costs. After the defendants filed their notice to defend on 1 January 2020, on 28 February 2020 the plaintiff issued an application for summary judgment against the defendants as envisaged in Uniform Rule 32(1)(b). According to the plaintiff, on 1 December 2019 the amount of R369,242.67 also became due and payable.

[10] On 11 February 2020 the defendants issued notices in terms of Uniform Rule 35(12) and (14). The defendants further filed their special plea, plea and an affidavit resisting summary judgment.

[11] In its application for summary judgment the plaintiff alleges that the defendants' special plea, plea and notices in terms of Uniform Rule 35 were a strategy by the defendants to delay the granting of an order for summary judgment.

[12] In their plea the defendants have raised the following point *in limine,* namely, that the plaintiff does not have *locus standi* to institute summary judgment proceedings.

[13] In its affidavit resisting summary judgment and in their plea the defendants oppose the granting of summary judgment on the ground that the plaintiff is precluded from launching these proceedings on the grounds that:

13.1 in May 2019 the parties concluded a *pactum de non petendo* which precludes the plaintiff from instituting these proceedings pending finalisation of negotiations; and

13.2 since the plaintiff was served with notices in terms of uniform sub-rules 35(12) and (14) and has not responded to such notices, the plaintiff was precluded from pursuing its summary judgment application until it has responded to the notices seeking discovery and inspection of certain documents.

Locus standi

[14] It is the defendants' contention that there is no proof that Growth Point has transferred ownership of the Hotel or ceded the lease agreement to the plaintiff. The defendants base their objection to the plaintiff's *locus standi* on the grounds that:

14.1 the plaintiff has failed to attach proof of its purchase of the Hotel and the cession of the lease;

14.2 the original agreement between Growth Point and the defendants, attached to the particulars of claim, is not the original as it contains manuscript writing and is illegible;

14.3 the addendum to the agreement is illegible and is the subject matter of a Rule 35(12) notice; and

14.4 the lease agreement was ever renewed.

[15] On behalf of the plaintiff it was argued that the defendants' objection to the plaintiff's *locus standi* is a sham in that over the period 22 July 2015 to 27 November 2019 the second defendant, the sole director of the first defendant, has been communicating with the plaintiff's representative in which the first defendant:

15.1 acknowledged plaintiff as its new landlord. On 22 July 2015 the second defendant sent the plaintiff an email in which he stated, *inter alia,* the following;

"it was a pleasure meeting you last week when you visited the Hotel as the new landlord".

15.2 frequently sought indulges from the plaintiff with regard to monthly rental payments. In this regard plaintiff has made reference to an email dated 8 October 2015 wherein the first defendant sought an indulgence from the plaintiff to pay rent for the Hotel and conference venues between the 7th and 14th of every month and not necessarily at the beginning of each month as provided for in the agreement.

[16] The plaintiff has also attached to its affidavit in support of its application for summary judgment an email (annexure RA4) dated 22 July 2015 in which the second defendant, acting on behalf of the first defendant acknowledges the plaintiff as its new landlord and emails (amongst others annexure RA5 and RA16) in which the first defendant acknowledges liability to the plaintiff.

[17] In their affidavit resisting summary judgment, the defendants have not dealt with the various written communication referred to in paragraph [16] above which show that the first defendant and the plaintiff have communicated with each other from the time the plaintiff became owner of the Hotel.

[18] I am of the view that the defendants' objection to the plaintiff's *locus standi* is baseless as it is clear from the correspondence between the parties in which the parties discussed, among other issues, the first

defendant's arrear rent and the possibility of the first defendant finding a replacement, that the defendants were aware that the plaintiff had become the new owner of the Hotel. As correctly pointed out by counsel for the plaintiff in terms of the principle of '*huur gaat voor koop'* the plaintiff as the new owner of the Hotel, with regard to the lease agreement, stepped into the shoes of Growth Point as the lessor. I am therefore of the view that the defendants' point on the plaintiff's *locus standi* has no basis and it ought to be dismissed.

[19] Uniform Rule 32(2) reads in part as follows:

> 32(2)(a)- Within 15 days after the date of delivery of the plea, the Plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the Plaintiff or by any other person who can swear positively to the facts."
>
> 32(2)(b) – "The Plaintiff shall in the affidavit referred to in sub-rule (2)(a) verify the cause of action and the amount, 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."
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> 32(3)(b) – "The Defendant may-
> (b) satisfy the court by affidavit which shall be delivered five (5) days before the day on which application is to be heard or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the Defendant has a bona fide defence to the action, such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefore."

[20] In an application for summary judgment the court enquires only into:

20.1 whether the defendant has disclosed the nature and grounds of his defence and the material facts upon which it is founded, and

20.2 whether on the facts so disclosed the defendant appears to have a defence which is both bona fide and good in law to either the whole or part of the claim[1].

[21] The defendants are opposing the plaintiff's application for summary judgment firstly, on the ground that the plaintiff has failed to respond to their Uniform Rule 35(12)[2] and (14)[3] notices, to the prejudice of the defendants in their preparation for trial.

[22] On behalf of the plaintiff it was submitted that even if it had not complied with the defendants' request, such failure cannot postpone or defer the determination of the application for summary judgment.

[23] In *Business Partners Ltd v Trustees, Botes Family Trust*[4], a decision the plaintiff relied on, with regard to the influence the non-compliance with

[1] *Business Partners n 4 para 8*
[2] Uniform Rule 35(12) reads as follows: "(12) Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and permit him to make a copy or a transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the Court, use such document or tape recording in such proceeding provided that any other party may use such documents or tape recording."
[3] Uniform Rule 35(14) reads as follows: "(14) After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to make available for inspection within five days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof."
[4] 2013 (5) SA 514 (WCC).

Uniform Rules 35(12) and (14) on an application for summary judgment, the court stated that:

> "[11] …. However, if they had difficulty in dealing with the pleadings because they require documents in order to determine what the plaintiff's case was, this should have been stated in affidavits opposing summary judgment as justification for their inability to deliver an affidavit disclosing the nature and grounds of the defence and the material facts upon which it was based. But what the defendants cannot do is circumvent the provisions of rule 32(3)(b) by delivery of the notice, in order to obtain documents which might support a bona fide defence or to defer summary judgment proceedings, as was submitted by Mr Newton on their behalf".

[24] Further in *ABSA Bank Ltd v Expectra* 423 (Pty) Ltd[5] the court held that:

> "[15] In the event that I am incorrect in my interpretation of the relevant part of the judgment in *Business Partners* and the learned judge was indeed stating or implying that the provisions of Rule 35(12) and (14) can somehow be utilised to defer an application for summary judgment until such time as appropriate response is received from a plaintiff, then I am in respectful disagreement therewith. In my view, for all the reasons which Schippers J sets out, invoking the provisions of Rule 35(12) and (14) is incompatible with the purpose and nature of summary judgment proceedings. If it were the intention of the rule maker that early discovery could, in this sense, be obtained, it would go a long way to stultify the procedure created by Rule 32 which has effectively been used by the courts over a long a period of time[6]. Defendants' intent upon delaying summary judgment could make use of the provisions of Rule 35(12) and (14) to obtain extended delays in summary judgment applications by tying up the plaintiff in contested interlocutory applications".

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[5] 2017 (1) SA 81 (WCC).
[6] *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Joint Venture* 2009 (5) SA 1 (SCA) Para [32]

[25] In the plea and affidavit opposing summary judgment, the defendants do not allege that they are not aware of the plaintiff's cause of action. As indicated earlier, the defendants, through the second defendant, have acknowledged that the plaintiff is the new owner and landlord of the Hotel hence negotiations took place between the parties as to how the first defendant's arrear rentals could be managed. It cannot be disputed that the defendants are well aware of the contents of the documents they seek to be discovered and inspected and could have pleaded their bona fide defence to the plaintiff's claim. I am therefore satisfied that the notices issued in terms of Uniform Rule 35 are meant only to delay the determination of the summary judgment application.

[26] Secondly, the defendants are opposing the plaintiff's application for summary judgment on the ground that the parties have concluded a *pactum de non petendo*[7] in an attempt to settle disputes between them. In their plea the defendants allege that:

> "10.4 Subject to the content of this plea and should it be found that the Plaintiff has the necessary *locus standi in iudicio*, the Defendants plead as follows:
>
> 10.4.1 At all material times the Plaintiff professed that it had required ownership of the property in question without any lease agreement concluded with the First Defendant or otherwise;

[7] Van der Merwe and others **Contract General Principles** second edition 373-374 described the *pactum de non petendo* as follows: "… *a pactum de non petendo* suspends the capacity to enforce [a contract], usually for a specified period or until the occurrence of some contingency."

10.4.2 The Plaintiff, duly represented by Mr Aboo-Baker and the First Defendant duly represented by the Second Defendant, entered into a pactum de non petendo in the bona fide attempt to settle any purported disputes between the parties and to prevent the need for any reciprocal litigation between the parties;

10.4.3 The Plaintiff by demanding performance from the First and/or Second Defendants and instituting the current proceedings is acting in breach of the terms of the pactum de non petendo as pleaded infra.

10.5 the relevant express, alternatively tacit, alternatively implied terms of the pactum de non petendo are the following:

10.5.1 The Plaintiff will acquire the sole shareholding in the First Defendant against payment consideration equal to the acquisition of the Second Defendant's loan account in the First Defendant;

10.5.2 The Plaintiff, in doing so, will acquire and/or write off any debt potential liability vis-à-vis the Plaintiff and the First Defendant;

10.5.3 The Second Defendant will be released from any and all surety obligations towards either the lessor (and subject to the aforementioned) the Plaintiff;

10.5.4 The first Defendant will not pursue any claim for damages based on breach of contract and/or failure on the part of the Plaintiff to provide the First Defendant with a premises suitable for the purpose for which it was initially leased, being the operation of the business of a hotel;

10.5.5 That the Plaintiff's attorneys of record will attend to the drafting of an agreement required for the transfer of the shares on the terms pleaded supra; and

10.5.6 That the Second Defendant will be retained as manager of the hotel operated from the premises on a temporary basis based on his permanent replacement by an individual to be appointed by the Plaintiff.

10.6 The agreement as pleaded supra superseded any contractual liability which may have been incurred between the Plaintiff and the First and/or Second Defendants;

10.7 No time of performance of the reciprocal duties arising from the agreement pleaded supra was agreed between the parties.

10.8 Notwithstanding demand on behalf of the First Defendant for the Plaintiff to comply with its obligations in terms of the agreement supra, the Plaintiff has failed and/or refused to comply with the obligations."

[27] In the affidavit resisting summary judgment, the defendants allege that from May 2019 the parties have been engaged in negotiations aimed at the plaintiff buying shareholding in the second defendant. In support of this allegation the defendants are relying on a letter sent to the plaintiff in which the defendants had attached the second defendant's financials. According to the defendants the said negotiations culminated in the parties on 16 August 2019 concluding an oral agreement in terms of which the plaintiff would not, for the time being, institute proceedings against the defendants seeking payment of the arrear rentals.

[28] Counsel for the defendants submitted that despite the existence of a non-variation clause, the enforcement of a *pactum de non petendo* did not violate the principle laid down in *SA Sentrale Ko-op*

Graanmaatskappy Bpk v Shifren en Andere[8] with regard to the inviolability of a non-variation clause. In this regard the defendants are relying on the decision in *HNR Properties CC and Another v Standard Bank of South Africa Ltd*[9] where the court stated the following:

> "[19] … No doubt in particular circumstances a waiver of rights under a contract containing a non-variation clause may not involve a violation of the *Shifren* principle, for example, where it amounts to a *pactum de non petendo* or an indulgence in relation to previous imperfect performance."

[29] On behalf of the plaintiff it was denied that the parties had concluded a pactum de non petendo. Inasmuch as the plaintiff acknowledges that there have been negotiations between the parties, it is the plaintiff's contention that no agreement was reached that the plaintiff would not pursue its claim against the defendants for the arrear rentals. According to the plaintiff since no agreement could be reached on the terms of the proposed take-over of the first defendant by the plaintiff, on 27 November 2019 the plaintiff wrote to the defendants indicating in clear terms that it was not amenable to the terms propose by the defendants and demanded immediate payment of the arrear rentals.

[30] Further, it was submitted on behalf of the plaintiff that in the event of a finding that a pactum de non petendo was concluded, since such an

[8] 1964 (4) SA 760 (A). In the *Shifren* matter the court held that a term in a written contract providing that all amendments and variations to the contract have to comply with specified formalities is binding. See also in this regard *Brisley v Drotsky* 2002 (4) SA 1 (SCA).
[9] 2004 (a) SA 1 (SCA). See also *Miller and Another NNO v Dannecker* 2001 (1) SA 917 (C).

agreement was not in writing, it was of no force and effect because of the non-variation clause contained in the lease agreement.

[31] The issue to be determined is whether a pactum de non petendo was concluded, and if it was, whether the oral agreement was valid in the light of the non-variation clause.

[32] With regard to the existence of the pactum de non petendo as alleged by the defendants, all what the defendants have shown is that there were negotiations between the parties and during that period of negotiating, no claim was made by the plaintiff for payment of the arrears. However, in light of the letter dated 27 November 2019, it is clear that the plaintiff had terminated the negotiations in that the parties could not reach agreement on the terms of the proposed take-over of the first defendant. I am of the view that from that date it was open to the plaintiff to pursue its claim for payment of the arrear rentals.

[33] The defendants have not disputed that the first defendant is in arrears with regard to the rent for the Hotel nor have they disputed the amounts due as pleaded by the plaintiff.

[34] Further, it is apparent that the defendants have not shown that they have a bona fide defence to the plaintiff's claim and I am of the view that their opposition is merely to delay the plaintiff's claim.

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

'Summary judgment is granted against the defendants jointly and severally the one paying the other to be absolved, for:

15.1 Payment of the sum of R4,705,757.33.

15.2 Interest on the sum of R R4,705,757.33. at the rate of 12% per annum from date of issuing summons to date of payment.

15.3 Costs on an attorney and client scale.

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N. P. MNGQIBISA-THUSI
JUDGE OF THE HIGH COURT

Date of hearing: 04 August 2020

Date of judgment: 28 May 2021

Appearances

For Plaintiff: Adv M T A Costa (instructed by DJ Steyn Attorneys Inc)

For Defendants: Adv G T Avvakoumides (instructed by Mark Efstratiou Inc)