

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: ***29th July 2021*** Signature:

CASE NO: 41129/2019

DATE: 29th JULY 2021

In the matter between:

CHARISMA PROPERTIES (PTY) LIMITED

Plaintiff

and

WOODSTAR & CO (PTY) LIMITED

Defendant

Coram: Adams J

Heard: 20 July 2021 – This matter was disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: 29 July 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, being uploaded to the CaseLines system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 12:30 on 29 July 2021.

Summary: Application for summary judgment – defendant denies that it entered into a monthly tenancy with the plaintiff – it alleges that the lease was in fact concluded with a related sole proprietorship with a similar name – plaintiff contended that defendant’s fanciful defence should be rejected as far-fetched – factual dispute between the parties, which the court is not required to decide or to determine whether or not there is a balance of probabilities in favour of the one party – Amended Uniform Rules of Court 32(2)(b) and 32(3)(b) discussed – the Court was satisfied by the defendant’s affidavit that it has a *bona fide* defence to the action – summary judgment refused.

ORDER

- (1) The plaintiff’s application for summary judgment is dismissed.
 - (2) The defendant is granted leave to continue defending the action against it by the plaintiff.
 - (3) The costs of the application for summary judgment shall be in the cause of the main action.
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JUDGMENT

Adams J:

[1] I have before me an opposed application by the plaintiff for summary judgment against the defendant, whose only defence to the plaintiff’s claim is simply one of ‘mistaken identity’.

[2] The plaintiff’s cause of action against the defendant is based on a monthly tenancy in respect of commercial premises situated in Kew, Gauteng. The lease agreement between the parties, according to the particulars of plaintiff’s claim, has never been reduced to writing. It is the case of the plaintiff that previously the monthly tenancy was between the plaintiff and a Mr Hikmet Acar trading as Woodstar. The lessee initially was Mr Acar who did business as a sole

proprietor under the name and style of 'Woodstar'. This lease or monthly tenancy, so it is alleged by the plaintiff in its particulars of claim, was taken over by and assigned to the defendant on its incorporation during 2018.

[3] In this action the plaintiff sues the defendant for arrear rental and for an eviction order on the basis that during 2019 the defendant, in breach of the monthly tenancy, had fallen into arrears with its monthly instalments. As and at November 2019 the arrear rental amounted in total to R594 757.77. In any event, during June 2019, so the plaintiff avers, the monthly tenancy with the defendant was cancelled because the defendant was not prepared to commit itself to a written lease agreement.

[4] The defence raised by the defendant in its plea is simply that it (the defendant) is not the lessee in terms of the monthly tenancy, as alleged by the plaintiff. It is in fact Mr Acar, who trades as a sole proprietorship under the name and style of 'Woodstar', who is and has always been the lessee and the occupier of the property. Mr Acar, who incidentally is the sole director and shareholder of the defendant, admits the existence of the defendant and that it was incorporated during 2018. However, he denies in the strongest possible terms that the defendant took over the lease from his firm, Woodstar, or that the defendant is the present occupier of the premises in question. The defendant, so Mr Acar and the defendant maintain, has been wrongly cited in these proceedings.

[5] In its affidavit resisting summary judgment, the defendant repeats this defence to the plaintiff's claim. The defendant does not deal in any way with any of the other allegations made in the particulars of plaintiff's claim. So, for example, Mr Acar does not address the issue whether or not the occupier of the premises is in arrears with his monthly instalments or whether the monthly tenancy has been cancelled. So, the way I see it, the defendant stands or falls by this one defence raised by it.

[6] Uniform Rule of Court 32(3)(b) requires the defendant to satisfy the court by affidavit that he has a *bona fide* defence to the plaintiff's claim. As pointed out by *Erasmus: Superior Court Practice, Volume 2*, 'satisfy' does not mean

'prove'. What the rule requires is that the defendant sets out in his affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. In this matter, the defendant's defence is based upon facts, in the sense that the defendant disputes the very material fact alleged by the plaintiff in its particulars of claim, namely that the defendant took over from a sole proprietorship the lease agreement. In these circumstances, the court is not required to decide these factual issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. I am satisfied that the defendant in resisting the application for summary judgment has set out facts which constitute a defence to the plaintiff's claim. On those facts, the plaintiff, in a manner of speaking, is 'barking up the wrong tree'. And that is a solid defence.

[7] The new Subrule 32(2)(b), introduced by the Amendment to the Rules which came into effect on the 1st of July 2019, requires the plaintiff, in his affidavit in support the summary judgment application, also to explain briefly why the defence as pleaded by the defendant does not raise any issue for trial. The plaintiff complies with this requirement by stating the following in his supporting affirmation: -

- '11. The Respondent / Defendant denies that its business was previously a sole proprietorship trading as Woodstar and represented by Acar. The Respondent / Defendant further denies that it occupies the rented property described or that the Respondent / Defendant has any agreement with the Applicant / Plaintiff. The Respondent pleads further that its business is separate and distinct from the business of Acar. The Respondent / Defendant further pleads that Acar rents the property from the Applicant / Plaintiff.
- 11.1 The allegations herein are spurious and opportunistic; the Respondent / Defendant attaches no document whatsoever in support of these allegations. The Plea is nothing other than a bare denial.
- 11.2 The Respondents does not raise a triable issue and it shows that the Respondent has no bona tide defence to the Applicant's / Plaintiff's Claim. What is significant is the Respondent / Defendant does not deny it is in occupation or even on its version in the plea that the business is on the

premises and utilizing the premises. There is no defence of a triable nature raised herein.

11.3 In an affidavit deposed to under Magistrates Court case number 1327/2019 in the Alexandra Magistrates Court in 2019, the Defendant as represented by one Acar Hikmet stated that both he and the Defendant were occupying the premises and that ostensibly he traded as a sole proprietor under the name of Woodstar, that it was incorporated in 2018 and that it too trades from the premises, but as a separate entity. This is simply disingenuous and far-fetched and is not a defence to the fact that whichever entity is relied upon, neither has paid its rentals for months and notice has been given for them to vacate. Neither Hikmet trading as Woodstar, nor Woodstar (Pty) Ltd are in lawful occupation and neither has paid its rentals for years, either way, neither entity, even if one were to accept the defence pleaded which is not admitted as having any validity are entitled to remain in occupation either way. A copy of that affidavit will be made available to the court if the Defendant in its Resisting affidavit disputes that such admissions were made.'

[8] The plaintiff's stance in that regard is, in my view, misguided. For starters, I cannot agree with the plaintiff's submission that the version of the defendant in its plea and in its affidavit resisting summary judgment, is far-fetched. On the contrary, all things considered, defendant's version is not far-fetched at all. It is true, as contended by the defendant, that at no stage during the events preceding the institution of this action was reference ever made to the defendant. So, for example, the invoices and the statements in respect of the rental payments were all addressed to 'Woodstar', as were the final demand and cancellation notice from the plaintiff's attorneys dated 28 June 2019. It is very probable, as submitted by the defendant, that the plaintiff assumed that the defendant had taken over the lease when it was incorporated during 2018. There is however not one iota of evidence in support of that assumption.

[9] In these circumstances, there is a genuine prospect that the defendant will be able to demonstrate at trial that Woodstar, the sole proprietorship, and not it, the defendant, is the lessee in terms of the monthly tenancy on which the

plaintiff's cause of action is based. If this can be demonstrated by the defendant, then the plaintiff's claim will not succeed.

[10] For all of these reasons, I am, in the words of the rule, satisfied by the defendant's affidavit that it has a *bona fide* defence to the action. The affidavit does disclose fully the nature and grounds of the defence and the material facts relied upon therefor. The defendant is accordingly entitled to leave to defend.

Order

[11] Accordingly, I make the following order: -

- (1) The plaintiff's application for summary judgment is dismissed.
- (2) The defendant is granted leave to continue defending the action against it by the plaintiff.
- (3) The costs of the application for summary judgment shall be in the cause of the main action.

L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON: 21st July 2021 – The matter was disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

JUDGMENT DATE: 29th July 2021 – judgment handed down electronically.

FOR THE PLAINTIFF: Mr O L Mbunye

INSTRUCTED BY: Larry Marks Attorneys, Johannesburg

FOR THE DEFENDANT: Mr Hikmet Acar

INSTRUCTED BY: The Defendant's Sole Director