



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: **3156/2023**

In the matter between:

JOHN B BELGROVE PROPERTIES (PTY)LTD

Plaintiff

and

MAMOHATO FRUITS AND VEG AND TRANSPORT (PTY) LTD
(REG NO: 2022/552032/07)

First Defendant

DAVID MOSHOESHOE MOSHOESHOE

Second Defendant

CORAM: PJJ ZIETSMAN AJ

HEARD ON: 9 NOVEMBER 2023

RESERVED ON: 13 NOVEMBER 2023

DELIVERED ON: 14 FEBRUARY 2024

Introduction

- [1] This is an opposed application for summary judgment.
- [2] The Plaintiff's claims against the First Defendant are premised on a written lease agreement for a business premises situated at Sterkspruit.
- [3] The cause of action against the Second Defendant is a written suretyship agreement in terms whereof the Second Defendant bound himself to the Plaintiff as surety and co-principal debtor with the First Defendant.

Nature of the Plaintiff's claims

- [6] Plaintiff instituted three distinct claims against the First Defendant.
- [7] The first claim (Claim A) is for payment of arrear rental of R 66 325,33.
- [8] The second claim (Claim B) is for damages of “*not less than R 90 459,00*”¹ for early cancellation of the lease agreement; and
- [9] The third claim is for payment of “*damages in the amount R 991, 33 per day (VAT excluded) for the period 1 July 2023 until 31 June 2025, alternatively until the premises has been re-let, whichever occurs first*”² as a result of the early cancellation of the lease agreement.
- [10] The Plaintiff alleges that the claims are liquidated amounts of money which falls within the ambit of Rule 32(1)(b).

Nature of the Defences

- [11] The Defendants oppose the application on both technical grounds and the merits.
- [12] Firstly, they contend that the deponent to the founding affidavit does not have locus standi to bring the application on behalf of the Plaintiff, secondly they submit that the Court does not have jurisdiction to hear the application and thirdly they allege that the Plaintiff failed to disclose latent defects in the lease premises which misrepresentations are material and induced the agreement.

Liquidated claim for purposes of Rule 32(1)(b): Claims B and C

- [13] Summary judgment is available if a plaintiff has a claim for a liquidated amount of money³.
- [14] In *Botha v W Swanson & Company (Pty) Ltd* 1968 (2) PH F85 (CPD) Corbett J (as he was then) put the test as follows:

¹ Particulars of claim, para 10, p 7.

² Particulars of claim, para 11, p 8 and Application for summary judgment, para 11, p 73.

³ Uniform Rule 32(1)(b)

'[A] claim cannot be regarded as one for "a liquidated amount in money" unless it is based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a mere matter of calculation.'

- [15] I shall first deal with Claim B and C
- [16] The nature of Claim B is one for past damages as a result of the early cancellation of the lease agreement. It is calculated for the period 1 April 2023 until 30 June 2023, i.e. the period before summons was issued.
- [17] Claim C is also one for damages as a result of the early cancellation but in respect of future damages, calculated for the period 1 July 2023 (the first day of the month following the issuing of the summons) until 31 June 2025, (the last day of the agreed leased term as per the lease agreement), alternatively until the premises has been re-let.
- [18] In paragraph 11.1 of the particulars of claim it is pleaded that the daily rate of R 991,33 (VAT included) in respect of claim C is derived by multiplying the monthly rental of R 30 153,00 by twelve months and then divide it by 365 days to arrive at a daily rate.
- [19] The difficulty with the Plaintiff's calculation is that the agreed monthly rental as per clause 4.1 of the agreement is R 28 317,60 (VAT excluded) per month for the period 1 July 2023 to 30 June 2024 and R 30583,01 (VAT excluded) per month for the period 1 July 2024 to 30 June 2025.
- [20] The basis for the Plaintiff's calculation of its daily rate for future damages is thus not evident from the lease agreement.
- [21] After having heard the matter, I invited the Plaintiff to file supplementary heads of argument on whether summary judgment is competent in respect of claim C.
- [22] The Plaintiff's attempt in paragraph 4.5 of its supplementary heads of argument respectfully does not alleviate the problem highlighted above. It, too, contends that the monthly rental in terms of clause 4.1 of the agreement is R 30 153,00 per month. In addition, it would appear that the Plaintiff's calculation seems to suggest that the daily rate of R 991,33 is excluding of value added tax whereas the particulars of claim speaks of a daily rate of R 991,33 inclusive of value added tax.
- [23] In addition to these inconsistencies there are two further issues of concern.
- [24] The first relates to the nature of Claim C.

- [25] Plaintiff' alleged that the Defendant has breached the agreement during February 2023 and has “*since vacated the leased premises*”⁴ but the papers are silent as to exactly when the premises were vacated.
- [26] Furthermore, it is the Plaintiff's case that it terminated the lease when it issued the summons – i.e. 21 July 2023.
- [27] Claim C is thus a claim for future damages arising from the early cancellation of the lease however, it is noteworthy that the lease agreement does not provide for the payment of agreed liquidated damages in respect of the early termination of the agreement.
- [28] I accept, in the absence of evidence to the contrary, that the rental agreed in the lease agreement represents the liquidated value of the lease premises but what considers me is the period for which damages are claimed.
- [29] *Hyprop Investments Ltd and Another v NCS Carriers and Forwarding CC and Another*,⁵ is a case where the applicant in motion proceedings claimed damages against their former tenant (and the tenant's surety) for 'holding over', i.e. remaining in occupation of the leased premises after cancellation of the lease concerned. As to the nature of a claim for damages arising from early cancellation the Full Court held that:

[36] Firstly: continued occupation of the premises is irrelevant to a claim for damages arising from cancelling a lease due to the tenant's breach.

[37] In such a case the measure of damages is the rent for the unexpired portion of the lease post-cancellation (and suitably discounted if the full period has not matured by date of judgment), less the amount actually received from subsequently reletting the premises to a new tenant, or which ought to have been received had the landlord taken reasonable steps to mitigate its damages (see *Hazis v Transvaal and Delagoa Bay Investment Co Ltd* 1939 AD 372 at 388; *Desmond Isaacs Agencies (Pty) Ltd v Contemporary Displays* 1971 (3) SA 286 (T) at 290F – H; and *Soar h/a Rebuilds for Africa v JC Motors en 'n Ander* 1992 (4) SA 127 (A) at 135A – F).

- [30] In *casu*, the full period of the lease has not matured at date of this judgment and particulars of claim is silent on whether the Plaintiff was able to re-let the premises since the First Defendant vacated it or whether the Plaintiff has taken reasonable steps to mitigate its damages.

⁴ Particulars of claim, para 5, p 6; Founding affidavit para 18.3, p 79

⁵ 2013 (4) SA 607 (GSJ) at

- [31] I am thus not convinced that Claim C constitutes a liquidated damages claim within the ambit of Rule 32(1)(b).
- [32] I am also not convinced that the Plaintiff has made out a case in respect of Claim B. It is again important to have regard to the nature of the claim, as formulated in the particulars of claim. In this regard the Plaintiff pleads in paragraph 10 of the Particulars of Claim that:
- “As a result of the early cancellation of the Lease Agreement plaintiff is suffering damages in the amount of not less than R 90 459,00 (VAT included) for the period from 1 April 2023 until 30 June 2023”*
- [33] However, it is the Plaintiff’s case that the agreement was only cancelled when the particulars of claim was issued, i.e. on 21 June 2023.
- [34] Claim B, as pleaded, is thus a claim for damages as a result of the early cancellation of the lease agreement in respect of a period during which the agreement had not been cancelled. Such a claim cannot be sustained.

Claim A

- [35] As for Claim A, the First Defendant essentially raises a defence of misrepresentation of latent defects which induced the First Defendant to conclude the agreement with the Plaintiff.
- [36] In essence, the First Defendant alleges that it never inspected the premises before the lease was concluded and that the Plaintiff represented to the First Defendant that the premises is suited for the First Defendant’s business needs but it concealed the fact that the roof was leaking.
- [37] In addition, the First Defendant pleads that the parties concluded an agreement (presumably a verbal agreement) to the effect that the First Defendant would repair the premises and that the Plaintiff would reimburse the First Defendant.
- [38] The pleaded defence not only stands in direct contrast with clause 15 of the lease agreement, which provides that the First Defendant inspected the premises and acknowledges that it is fit for purpose, and clause 14.2 which provides that no agreement at variance with the terms of the lease agreement shall be binding upon the parties unless reduced to writing under the hands of both parties, but the plea and answering affidavit lacks the

necessary level of detail and clarity expected for disclosing of a *bona fide* defence to Claim A.

First point *in limine*

[39] The first point *in limine*, namely that the deponent lacks the necessary locus standi to institute the application, and the Defendants' subsequent Rule 7(1) notice (filed two days before the application was heard) was, to my mind, satisfactorily addressed through the Plaintiff's resolution to institute legal proceedings and the special power of attorney, filed on 8 November 2023.

Second point *in limine*

[40] The second point *in limine*, as I understand it, is that this Court does not have jurisdiction to adjudicate the matter because the parties agreed in clause 16.1 and 16.2 of the lease agreement to institute proceedings in the East London High Court or the Magistrate Court of East London.

[41] The argument is thus that the parties contractually agreed to oust this Court with jurisdiction.

[42] Such a defence cannot stand in light of the Defendants' admissions in paragraph 1 of the plea read with paragraphs 1.1 and 1.2 of the particulars of claim, namely that the Defendants are domiciled within the geographical jurisdictional area of this Court, which brings this matter within the realm of section 21 of the Superior Courts Act, 2013.

[43] In any event, an agreement contrary to section 21 of the Superior Courts Act, 2013 is unlawful, unenforceable⁶ and *ultra vires*.

Costs of the summary judgment application

[44] I am of the view that given the partial success on both sides, each party should be liable for its own costs of the summary judgment application.

Order

⁶ Bafana Finance Mabopane v Makwakwa and Another 2006 (4) SA 581 (SCA) at par 21

[45] I make the following order:

45.1 Summary Judgment is granted in respect of Claim A.

45.2 The First and Second Defendant is liable jointly and severally, the one paying the other to be absolved, for:

45.2.1 Payment to the Plaintiff of R 66 326,33

45.2.2 Interest on R 66 326,33 at the rate of 7,75% per *annum a tempora morae* to date of final payment.

45.3 Summary judgment in respect of Claim B and Claim C is dismissed and leave is granted to the First- and Second Defendant to enter into the principal action.

45.4 Each party is liable for its own costs of the summary judgment application.

45.5 The costs of the action in relation to Claim A stands over to be adjudicated in the principal action.

PJJ ZIETSMAN AJ

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