

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

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

22 October 2021.

DATE

SIGNATURE

In the matter between:

Case No: 2020/19245

TOWER PROPERTY FUND LIMITED

Plaintiff

and

UNITOOLS CC
(Registration No. 2001/025457/23)

First Defendant

YOONNUS AHMED HATHURANI
(ID No. 5503235066089)

Second Defendant

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time of delivery is deemed to be 22 October 2021 at 10h00.

JUDGMENT

GOTZ AJ**INTRODUCTION**

- [1] The Plaintiff, Tower Property Fund Limited (“**Tower**”), seeks summary judgment against the Defendants for the amount of R94 459.13, plus interest and costs.
- [2] The dispute arises from the failure by the First Defendant, Unitools CC (“**Unitools**”), to pay rental and related charges allegedly owing to Tower in terms of a lease.
- [3] The lease was concluded between Tower and the Unitools on 12 December 2018. Unitools was duly represented in the conclusion of the agreement by the Second Defendant. At the time, the Second Defendant also bound himself as guarantor and co-principal debtor for amounts owed by Unitools to Tower.
- [4] In terms of the lease, Tower let commercial premises, being an office in a building situated in Sturdee Avenue, Rosebank, Gauteng, to Unitools.
- [5] It was agreed that the lease would commence on 1 February 2019 and terminate on 31 May 2022.

- [6] The agreement provided, in clause 12 of the Schedule to the General Conditions of Lease, that the “Sole Permitted Usage” of the premises was for “Jewellery manufacturing and Retail”. It is common cause that it was used for that purpose from 1 February 2019 until at least 23 January 2020 when a robbery occurred at the premises. During the robbery, the Defendants allege, jewellery, cash, as well as precious metals and stones used to manufacture jewellery, belonging to Unitools, were stolen. The premises were also badly damaged.
- [7] Unitools alleges that it lost stock and equipment to the value of some R12 258 000.00 in the robbery. It also claims that it was unable to use the premises for the purpose for which they were leased after 23 January 2020. It is common cause that Unitools ceased operations after the robbery, and paragraph 12 of the plea alleges that Unitools moved out of the premises on 30 June 2020. The Defendants also plead that Unitools cancelled the lease agreement on that date.
- [8] Tower’s action is founded on the lease. It has formulated two claims. Claim 1 is for the unpaid monthly rental, operating costs, rates and parking rental, that Tower says remains payable by Unitools for the period February 2021 up to, and including, July 2021. It appears that Unitools paid certain amounts to Tower in February and March 2021, its last payment being on 30 March 2021. It then stopped making payments. On Tower’s computation, which is set out in Annexure B to the

particulars of claim, Unitools still owes it R94 459.13 for the period.

- [9] Claim 2 is for damages (positive interesse) in the amount of R281 113.50 that Tower alleges it suffered as a result of the early cancellation of the lease agreement. I need not concern myself with the merits of this claim. Given that Claim 2 is for an unliquidated amount, it is not the subject of the summary judgment application.

TOWER'S CLAIM 1 IS FOR A LIQUIDATED AMOUNT

- [10] Tower prays for summary judgment against the Defendants, jointly and severally, in the following terms:

“CLAIM 1

1. Payment of the amount of R94,459.13;
2. Interest on the above at the rate of 9.25% per annum compounded monthly from 2 July 2020 to date of payment;
3. Cost of suit on scale of attorney and own client;”

- [11] The right to occupation of the premises by Unitools was based upon the written lease agreement (Annexure A to the particulars of claim) concluded between the parties on 12 December 2018. Tower alleges that Unitools has breached the lease agreement by failing to pay the rental and related charges under the lease.

[12] Annexure B to Tower's particulars of claim shows that Unitools' account was in credit until 1 February 2020.¹ Although Unitools made payments to Tower on 13 February, 17 March and 30 March 2021, it ultimately fell into arrears around that time. The amount of R94 459.13 includes certain charges for July 2020. From the accumulated arrears allegedly owed by Unitools on 2 July 2020, Tower has deducted a deposit amount of R78 787.72 (referred to as "security"). All of these calculations are clearly set out in Annexure B to the particulars of claim.²

[13] I am satisfied that Tower's claim is for a liquidated amount.

THE DEFENDANTS' DEFENCES

[14] The Defendants admit that: Unitools concluded the lease on the terms as set out in the written agreement, that the Second Defendant bound himself as guarantor; that Unitools has not made payment of the amount of R94 459,13; and that Unitools has ceased operations and vacated the premises.

[15] They have, however, raised several defences to Claim 1. Each of them has its foundation in the robbery that occurred in January 2020.

¹ On 30 January 2020, Unitools' account reflected a credit of R22 802.63.

² The Defendants do not appear to dispute them.

- [16] The Defendants' plea and their counterclaim describe the robbery in some detail. I will briefly summarise the allegations.
- [17] It is alleged that at approximately 23h00 on 23 January 2020, employees of a security company known as DDL Security Services (Pty) Ltd trading as 24/7 Security ("**DDL Security**"), wearing its uniforms and driving a vehicle belonging to it and bearing its name and logo forcefully entered the property on which the leased premises are situated.
- [18] Tower had contracted with a security company known as Sirius Risk Management (Pty) Ltd ("**Sirius**") to provide security services at the property. The Defendants say that Sirius was contracted to *inter alia* provide security guards to control access to the property, as well as to patrol it, and to ensure that a security vehicle from central dispatch attended at the property on a regular basis to check on the security guards.
- [19] The employees of Sirius who were on duty on the evening of 23 January 2020 failed to follow proper access control protocols, opened the metal gates to the property and allowed the vehicle with the employees of DDL Security through the gates and onto the property when they should not have done so. This gave the employees of DDL Security the opportunity to tie up the Sirius guards and break into and rob the leased premises.

[20] The DDL Security employees broke through the windows and the walls of the leased premises in such a way and in such places that indicated that they had knowledge of the placement of the burglar bars, alarm system and the Unitools' safe. They bypassed the alarm and dismantled certain pepper spray devices that had been installed by Unitools in the leased premises and put them in another office. They then used special metal cutting tools to cut open Unitools' metal safe, indicating that they knew of and came prepared for such a safe.

[21] The Defendants also allege that Sirius failed to ensure that a patrol car was dispatched on a regular basis throughout the evening, as was its official or regular practice, to drive past the leased premises and ensure that the security guards it had posted at the leased premises were not immobilized. If it had done so, Sirius would have discovered that its security guards were tied up and would have been able to interrupt the robbery in progress, saving some or all of Tower's jewellery from being stolen.

[22] Thus, the Defendants allege that the robbery was executed in such a manner that indicated inside knowledge of what security measures were in place and came specially prepared to deal with them.

[23] They appear to attribute this inside knowledge to a Mr Thamisango Nkomo ("**Nkomo**"), who they allege was employed by Sirius as a site

manager and deployed to manage the security at the property. They allege, *inter alia*, that Nkomo would inspect the Unitools' leased premises from time to time on unannounced visits, have meetings with Unitools about the security of the premises and supervise the Sirius security guards assigned to the property. In particular, the Defendants allege that Nkomo was the only one of the staff members of Sirius who was aware: that Unitools had a walk-in safe hidden in the back of its offices; of the layout and details of the burglar bars and the hidden alarm system that Unitools had installed at the premises; and that Unitools had installed pepper-spray devices in its offices near the walk-in safe.

[24] The Defendants allege further that Nkomo has a family member who is or was employed by DDL Security on or around the date on which the robbery took place. Nkomo is also alleged to have absconded from his job on or around the day of the robbery and has not been seen since by Tower, the Defendants or Sirius.

[25] Against this backdrop, the Defendants allege that they are not liable for unpaid rental after 23 January 2020. They have denied that any money is due to Tower after the date of the robbery, and allege further that Tower breached the lease. They have also formulated counterclaims in delict against Tower, Sirius and DDL Security.

[26] Properly construed, the Defendants seek to resist Tower's summary

judgment application on four grounds.

[27] First, the Defendants plead that the lease falls to be set aside as a result of a misrepresentation made by Tower before the conclusion of the agreement. Tower's representation, which the Defendants say was false, related to the state of the security at the property.

[28] The Defendants' second defence is that Unitools was denied beneficial occupation of the premises after and as a consequence of the robbery, and is therefore not liable for the amounts claimed by way of summary judgment. The defence is articulated in paragraph 11.2 of the Defendants' heads of argument as follows: "*following the robbery the defendants did not have beneficial occupation of the premises as it was discovered that the security was not sufficient for the type of business the defendants ran (jewellery manufacturing and sales)*". On this basis, the Defendants allege that they are entitled to withhold rental after January 2020.

[29] Third, the Defendants have pleaded that Tower breached the lease by failing to provide premises fit for the purpose for which they were let, being a jewellery business.

[30] Fourth, the Defendants rely on their delictual counterclaim against Tower. In summary, the Defendants allege that Tower had a legal duty

to ensure that the people it hired to perform security services did not cause damage to the Defendants either by negligently performing their jobs or by deliberately causing loss (by planning and carrying out the robbery) as they allegedly did in this case. Tower, it is claimed, failed in this legal duty (thus acting wrongfully), and acted negligently, which caused damage to the Defendants.

SUMMARY JUDGMENTS GENERALLY

[31] Due to the conclusion to which I have come, each of these defences needs to be carefully considered.

[32] The legal principles governing summary judgment proceedings are well-established. In *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A–D, Corbett JA outlined these principles as follows:

“[One] of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant had “fully” disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a

defence which is both *bona fide* and good in law. If satisfied on these matters the Court must refuse summary judgment either wholly or in part, as the case may be. The word “fully”, as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence.”

[33] In *Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) it was held:

“[31] ... The summary judgment procedure was not intended to “shut a defendant out from defending”, unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.

[32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful applications in our courts, summary judgment proceedings can hardly continue to be described as extraordinary.”

[34] Notwithstanding this, summary judgment proceedings are still routinely described as extraordinary.³ Whether or not the label is appropriate,

³ See for example, recently, *Freestone Property Investment (Pty) Ltd vs Remake Consultants CC and Another* (2020/29927) [2021] ZAGPJHC 150 (25 August 2021) (per Gilbert AJ) at para 46.

however, it cannot be denied that courts are, and should be, extremely loath to grant summary judgment. They do so only if they are satisfied that the plaintiff has an unanswerable case. Summary judgment is a remedy that permits a judgment to be given without trial. Its grant closes the doors of the court to the defendant.⁴ That can only be done if there is no doubt that the plaintiff has a case that is unanswerable.⁵

[35] The court has an overriding discretion.⁶ What is meant by this is if the court has any doubt as to whether the plaintiff's case is unanswerable at trial such doubt should be exercised in favour of the defendant and summary judgment should be refused. Thus, “[*t*]he grant of the remedy is based on the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus and bad in law”.⁷

[36] The test is whether on the set of facts before it, the court is able to conclude that a defence raised by the defendant is bogus or is bad in law. The defendant is not required to give a complete account of the facts, in the sense of giving a preview of all the evidence. Affidavits in summary judgment proceedings are treated with a certain degree of indulgence, and even a tersely stated defence may be sufficient indication of a *bona fide* defence. Nevertheless, the defence must not be averred in a way

⁴ See *Evelyn Haddon & Co Ltd v Leojanko (Pty) Ltd* SA 662 OPD at 666A.

⁵ *Breitenbrach v Fiat S.A. (EDMS) Bpk* 1976 (2) SA 226 (N) at 229.

⁶ *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA) at paras 10 and 11

⁷ *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A) at 423G

which appears to be needlessly bald, vague or sketchy.

[37] What falls to be determined by this court is whether, on the facts alleged by Tower in its particulars of claim, it should grant summary judgment on the basis that claim is unanswerable or unimpeachable or whether the Defendants' plea, read with their affidavit opposing summary judgment, disclose such a *bona fide* defence.

[38] I turn to consider the defences raised.

THE FIRST DEFENCE – MISREPRESENTATION

[39] In essence, the Defendants have alleged that when Tower showed the leased premises to Unitools, before the proposed lease agreement was concluded, Tower had been informed that Unitools intended to use the premises for jewellery manufacturing and retail and that it was necessary that sufficient security was in place. Tower had indicated that sufficient security was indeed in place. Its representative is alleged to have pointed to several security cameras placed inside and outside the building as well as to have stated that a security company employed by Tower was continuously on site, regularly patrolling the premises as well as controlling access to the property.

- [40] The Defendants allege that such representations made by Tower gave Unitools an impression of sufficient security on which it relied to its detriment. Unitools alleges that it would not have entered into the agreement of lease but for the representations made by Tower as regards the security.⁸
- [41] The Defendants then allege that “*the premises were not in fact fit for the purpose for which they were let as the security cameras were not working during the relevant periods and the security company, employed by the Applicant/Plaintiff, failed to properly guard the leased premises.*”⁹
- [42] In the sequence of the Defendants’ allegations, this appears, and must in my view be read, as an averment that representations made by Tower, before the lease was concluded, ultimately proved to be false. They are alleged to be false, first, because the security cameras were not working during the relevant periods and, second, because Sirius failed to properly guard the leased premises.
- [43] In order to found a cause of action for the rescission of a contract for misrepresentation, the representation must relate to a matter of present or past fact.¹⁰ Put differently, they cannot relate to a set of facts which might pertain in the future. There are of course circumstances in which

⁸ Affidavit Opposing Summary Judgment, para 11.1.

⁹ Affidavit Opposing Summary Judgment, para 11.3.

¹⁰ *Feinstein v Niggli and Another* 1981 (2) SA 684 (A) at 695B–C.

the expression of an *opinion* as to a future state of affairs may, by implication, constitute a representation of a present fact. For example, a statement of opinion by a party who best knows the facts may involve a statement of a material (present) fact, because the representor is implicitly stating that there are facts that justify the opinion expressed.¹¹ But even in these cases, it must be borne in mind that the (mis)representation must relate to the facts as they purportedly existed at the time of the statement. In this case, the Defendants seek to rely upon a representation that the security measures that had been put in place by Tower at the leased premises would properly function throughout the term of the lease, such that Unitools could use the premises for jewellery manufacturing and retail. That, in my view, constitutes a representation that relates to what the facts might be in the future. Neither the fact that the security cameras may not have been properly functioning some 13 months later in January 2020, nor the fact that Sirius may have failed to properly guard the leased premises on the day of the robbery, constitute facts about which Tower could have made a ‘misrepresentation’ before the lease was concluded on 12 December 2018.

[44] There is a further difficulty with the Defendants’ first defence. It is that the lease agreement appears to exclude a cause of action based on any representation. Clause 38.1 of the lease records that: “*Each of the Parties hereby warrants to and in favour of the other that: ... [38.1.8] it*

¹¹ Supra, at 695C–H.

is not relying upon any statement or representation by or on behalf of any other Party, except those expressly set forth in this Lease.” Clause 48.1 says that *“This Lease contains all the terms and conditions of the Lease between the Parties. The Parties acknowledge that there are no understandings, representations or terms between them in regard to the letting of the Premises other than those set out herein”*.

- [45] In these circumstances, and this was common cause at the hearing of this application, the Defendants can only rely upon a misrepresentation that was fraudulent.¹² In the *Wells v SA Alumenite Co* case, Wells, the defendant in the magistrate's court, when sued for the purchase price of a lighting plant purchased by him from the plaintiff, raised the defence that he had been induced to enter into the contract by misrepresentations made by a salesman who, acting on behalf of the plaintiff, had negotiated the sale. Wells claimed in reconviction for an order rescinding the contract on the ground of the alleged misrepresentations. However, the order form, signed by Wells, contained the following condition: *“I hereby acknowledge that I have signed this order irrespective of any representations made to me by any of your representatives and same is not subject to cancellation by me”*. The Appellate Division held that in the absence of any allegation that the representations made were fraudulent, Wells was bound by the condition in the order. His plea, therefore, was found to have disclosed no defence.

¹² *Wells v SA Alumenite Co* 1927 (AD) 69.

[46] While the Defendants' heads of argument contain a number of assertions that the representations in issue were fraudulent, neither the Defendants plea, nor their affidavit opposing summary judgment make such an allegation. They also do not contain facts from which an inference could be drawn that Tower had knowledge that the representations were false.¹³ It is not enough to merely allege that a representation was false. An allegation as to the mental element must also be made.¹⁴ Such an allegation is absent from both the Defendants' plea and their affidavit opposing summary judgment.

[47] Accordingly, I do not think there is merit in the Defendants' first defence.

THE SECOND DEFENCE – MISREPRESENTATION

[48] I agree with Tower that the Defendants' second defence is to be characterised as the *exceptio non adimpleti contractus*.¹⁵

[49] A lease of immovable property is, generally a reciprocal agreement between one party (the lessor) and another party (the lessee) in terms of

¹³ *Ruto Flower Mills (Pty) Limited Morlates* 1957 (3) SA 113 (T)

¹⁴ See *Breedt v Elsie Motors (Edms) Beperk* 1963 (3) SA 525 (A). I have considered the Defendants' suggestion in its heads of argument that it was for Tower to deny any fraudulent misrepresentation in its affidavit in support of its summary judgment application. I do not think this is correct.

¹⁵ As envisaged in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A).

which the lessor agrees to give the lessee the temporary use and enjoyment of the property in return for the payment of rent. The temporary use and enjoyment of the leased property is an essential ingredient of a lease.¹⁶ Under the *exceptio*, where a lessee is deprived of or disturbed in the use or enjoyment of leased property to which it is entitled in terms of the lease, it can in appropriate circumstances be relieved of the obligation to pay rental, either in whole or in part. The Court may abate the rental due *pro rata* to the lessee's own reduced enjoyment of the property. This is true not only where the interference with the lessee's enjoyment of the leased property is the result of *vis major* or *casus fortuitus* but also where it is due to the lessor's breach of the contract, for example because the leased property is not fit for the purpose for which it was leased or because the performance rendered by the lessor is incomplete or partial. The lessee would be entirely absolved from the obligation to pay rental if it were deprived of or did not receive any usage whatsoever.¹⁷

[50] The Defendants have invoked these principles and claim that Unitools was justified in withholding the rental claimed, either in whole or in part, following the robbery. The claim appears to be that the interference with Unitools' enjoyment of the leased property was the result of *vis major* or *casus fortuitus* (constituted by the robbery). It is not that Tower failed to

¹⁶ See AJ Kerr, *The Law of Sale and Lease*, 3ed (2004), p 245; and WE Cooper, *Landlord and Tenant*, 2ed (1994), p 2.

¹⁷ See *Thompson v Scholtz* 1999 (1) SA 232 (SCA) at 247 A–C.

perform its obligation under the lease agreement, i.e., to provide premises that were fit for the purposes for which they were leased, being “Jewellery manufacturing and Retail”. That appears to be the basis of the Defendants’ third defence. Even if I am wrong in this characterisation, however, I reach the same conclusion in the light of the cases referred to below.

[51] I am bound by a long line of authority¹⁸ culminating in *Baynes Fashions (Pty) Ltd t/a Gerani v Hyprop Investments (Pty) Ltd*¹⁹ as well as *Tudor Hotel and Brasserie and Bar (Pty) Limited v Hence Trade 15 (Pty) Limited*²⁰ which clearly establishes that the *exceptio* is not available to the Defendants in the present circumstances.

[52] In *Baynes Fashions* a dispute arose about the entitlement of a lessee to withhold the payment of rental, or claim for losses to a business, as a result of the landlord having interfered with the lessee's beneficial occupation by effecting building works on the property on which the leased premises were located. The SCA said that the common law principle of reciprocity, which imposes reciprocal duties on the part of the lessor and lessee and which underpins the *exceptio*, would ordinarily entitle the lessee to claim a reduction of rent from the lessor for the

¹⁸ Commencing with *Arnold v Viljoen* 1954 (3) SA 322 (C).

¹⁹ 2005 JDR 1382 (SCA)

²⁰ [2017] JOL 38843 (SCA); (793/2016) [2017] ZASCA 111 (20 September 2017)

deprivation of or interference with the former's beneficial occupation. It found, however, that a contrary intention appeared clearly from the terms of the lease. It held:

“[5] Clause 6.2 provides as follows:

'All rentals payable by the TENANT in terms hereof shall be paid monthly in advance without any deduction or set off...'

Clause 25 grants to the landlord the right to repair and add to buildings. Clause 25.1 and 25.4 read as follows:

'25.1 The LANDLORD shall be entitled at any and all times during the currency of this Lease to effect any such repairs, alterations, improvements and/or additions to the premises or the buildings and/or erect such further buildings on the property as the LANDLORD in its discretion may decide to carry out or erect and for any such purpose to erect or cause to be erected scaffolding, hoardings, an/or other building equipment and also such devices as may be required by law or which the architects may certify to be reasonably necessary for the protection of any person against injury arising out of the building operations, in such manner as may be reasonably necessary for the purpose of any of the works aforesaid, in, at, near or in front of the premises.

...

25.4 The TENANT shall have no claim against the LANDLORD for compensation, damages, or otherwise by reason of any interference with his tenancy or his beneficial occupation of the premises occasioned by any ... repairs or building works as herein before contemplated...'

[6] As clauses 6.2 and 25.4 have the effect of excluding remedies that a tenant has under the common law, they must be restrictively interpreted. Interpreted thus, it is contended on behalf of the appellants that the words 'or otherwise' in clause 25.4 must be construed to relate to a specie of damages claimed by a lessee from a lessor, and not to the withholding of rent. There is no merit in this contention. The words 'or otherwise' in this context can refer only to a claim other than one for

compensation or damages. A claim for remission of rent is patently a claim other than one for compensation or damages. Clause 25.4 in express terms therefore excludes a claim for the remission of rent.

[7] With respect to clause 6.2 it is contended on behalf of the appellants that the word 'payable' confers a right on the lessor to claim payment only when it has performed in terms of the contract by granting beneficial occupation to the lessee. As the respondent has failed to grant beneficial occupation to the first appellant, thereby failing to perform in terms of the contract, so the argument proceeded, the rent was not 'payable'.

[8] There is no warrant for this construction. The clause imposes an obligation on the lessee to make payment of rent 'in advance'. This means that the payment of rent by the lessee is not contingent upon prior performance by the lessor. In any event, the first appellant continues to trade and therefore does have beneficial occupation of the premises. The appellants' real complaint is that the renovations effected by the respondent have interfered with the first appellant's right to occupy the premises beneficially in a manner that has led to the first appellant suffering a substantial loss to its monthly turnover. This loss, contends the appellants, entitles the first appellant to deduct the rent which is 'payable' to the respondent. The simple answer to this complaint is that clause 25.4 in express terms, precludes the reduction of rent in these circumstances.

[9] It can hardly be clearer that clauses 6.2 and 25.4 are intended to prevent any deduction of rent by the lessee where the renovations that are undertaken by the landlord in terms of clause 25.1 interferes with the lessee's right of beneficial occupation. The appellants signed the agreement that contained these clauses and cannot now seek to extricate themselves from its consequences.”

[53] Similarly, in *Tudor Hotel*,²¹ the SCA, after referring to *Baynes Fashions*, found that a lessee was not entitled to withhold rental on the basis of the *exceptio* because the lease made it clear that the obligations were not

²¹ *Supra*.

reciprocal. It held:

“[11] The agreement that the rent was payable ‘monthly in advance’ had the effect of altering the usual position, that in the absence of contractual provisions, rent is payable in arrear at the end of each period in the case of a periodical lease, after the lessor has fulfilled his obligation. The lease agreement therefore altered the reciprocal nature of the obligations of the lessor and the lessee. The obligation of the lessee to make payment of the rent was no longer reciprocal to the obligation of the lessor to grant beneficial occupation of the premises to the lessee.

[12] The application of the principle of reciprocity to contracts is a matter of interpretation. It has to be determined whether the obligations are contractually so closely linked that the principle applies. Put differently, in cases such as the present the question to be posed is whether reciprocity has been contractually excluded.

...

[15] The relevant clauses in the present lease agreement must be interpreted against the background set out above. Clause 10.1 provides that:

‘All payments in terms of this lease to be made by the tenant to the landlord shall be made on or before the first day of each month without demand, free of exchange, bank charges and without any deductions or set off whatsoever – ’

[16] Clause 21 of the lease agreement provides for the ‘Landlords Limitation of Liability’ in the following terms:

‘21.1 The tenant shall –

21.1.1 . . .

21.1.2 not have any claim of any nature whatsoever against the landlord whether for damages, remission of rent or otherwise, for any failure of or interruption in the amenities and services provided by the landlord, any local authority and/or other service provider to the leased premises, building and/or property unless such failure or interruption is caused by the negligent or wrongful act or omission by the Landlord

or its agent or representative, notwithstanding the cause of such failure or interruption;

21.1.3 not be entitled to withhold or defer payment of any amounts due in terms of this lease for any reason whatsoever;’

[17] The provision that the rental was to be paid ‘on or before the first day of each month’ had the effect that it was to be paid in advance by the appellant. The obligation of the appellant to pay the rental was accordingly not reciprocal to the obligation of the respondent to provide beneficial occupation of the entire premises. Additionally clause 21.1.2 precluded the withholding of rental as a result of a ‘failure of or interruption in the amenities and services provided by the landlord.’

[18] The terms of the lease therefore precluded suspension of the payment of rental by the appellant, as a result of the failure by the respondent to afford the appellant beneficial use of the entire leased premises. As a result, the cancellation of the lease by the respondent was justified, the appellant being in arrears with the rental payments.”

[54] The lease agreement in this case contains clauses of precisely the same design and import.

[55] Clause 5.7 says:

“The Monthly Rental and the Operating Costs, plus any other costs due by the Tenant in terms of this Lease, shall be paid by the Tenant to the Landlord monthly in advance on or before the first day of each and every calendar month or next business day thereafter, commencing from the Occupation Date or the Commencement Date, whichever occurs last.”

[56] Clause 5.14 provides:

“The Tenant shall not be entitled to withhold the payment of any rental, services, operating costs or amounts due in terms of this Lease, or any part or portion thereof, for any reason whatsoever.”²²

[57] Finally, on the authority of the SCA in *Tudor Hotel*,²³ clause 29.2 of the lease also precludes the withholding of rental. It reads as follows:

“The Tenant shall not have any right, remedy or claim of any nature whatsoever and howsoever arising against the Landlord for any loss, damage (whether general, special or consequential) expenses or injury of any nature whatsoever or howsoever arising which may be suffered by the Tenant, directly or indirectly, irrespective of whether or not such loss, damage, expense or injury shall have been caused through or as a result of the negligence (gross or otherwise) of the Landlord or any person for whose acts or omissions the Landlord is vicariously liable in law.

Without derogating from the generality of the foregoing, the Landlord shall have no liability to the Tenant in respect of any such loss, damage, expense or injury which may be suffered by the Tenant by reason of any latent or patent defects in the Premises or in the Building or in the Property, or from any fire in the Premises or in the Building, or any theft from the Premises or the Building, or by reason of the Premises or the Building or part thereof being in or falling into a defective condition or state of disrepair, or as a result of any particular repair not being effected by the Landlord either timeously or at all, or arising out of vis major or casus fortuitus, or arising out of any act of omission of any Tenant of the Building or a change of the Building's facade, appearance or any other feature thereof, or arising in any manner whatsoever out of the use of the Premises or of the Building by any person.”

²² Emphasis added.

²³ *Supra*, at para [17] referring to the exemption clause in 21.1.2 of the lease.

[58] I am mindful of the principle that the availability of the *exceptio* is a matter of interpretation of the contract,²⁴ and that every contract must be interpreted with reference to its own terms, elucidated by context and purpose.²⁵ But the triad of text, context and purpose which must give meaning to these clauses of the lease agreement do not, in my view, permit of a distinction with the agreements in issue in *Baynes Fashion* and *Tudor Hotel*. The same conclusion must be reached. In particular, Unitools agreed that it would not be entitled to withhold payment of the amounts due, in advance, on the first of every month. It must be held to the bargain it struck.

[59] Accordingly, I find that there is no merit in the Defendants' second defence

THE THIRD DEFENCE – BREACH

[60] The Defendants' third defence is that Tower breached the lease by failing to provide premises that were fit for the purposes for which they were leased, being jewellery manufacturing and retail sales. At the heart of this defence is the allegation that Plaintiff failed to provide adequate security.

²⁴ *Tudor Hotel*, supra, at para 12.

²⁵ *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* (470/2020) [2021] ZASCA 99; [2021] 3 All SA 647 (SCA) (9 July 2021) at para 51.

[61] Tower argues that the Defendants appear to be claiming that the alleged representations made by Tower (which form the basis of the Defendants' first defence) should be regarded as tacit terms of the lease agreement, or perhaps terms orally agreed between the parties. The Defendants do not, however, plead any tacit term or oral agreement. It may not have been necessary to do so. The Defendants point out that the premises were expressly leased for the purposes of "Jewellery manufacturing and Retail".²⁶ As a result of the robbery, it became clear that they could not be used as such. They were not, it is alleged, fit for the purpose for which they were leased in the first place, at least following the robbery. The Defendants aver that *this* amounted to a breach of the lease agreement.²⁷ The underlying reason for this alleged breach is that the security services provided by Tower were proven to be inadequate²⁸ and, the Defendants allege, Unitools could in these circumstances claim compensation by way of an abatement of rental and/or damages.²⁹

[62] Tower has pointed to clause 26.1 of the lease agreement, which says that "*Security of and control of access to the Premises shall be the*

²⁶ They refer to clause 12 of the Schedule to the General Conditions of Lease and point out that clause 9 of the General Conditions of Lease provides that "*The Tenant shall use the Premises solely for the purpose described in paragraph 12 of the Schedule and for no other purpose whatsoever without the Landlord's prior written consent*".

²⁷ See, as an example of a case in which such a claim succeeded, *Gateway Properties (Pty) Ltd v Bright Idea Projects 249 CC and Another* (AR353/13) [2014] ZAKZPHC 41; [2014] 3 All SA 577 (KZP) (1 July 2014).

²⁸ Affidavit opposing summary judgment, paras 11.7 and 11.8. Mention is also made of the premises being badly damaged in the robbery.

²⁹ See *Tudor Hotel*, *supra*, at para 5.

responsibility of the Tenant.” It has interpreted clause 26.1 to mean that Unitools, not Tower, was responsible for security. In my view, this fails to appreciate that a distinction is drawn in the lease agreement between the “Premises” that were leased (being “*Office OF60G004, at 6 Sturdee Avenue, Rosebank*”), the “Building” (i.e., the building in which the leased premises are located), and the “Property” (i.e., the property on which the Building is built) and that various provisions of the lease expressly indicate that Tower was indeed responsible for providing or arranging some form of security services, at the very least for the “Building” or the “Property”. For example:

[62.1] Clause 1.1.11 of the General Conditions defines the Operating Costs, to which Unitools was obliged to contribute, as “reasonable costs incurred by the Landlord in respect of maintaining and running the Building and/or Property”.³⁰ One of these costs, specified in clause 1.1.11.3 of the lease, is “*security expenses*”.

[62.2] Clause 14.7 of the General Conditions provides *inter alia* that “*Should the Tenant require access to the Premises outside normal business hours, the Tenant shall obtain the Landlord's consent and the Landlord shall, having regard to its security services and the other provisions of this Lease, be entitled to*

³⁰ Emphasis added.

*make its consent conditional upon any terms and conditions which the Landlord in its sole and absolute discretion may deem necessary for the proper administration and/or security of the Premises or of the Building*³¹.

- [62.3] Clause 26.2, albeit rather cryptic, also suggests that Tower assumed some responsibility for security services under the lease. It provides: *“The Tenant shall join and be and remain a member of good standing of a building security association (“Association”), if any, that may be promoted or approved by the Landlord and having as its members the tenants of the Building, the object of which shall be the promotion of the security of the Building and the safety of the tenants thereof. The Tenant shall pay to the Association all such reasonable membership fees, subscriptions, contributions and levies as the Association shall from time to time by its rules lawfully require, which amounts shall be covered in the Operating Costs set out in paragraph 7.2 of the Schedule ...”*³².

- [63] Given these clauses, I am prepared to assume in favour of the Defendants that their contention that Tower would provide security services, at least for the Building and the Property, is not in conflict with the express

³¹ Emphasis added.

³² Emphasis added.

terms of the lease. While Unitools may have had a contractual obligation to secure the “office” that was leased as well as to control access to it, Tower cannot be said to have no obligation in relation to security services for the building in, and the property on, which it was situated.

[64] If Tower had an obligation to provide such security services, the questions of its adequacy, whether that obligation was breached, and whether it could thus be said that Tower failed to provide premises that were suitable for the purposes for which they were leased, are ones which raise factual disputes that can only be dealt with at trial.

[65] Nevertheless, there remains an insurmountable obstacle in the way of the Defendants. It is clause 29.2 of the lease.³³ This is an exemption clause,³⁴ which in my view precludes any claim against Tower for an abatement of rental and/or damages in these circumstances.

[66] While such exemption clauses must be restrictively interpreted, effect must be given to them. *First National Bank of SA Ltd v Rosenblum* 2001 (4) SA 189 (SCA)³⁵ illustrates the point.³⁶ In that case, the respondents sued the appellant bank (FNB) in the High Court for damages arising out of the theft of the contents of a safe deposit box provided at a small

³³ Quoted in para above.

³⁴ Sometimes referred to as exception clauses

³⁵ Also reported in [2001] 4 All SA 355 (A).

³⁶ See also *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another* 2008 (6) SA 654 (SCA).

annual fee by the bank for the first respondent's use. FNB sought to avoid liability on the basis that a term of the contract for the provision of the box expressly excluded liability. The stated case prepared in the matter revealed that one or more of FNB's staff had stolen the safe deposit box or allowed one or more third parties to steal the box. In doing so, FNB's staff had acted with gross negligence, or negligently, regarding the control of the keys safeguarding the place where the safe deposit box was kept, rendering it possible for the theft to occur. The High Court had concluded that FNB was not entitled to rely upon the exemption clause in its defence of the action. The SCA disagreed. It found:

[66.1] In matters of contract, the parties must be taken to have intended their legal rights and obligations to be governed by the common law unless they have plainly and unambiguously indicated the contrary. Therefore, even where an exemption clause is couched in language sufficiently wide to be capable of excluding liability for a negligent failure to fulfil a contractual obligation or for a negligent act or omission, it would not be regarded as doing so if there was another realistic and not fanciful basis of potential liability to which the clause could apply and so have a field of meaningful application.

[66.2] In the end, the answer had, however, to be found in the language

of the exemption clause read in the context of the agreement as a whole within its commercial setting and against the background of the common law due regard being had to any constitutional implication.³⁷

[66.3] The relevant clause contained the phrase “or as a result of any cause whatsoever”, the breadth of which could not be narrowed so as to only exclude liability for causes beyond the control of the bank.³⁸

[66.4] Although there was no express reference to the bank's employees in the relevant clause, it seemed obvious that they were included in it. If the exemption from liability accorded by the clause were to be construed as being confined to cases relating to the acts and omissions of those who might be regarded as the 'controlling or directing minds' of the bank, the potential field of operation of the exemption would be so slight that it would not have been worth the bank's while to insist on it. This would have left it entirely unprotected against liability stemming from the potential negligence or dishonesty of many thousands of employees. The bank, as an artificial non-human entity, was obviously incapable of being negligent itself. The negligence of the human beings

³⁷ At paras [6] and [7]; 195G–H, 195I–196A and 196B–C.)

³⁸ At paras [12] and [13]; 197B–F and H.

acting as the bank's controlling minds was attributable to the bank and it could also be held vicariously liable for the negligence of ordinary employees acting in the course and within the scope of their employment. Thus, when the contract said that the bank could not be held liable "*whether the loss or damage was due to the bank's negligence or not*" it included loss or damage due to the negligence of the bank's employees.³⁹

[66.5] The clause provided quite plainly that, if the loss or damage was due to the bank's negligence, attributed to it as a result of the negligence of its controlling minds or that of its employees, it was immune from liability.⁴⁰

[66.6] Thus, the relevant clause exempted the bank from liability for: theft committed by its own employees within the course and scope of their employment; for failing to exercise reasonable care and so negligently rendering it possible for the theft to take place; and for the negligence or gross negligence of its own staff, acting in the course of and within the scope of their employment, regarding control of the keys to the place where the safe deposit box was kept, thus rendering it possible for the theft to occur.⁴¹

³⁹ At paras [17] and [18]; 199A–F.)

⁴⁰ At para [23]; 201A/B, read with para [18] at 199E–F.

⁴¹ At paras [27] and [28]; 201H–202A.

[66.7] Accordingly, the claims of the respondents ought to have been dismissed.

[67] Clause 29.2 of the lease agreement must, in my view, be interpreted in the same way. Whether the Defendant's third defence is to be regarded as grounded in theft (i.e., the robbery) or in negligence, both are causes of loss which are specifically enumerated in the exemption clause.⁴² The breadth of clause 29.2 is remarkable. The parties agreed that Unitools would not have "*any right, remedy or claim of any nature whatsoever and howsoever arising*" against Tower for "*any loss, damage (whether general, special or consequential) expenses or injury of any nature whatsoever or howsoever arising*".

[68] This, in my view, excludes the right to claim, and/or the remedy of, an abatement of rental and/or damages consequent upon a breach of the lease by Tower.⁴³

[69] In these circumstances, the Defendants' third defence must also fail.

THE FOURTH DEFENCE – THE DELICTUAL COUNTERCLAIM

⁴² See *First National Bank*, supra, at para [8]; 196B–D.

⁴³ I note further that the lease does not, in clause 39 (the "Breach" clause) or elsewhere, provide Unitools with a remedy in the event of a breach by Tower.

[70] For the same reason, I am of the view that Unitools' counterclaim in delict has no merit. It too is precluded by clause 29.2 of the lease. The clause specifically exempts Tower for liability for "*negligence (gross or otherwise) of the Landlord or any person for whose acts or omissions the Landlord is vicariously liable in law*". It also specifically provides that the "*Landlord shall have no liability to the Tenant in respect of any such loss, damage, expense or injury which may be suffered by the Tenant by reason of ... any theft from the Premises or the Building*".

[71] Accordingly, I also do not think there is merit in the Defendants' fourth defence.

THE SECOND DEFENDANT'S LIABILITY

[72] The Second Defendants' liability is based on the fact that he bound himself jointly and severally to Tower, as guarantor and co-principal debtor *in solidum* with Unitools.

[73] He did so in term of clause 16 of the Schedule to the General Conditions of Lease, read with clause 11 of the General Conditions and by signing as Guarantor on 3 December 2018.⁴⁴ The Second Defendant was thus contractually liable to pay to Tower "*all sums which ... shall become due and owing at any time or times in the future by the Tenant to the*

⁴⁴ See the signature page of the lease, page 47

Landlord pursuant to the terms of this Agreement”.⁴⁵

[74] I do not understand the Defendants to dispute that, in the event that I find that Unitools is liable for the sum claimed in this application, the Second Defendant must be held jointly and severally liable as Guarantor.

CONCLUSION AND COSTS

[75] Accordingly, I find that summary judgment should be granted in favour of Tower.

[76] Tower and Unitools agreed on the scale of costs in the lease agreement.⁴⁶ Although there is nothing in the manner in which the Defendants have approached this litigation that would ordinarily justify an award of punitive costs, I must award costs on the attorney and client scale, as the parties have agreed, unless there are good grounds, in the exercise of my discretion, to not give effect to their agreement.⁴⁷

[77] There are no such grounds.

ORDER

⁴⁵ Clause 11.1 of the General Conditions.

⁴⁶ Clause 39.2 of the General Conditions.

⁴⁷ *Intercontinental Exports (Pty) Ltd v Fowles* (85/98) [1999] ZASCA 15; [1999] 2 All SA 304 (A) (23 March 1999), at paras 26 and 27.

[78] In the circumstances, in relation to Claim 1, I grant judgment in favour of the Plaintiff. I make the following order:

1. The application for summary judgment is granted;
2. The Defendants, jointly and severally, the one paying the other to be absolved, must pay to the Plaintiff:
 - 2.1 The amount of R94 459.13;
 - 2.2 Interest on the above amount at the rate of 9.25% per annum compounded monthly from 2 July 2020 to date of payment; and
 - 2.3 The costs of Claim 1, including the costs of the summary judgment application, on the attorney and client scale.

GOTZ AJ

Date of hearing: 18 May 2021

Date of judgment: 22 October 2021

Appearances:

Counsel for the Plaintiff: Adv J G Dobie
Instructed by: Reaan Swanepoel Attorneys

Counsel for the Defendants: Adv Rosalind J Stevenson
Instructed by: Clark Attorneys