Republic of South Africa
In the Western Cape High Court of South Africa

In the matter between: Case No: 6363/2011

PARYS DEVELOPMENT PROPERTIES (PTY) LTD Plaintiff

Versus

AMS BUSINESS VENTURES CC T/a COL CACCHIO PIZZERIA First Defendant
MARTIN NORMAN DAVID Second Defendant
MICHAEL JAMES DAVID Third Defendant
JARROD ANTHONY DAVID Fourth Defendant

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Judgment delivered on: 30 December 2011

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Louw J:

[1] This is an application in which the plaintiff seeks Summary Judgment for the payment of R629 601.14 together with interest and costs against the principal debtor (first defendant) and three sureties (second to fourth defendants), for outstanding rental and other charges arising from a lease of commercial retail property in a shopping centre known as Seaside Village, Blaauwberg, Cape Town.

[2] The defendants who oppose the application by way of an affidavit deposed to by the second defendant, Martin David, have raised a number of

defences. Mr Rabie who appeared on behalf of the defendants did not seek in argument to rely on all these defences and contended that for the following reasons, summary judgment should be refused;

1. The plaintiff's particulars of claim do not comply with the provisions of Rule 18 (6) in that it is not stated by whom the parties were represented when they concluded the lease agreement;
2. The nature and content of annexure 'B' to the plaintiff's particulars of claim, being a reconciliation of amounts charged and amounts paid upon which the plaintiff relies, shows that the amount claimed is not liquidated, and the contents of the document, in any event raises the issue of prescription;
3. The respondents have raised a bona fide defence on the merits, namely, that the written lease and the suretyships upon which the claim is based require to be rectified since, so it is contended, these documents do not reflect the true intention of the parties.

[3] During argument the first two defences raised were referred to as technical defences while the last defence was referred to as the defence on the merits.

[4] I deal first with the defence on the merits.

[5] The lease is for a period of five years which commenced on 1 June 2006 and expired on 31 May 2011. The agreement provides for an escalating

basic monthly rental as well as for the payment of a pro rata share of certain expenses and other charges.

[6] The defendants allege that during the negotiations preceding the conclusion of the lease, one Johan van der Walt represented the plaintiff and that the second defendant acted on behalf of the first defendant; that van der Walt represented that the Seaside Village shopping centre would never have an occupancy rate below 85% and that the first defendant based its business plan on the said representation. In addition, it is alleged that the plaintiff's agent gave the second defendant certain assurances that the tenant mix would consists of retail businesses. The opposing affidavit continues to read as follows:

> '[11] I specifically was led to understand by the representative of the applicant that I would only be liable for the full amount of rental as recorded in the agreement of lease should an occupancy of 85% or higher be achieved by the shopping centre. Should the said 85% occupancy not be achieved over the entire rental period, the rental that the first defendant would be liable for would be reduced proportionally to the percentage of occupancy...
>
> The first defendant was moved to conclude the lease agreement due to the aforementioned representations made by the applicant's representative.
>
> [12] The occupancy rate of the shopping centre dropped below 85% on numerous occasions whilst the first respondent was in occupation of the leased premises...
>
> The applicants have not discounted rent in terms of the current agreement as was agreed and this issue should be rectified.
>
> ...

[17] The fact that the written contract does not correctly record the common intention of the parties upon conclusion thereof can only be attributed to a common error by the parties.'

[7] The opposing affidavit continues to state that if the defendants should be given leave to defend, they will institute a counterclaim for rectification of the written lease and suretyships and reclaim such amount as they may prove that the first defendant has overpaid the plaintiff because the rental was not reduced in accordance with the terms of the agreement as alleged by the defendants.

[8] Rule 32 (3) (b) requires the defendants to set out in their opposing affidavit fully the nature and grounds for their defence and the material facts they rely upon for such defence. The question is whether the defendants have complied with the provisions of this Rule by satisfying the court by affidavit that they have a bona fide defence to the plaintiff's claim.

[9] It is common cause that a defence based on rectification properly raised cannot be resolved in a summary judgment application.

[10] Mr Van Dugteren who appeared on behalf of the plaintiff submitted that the defendants' defence of rectification is in fact not bona fide because the defence is clearly an afterthought. The defendants do not contend that they ever raised the claim that the written document does not reflect the parties' true intention during the more than four years of the currency of the lease. In addition, he submitted, it is extremely unlikely that if it were the true intention

of the parties, that the comprehensive written lease that does reflect changes through deletions of certain standard terms, would not have expressly recorded the 85% clause contended for. Mr van Dugteren submitted that the defence is clearly not advanced honestly. The facts stated are, he submitted equivocal, incomplete and requires the court to speculate and the manner in which the defence is sought to be disclosed is inherently and seriously unconvincing (see Breitenbach v Fiat SA Eiendomsbeperk 1976 (2) SA 226 (T) at 228 B-C).

[11] A party seeking rectification of the document containing the contract between the parties must establish that as a result of an error or mistake, the document does not reflect the common intention of the parties and must show what the real common intention of the parties was and how the document must be rectified in order to reflect the common intention. Usually it is required that the mistake which gave rise to the incorrect recordal of the common intention must be a mistake common to the parties.

[12] Mr Rabie on behalf of the defendants conceded that the affidavit is ineptly worded but submitted that it is not required of the defendants to set out the defence as it would be required in a formal pleading.

[13] In my view the defence as set out in the opposing affidavit misses the necessary allegations of fact to support a claim for rectification. It is not stated that the parties did reach consensus in regard to the term the defendants now rely upon. At most the case made out is that of a

misrepresentation which induced the first defendant to conclude the agreement in the form it did. The nearest that the defendants come to stating that there was a common intention is to be found in paragraph 17 above. This is not an out and out allegation that the parties did form a common intention.

[14] It follows that in my view the defendants have not satisfied the requirements of Rule 32 (3) (b). They did not disclose their defence and material facts upon which it is based with the required particularity and completeness to enable this court to decide whether the affidavit in fact discloses a bona fide defence.

[15] It is trite that the matter does not end there. Rule 32 (5) requires the court to exercise a discretion whether to grant or to refuse summary judgment despite the fact that the defendants have failed to comply with Rule 32 (3) (b). This, it is again trite, is a discretion which must be exercised judicially and not capriciously. It must be founded on facts which appear from all the papers before the court and not upon speculation. Our courts have, however, in numerous cases stated that where on the facts properly before the court there is a doubt as to whether the plaintiff's case is an unanswerable case, generally summary judgment will not be granted. In considering this issue I do not lose sight of the judgment of the SCA in Joob - Joob Investments v Stocks Mavundla Zek 2009 (5) SA (1) SCA at 11H – 12E [par 32] and [33]. In the final analysis a defendant with a triable issue must not be shut out by the granting of summary judgment.

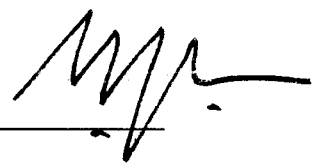
[16] I am not satisfied that in this case the plaintiff has an unanswerable case. The defendants' case is that the true agreement between the parties was that in certain circumstances the full monthly rental would not be due and owing. They state that the occupancy rate often fell below 85%. The plaintiff's particulars of claim and in particular annexure 'B' thereto which sets out the quantification of the plaintiff's claim, demonstrates on a prima facie basis that the plaintiff on its own case has not been charging the first defendant the full monthly rental as set out in the written agreement.

[17] In my view the proper determination of what the parties agreed upon and, pursuant thereto, what amounts are due and owing, if any, by the first defendant and sureties should be done by way of a trial. I am not satisfied that there is no doubt that the defendants would not at a trial be able to answer the plaintiff's claim.

[18] In view of the conclusion to which I have come, it is not necessary to consider the technical defences.

[19] It follows that the following order should be made:

1. Summary judgment is refused.
2. The defendants are granted leave to defend.
3. Costs shall stand over for later determination at the trial.



**W.J. LOUW**

Judge of the High Court