REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

13 December 2021

Case No:55605/20

In the matter between:

NATIONAL STADIUM OF SOUTH AFRICA (PTY) LTD First Plaintiff

SAIL RIGHTS COMMERCIALISATION (PTY) LTD Second Plaintiff

and

STREET SPIRIT TRADING 79 (PTY) LTD First Defendant
(Registration Number: 2007/008244/07)

THE FOOD FACTORY (PTY) LTD Second Defendant
(Registration Number: 2017/483741/07)

RYAN DONALD Third Defendant

JUDGMENT

SK Hassim AJ

[1] The plaintiffs' claim arises out of two written "Suite Rental Agreements. The plaintiffs seek summary judgment for amounts which they allege are due in terms of these agreements.

A. THE FIRST SUITE RENTAL AGREEMENT

(a) Conclusion of first suite rental agreement, addenda thereto and an acknowledgement of debt

[2] The first, was entered into on or about 24 May 2018, between the first plaintiff (duly represented) and the first defendant (represented by the third defendant) in terms of which the first plaintiff let to the first defendant for a period of one year from 1 March 2018 to 28 February 2019, a suite (No. US59 31-seater) at the FNB stadium at an annual rental of R516 000.00. In addition to the rental amount the first defendant had to pay a general service levy of R15 300.00 p.a., and a television fee of R1 650.00 p.a. The second plaintiff was the first plaintiff's agent to receive amongst others, payments from the first defendant. ("**the first suite rental agreement).**

[3] On 28 July 2018, the parties concluded an addendum to the main agreement ("**the first addendum")** in terms of which the first defendant undertook to pay to the second plaintiff payments which had become due under the main agreement in four equal payments of R133 237.50 (excluding VAT) payable on 31 July 2018, 30 September 2018, 30 November 2018, and 31 January 2019.

[4] On 26 February 2019, the parties concluded a second addendum to the main agreement ("**the second addendum")** in terms of which the date of commencement of the main agreement was amended to 1 March 2019, and the termination date to 28 February 2020. The annual rental was amended to R541 000.00 p.a., the general service levy to R16 100.00 and the television fee to R1 740.00. The monthly payments reflected in the first addendum were amended to R139 910.00, and the dates for payments to 31 July 2019, 30 September 2019, 13 November 2019, and 31 January 2020.

[5] On 24 March 2020, the third defendant acknowledged, on behalf of the first defendant, indebtedness to the second plaintiff in an amount of R643,586.00 ("**the AoD").**

(b) Claims arising from the first suite rental agreement

[6] This is a claim for payment of R643 586.00 (VAT included) being the amount due in terms of the first suite rental agreement.

(i) Claim 1 and Claim 2 against the first defendant for payment of R643 237.00

[7] These are alternative claims against the first defendant for payment of R643 237.00. Claim 1, constitutes the amount outstanding under the first suite rental agreement. Claim 2 is the amount acknowledged to be owing to the second plaintiff in terms of the AoD.

(ii) Claim 3 against the second defendant for payment of R643 237.00

[8] This claim is alternative to claims 1 and 2 and conditional upon a finding that the first defendant was not a party to the suite rental agreements, the two addenda and was not the person who acknowledged indebtedness under the AoD.

(iii) Claim 4 against the third defendant for payment of R643 237.00

[9] This claim is based on an alleged fraudulent representation of authority by the third defendant, and is in the alternative to claims 1, 2 and 3, and conditional upon a finding that the second defendant was not a party to the main agreement, the two addenda and was not the person who acknowledged indebtedness under the AoD.

B. THE SECOND SUITE RENTAL AGREEMENT

(a) Conclusion of the second suite rental agreement

[10] The second suite rental agreement was entered into on 12 March 2020 between the parties duly represented in terms of which Suite No US59 was let to the first defendant effective 29 February 2020 until 28 February 2021 at an annual rental of R488,750 .00, an annual general service levy of R16 905.00 and a television fee of R1 830 000.00. The second plaintiff was the first plaintiff's agent to receive amongst others, payments from the

first defendant ("**the second suite rental agreement).** The first defendant undertook to pay to the second plaintiff an amount of R 100,000.00 on or before 15 March 2020 and thereafter 5 equal payments of R 81,497.00 on 15 April 2020, 15 May 2020, 15 June 2020, and 15 August 2020.

(b) <u>Claims arising from the second suite rental agreement</u>

[11] This is a claim for payment of an amount of R 115,000.00 (R 100,000.00 +15% VAT).

(i) Claim 5 against the first defendant for payment of R 115,000.00

[12] This arises out of the first defendant's failure to pay the amount of R 115,000.00 on 15 March 2020 as undertaken in the second suite rental agreement.

(ii) Claim 6 against the second defendant for payment of R 115,000.00

[13] This claim is in the alternative to claim 5, and conditional upon a finding that the second defendant and not the first defendant entered into the second suite rental agreement. In the event of such finding the claim arises out of the second defendant's failure to pay the amount of R 115,000.00 on 15 March 2020 due in terms of the second suite rental agreement.

(iii) Claim 7 against the third defendant for payment of R 115,000.00

[14] This claim for payment of R 115,000.00 against the third defendant, is based on the alleged fraudulent representation by the third defendant. Claim 7 is in the alternative to claims 5 and 6 and conditional upon a finding that the third defendant was authorised by neither the first nor second defendant to enter into the second suite rental agreement.

C. THE PLEA

[15] The defendants seek the dismissal of the action on the basis that clause 33 of the suite rental agreements compel the parties to submit their disputes to arbitration. However, this provision was deleted in the first addendum to the first suite rental agreement. Therefore, in so far as the plaintiffs' claim in terms of the first suite rental agreement is concerned, the defence is not. However, clause 33 was reintroduced in the second suite rental agreement. The second defendant did not argue before me that the dispute under the second suite rental agreement had to be submitted to arbitration.

[16] The defendants' defence in broad terms is (i) the party to all the agreements was the second defendant and the reference to the first defendant was in error; (ii) the suite rental agreements were subject to a further term (either express, alternatively implied further alternatively tacit) that the second defendant would be appointed as an accredited caterer at the FNB stadium ("**the stadium**"); (iii) Alternatively, when the parties entered into the suite rental agreements they also entered into "a parallel agreement" in terms of which the second defendant was appointed as an accredited caterer at the stadium; (iv) the rights and obligations between the parties are therefore bi-lateral; (v) the plaintiffs have breached their obligation in terms of the "parallel agreement" to appoint the second defendant as an accredited caterer; (vi) the second defendant was excused from performance until the plaintiffs had discharged the obligation to appoint it as an accredited caterer at the stadium; (vii) the third plaintiff was authorised to conclude the suite rental agreements, addenda to the first suite rental agreement and the acknowledgement of debt and for that reason, they had been no fraud on the part of the third defendant; (vi) they do not know how the amounts R 643 237.00 and R 115,000.00 have been computed.

[17] As I see it, the first defendant's defence is that it was not a party to any of the agreements. The second defendant's defence is the breach of the plaintiffs' undertaking (express alternatively implied further alternatively tacit) to appoint the second defendant as an accredited caterer at the stadium alternatively the breach of the "parallel agreement"

by the plaintiffs which excuses performance from the second defendant. The third defendant's defence is that he was authorised to enter into the agreements on behalf of the second defendant and did not act fraudulently.

D. THE APPLICATION FOR SUMMARY JUDGMENT

(a) The security issue

[18] After the delivery of the defendants' plea, the plaintiffs applied for summary judgment against the second defendant in terms of claims 3 and 6. The second defendant did not deliver an affidavit resisting summary judgment.

[19] The application was enrolled for hearing on 14 April 2021, on which day the second defendant communicated its election to provide security as envisaged in uniform rule 32(3)(a) and the parties agreed to an order that on or before 30 April 2021 *"[t]he Second Defendant shall file a valuation of assets of the tendered security (which shall include the depreciation over the period of 3[three] years) by a sworn valuator under oath"*.

[20] On 27 May 2021, the second defendant's attorney transmitted to the plaintiffs' attorney an email which reads as follows"

> "*Please find the valuation as received from our client earlier this week attached hereto. Our client informs us that this particular valuator is often used by hotels to value the equipment because he understands the industry and the market value of the equipment. If your clients are not satisfied with the amounts contained therein, our client is prepared to make himself available for your expert to conduct his own valuation.*
>
> *If your clients are satisfied with the amounts contained in the valuation, kindly confirm the above, in writing, after which we will start the process of the registration of a notarial bond over the equipment, as security for your clients*."

[21] The "valuation" is a two-page document in the form of a table titled "Food Factory Equipment Valuation". It has three columns, "DESCRIPTION", "QTY" and "TOTAL". It has 51 line items with a description of equipment, the number of the described equipment

and an amount (the value) expressed in rands in the columns under headed "TOTAL". One of the described items, namely a "walk in fridge 5m x , 4 meter" does not have a rand value in the column headed "TOTAL". The items are valued at R1 963,090.35 which is made up of R 1,707,035.09 plus VAT in an amount of R 256,055.26.

[22] The "valuation" is seemingly prepared by "Ewan's Electrical services" whose mobile number appears below the name. No address appears thereon. The second page is signed by one Ewan Elliott. The document is not dated, nor are they any details to identify the entity or the individual. The document does not constitute a valuation. The author does not qualify himself to express an opinion on the value of the goods listed there nor, does he disclose the valuation method adopted by him. The author is in my view, clearly not a qualified valuator or a person with the relevant expertise to express an opinion on the value of the goods "valued". This much is evident from the lack of professionalism in the preparation of the "valuation". But more importantly, it is telling that after arriving at a total value of the goods, the author goes on to add to that amount VAT at 15%, resulting in a grand total of R963,090.35.

[23] The second defendant has not complied with the court order issued on 14 April 2021. The "valuation" does not constitute compliance with the court order. Firstly, the "valuation" is not one prepared by a sworn valuator, nor is it confirmed by the author, under oath. Secondly, the "valuation" does not include the depreciation of the goods over a three-year period. Thirdly, the "valuation" that had to be provided was of assets of "*tendered security"*. It seems that the parties had envisaged the registration of a notarial bond over specific movable assets[1], which was dependent upon the value of these assets. This is not surprising, because the plaintiffs needed the assurance that the security provided by the notarial bond was sufficient to meet its claim/s against the second defendant.

[24] The plaintiffs persist in their application for summary judgment.

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[1] That this was the intention appears from the second defendant's counsel's heads of argument.

[25] In terms of rule 32(3) a defendant who wishes to resist summary judgment must do one of two things: Either deliver an affidavit which satisfies the requirement of rule 32(3)(b) or give security to the plaintiff. A defendant may at the hearing, with the leave of the court, lead oral evidence that the defendant has a *bona fide* defence to the action. The second defendant has not delivered an affidavit, nor was leave sought to lead oral evidence. Therefore, unless I find that the second defendant has given security to the plaintiffs for any judgment and costs, subject to my discretion exercised on grounds for doing so having been advanced, the plaintiffs are entitled to summary judgment if they have complied with the provisions of rule 32(2).

[26] The second defendant does not dispute that the plaintiff has complied with the provisions of rule 32(2). The defendant has not adopted any of the options provided in rule 32(3) to oppose the application for summary judgment. The second defendant may have intended to give security or still intends to do so, but the factual position is that it has not. This is not a case where the defendant has given security and I have to determine whether a judgment and costs order is adequately secured.

[27] The defendant's counsel submits that I should adopt the approach of the court in Spring and Van den Berg Construction (Pty) Ltd v Banfrevan Properties (Pty) Ltd 1968(1) SA 326 (D) and grant leave to the second defendant to defend the action subject to the defendant providing security. However, in Spring and Van den Berg the plaintiff had to return to court for summary judgment if security was not posted. It seems that the order which found favour with the full court in Kgatle v Metcash Trading Ltd [2004] 4 All SA 202 (T) is preferable to the one in Spring and Van den Berg Construction. The plaintiffs' counsel, relying on Gralio (Pty) Ltd v DE Claassen (Pty) Ltd 1980 (1) SA 816 (A) argued that a defendant who admits liability to the plaintiff and concedes that it has no defence, cannot avoid summary judgment by providing security. The second defendant's counsel attempted to counter this on the basis that the second defendant has not admitted liability, nor has it conceded that it has no defence to the plaintiffs' claim. This being so, he argued,

Gralio does not apply, and it is therefore competent to grant leave to the second defendant conditional upon it giving security to the plaintiff.

[28] While it has been established in Kgatle v Metcash Trading Ltd that a court may in the exercise of its discretion in terms of rule 32(8) grant to a defendant leave to defend the action subject to the provision of security, this does not however mean that the second defendant is entitled to leave to defend where it has not demonstrated a *bona fide* defence. It is inimical to the purpose of summary judgment for a defendant who even though not admitting liability or conceding that it does not have a defence to a plaintiff's claim can escape summary judgment when he has no defence to the claim.

[29] Summary judgment has always been aimed at preventing a defendant from defending an action to which it has no defence and thereby delay the finalisation of the action. The amendments introduced to rule 32 with effect from 1 May 2019 came under scrutiny in Raumix Aggregates (Pty) Ltd v Richter Sand CC and Similar Matters 2020 (1) SA 623 (G). The full court there crisply captures the purpose of summary judgment in the following passage:

> *"[16] The purpose of a summary judgment application is to allow the court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine triable issue, thereby conserving scarce judicial resources and improving access to justice. Once an application for summary judgment is brought, the applicant obtains a substantive right for that application to be heard, and, bearing in mind the purpose of summary judgment, that hearing should be as soon as possible."*

[30] Granting leave to defend to a defendant who has no defence to a plaintiff's claim will result in (i) a plaintiff being deprived of having its claim satisfied even though there is no basis in law for the defendant to withhold payment; (ii) a plaintiff being forced into an expensive trial when there is no triable issue; and (iii) a waste of scarce judicial resources to the prejudice of all those who are unable to have access to justice because of the scarcity of judicial resources.

[31] Had the plea raised a valid defence, I might have been inclined to exercise the discretion conferred on a court by rule 38(8) and granted leave to defend to the second defendant subject to the posting of suitable security.

(b) Does the defense pleaded raise a triable issue?

[32] As indicated, the second defendant did not deliver an affidavit in opposition to the application for summary judgment and the plaintiffs, subject only to my discretion to refuse it, are entitled to summary judgment. Where a defendant has filed an affidavit resisting summary judgment, a court may have regard to the plea when assessing whether the defendant has a *bona fide* defence to a plaintiff's claim. But that does not mean that a defendant, can refuse to deliver an affidavit and rely on the plea alone to resist summary judgment. If this was sufficient, the rule would have expressly provided therefor; not only does it not so provide, it expressly, requires a defendant to deliver an affidavit.

[33] I have however decided to adopt a benevolent approach in this case because of the peculiar circumstances to which I turn.

[34] Prior to the amendment of rule 32 in 2019, the security which the defendant provided had to be to the Registrar's satisfaction. Whether the plaintiff was satisfied with the form or quality of the security was irrelevant. In practice however the parties agreed to the form of the security which would in most instances would have been a payment into an attorney's trust account, a guarantee from a financial institution or a security bond. There is no reason to abandon such a pragmatic approach when summary judgment is applied for under the amended rule.

[35] The plaintiffs knew, as far back as 13 April 2021 that the second defendant intended giving security in the form of a notarial bond. The second defendant expressly requested from the plaintiffs' confirmation whether they will be satisfied with this form of security. It is understandable that the plaintiffs were not prepared to accept the value placed on the goods, however they could have co-operated with the second defendant in establishing a

value. If they were unable to do so, then the second defendant may have had to consider another form of security. From the papers it does not seem that the plaintiffs attempted to arrive at a mutually acceptable valuation. An express invitation was extended by the second defendant that if the plaintiffs were not satisfied with the amounts as per the "valuation", they could appoint an expert to value the goods. This was on 27 May 2021. The plaintiffs adopted a supine attitude. I have decided in the circumstances to have regard to the plea in assessing whether the second defendant has a *bona fide* defence to the action.

[36] The plea is very sparse. It does not even meet the threshold required of an affidavit resisting summary judgment, namely that the deponent must state "*fully the nature and grounds of the defence and the material facts relied upon therefor*"[2], for the averment that the suite rental agreements imposed upon the plaintiffs an obligation to appoint the second defendant as an accredited caterer or that there was a "parallel agreement".

[37] The second defendant alleges that the suite rental agreements were subject to a term which compelled the plaintiffs to appoint the second defendant as an accredited caterer and in the alternative that a "parallel agreement" imposed such an obligation upon the plaintiffs. This alleged term as well as the "parallel agreement" are the basis for the *exceptio non adimpleti contractus* raised by the second defendant. In the absence of the second defendant having placed before me "the material facts relied upon" for the *exceptio non adimpleti contractus*. I am not satisfied that the defendant is *bona fide* in its defense.

[38] defence is *bona fide* raised. I am not satisfied that there is not a reasonable possibility that the *exceptio non adimpleti contractus* may succeed at trial.

[39] Claims 3 and 6, which is conditional upon a finding that the second defendant and not the first defendant was the party to the two suite rental agreements, are for the payment respectively of R643 586.00 (VAT included) being the balance due and payable under the

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2 *Cf.* Rule 32 (3)(a).

first suite rental agreement and R115 000.00 being the amount due under the second suite rental agreement.

[40] The second defendant admits in the plea that it, and not the first defendant, was the contracting party. It also admits that it has failed to make payment of R643 586.00 (VAT included) as well as R115 0000.00 VAT included). It pleads however that because the plaintiffs failed to appoint the second defendant as an accredited caterer at the stadium in breach of either a term (express alternatively implied alternatively tacit term) of the suite rental agreements or of a "parallel agreement" it is excused from performance because the rights and obligations of the parties were "*bilateral"*. It seems that the second defendant had in mind "reciprocal obligations". That this is the case appears from the second defendant's counsel's heads of argument where he characterises the defence as the *exceptio non adimpleti contractus*.

[41] The second defendant agreed to pay rental and the other charges "*in consideration for the Suite and the benefits referred to in clause 5*[3] *[of the suite rental agreements]*".[4] In terms of clause 5.4, the plaintiffs' obligation to give occupation to the second defendant arose after the latter had paid the rental and levies referred to in clause 6 and in terms of clause 5.5 the right to the benefits also arose only after the rental and levies had been paid. Clause 5.4 provides:

> "*5.4 Occupation of the suite will be given to the Lessee within 7 (seven) days of the Lessee complying with the provisions of clause 6."*

[42] The second defendant admits in paragraph 10 of the plea that it has not paid the amount of R643 586.00 and in paragraph 40 that it has not paid the amount of R115 000.00. It does however not plead that it did not do so because it was not given occupation or the benefits. It seems therefore that the plaintiff performed its obligations before they fell due; the second defendant was entitled to occupation and benefits only after it had paid the

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3 Occupation of the relevant suite and benefits such as complimentary tickets to events, parking tickets, service tickets for bar/waitering staff in the suite.

4 Clause 6.1.

amounts referred to in clause 6. I find it implausible that the plaintiffs would have entered into an agreement which entitled the second defendant to remain in occupation of the suite rent free for one year if the plaintiffs did not appoint it as an accredited caterer to the stadium. This makes no business sense; especially considering that it is expressly recorded in clause 2.2 of both suite rental agreements that "*the [first plaintiff] was willing to let the suite to the [second defendant] for commercial gain."* This is another reason, why I cannot find that the defendant is *bona fide* in its defense.

[43] Apart from this, the second defendant is confronted with two clauses that stand in the way of a defence based on obligations not recorded in the suite rental agreements.

[44] Clause 35.2 of the suite rental agreements reads:

> *"35.2 This Agreement constitutes the sole record of the agreement between the parties in regard to the subject matter hereof. No representation [sic] other than those contained in this Agreement has been made inducing any of the parties to enter into this agreement."*

[45] Clause 35.3 reads:

> "*No addition to, variation or agreed cancellation of this Agreement shall be of any force or effect unless in writing and signed by or on behalf of the Parties by a duly authorised representative."*

[46] The alleged obligation on the plaintiffs is therefore not binding; nor the alleged *"parallel agreement"* which impacts upon the subject matter of the two suite rental agreements. I am not satisfied that the *exceptio non adimpleti contractus* is available to the second defendant to defeat the plaintiffs' claims. I am not satisfied, that the defendant has an answer to the plaintiffs' claims at the trial. Consequently, it will subvert the purpose of rule 32 if the second defendant is granted leave to defend albeit subject to condition as provided in rule 32(8) that it gives security to the plaintiffs.

E. ORDER

In the result the second defendant is ordered to pay to the second plaintiff the following:

1. An amount of R643 586.00
2. An amount of R115 000.00.
3. Interest on the aforesaid amounts at the rate of 11.75% p.a. calculated from 1 March 2020 to date of payment
4. Costs of suit on the attorney client scale.

S K HASSIM AJ
Acting Judge: Gauteng Division, Pretoria
(electronic signature appended)
13 December 2021

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 14 December 2021.

Date of Hearing: 10 August 2021

Date of Judgment: 13 December 2021

Appearances:

For the applicant: Adv H Wessels

For the first and second respondents: Adv E Mann