



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

Case no: 2020 / 21134

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

**Signed: ..... Date: 25 October**

In the matter between:

**SHOES TRAVEL & ENTERPRISES CC**

**Plaintiff**

and

**OBERTHUR TECHNOLOGIES (PTY) LTD**

**Defendant**

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**JUDGMENT (SUMMARY JUDGMENT)**

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**This judgment is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading the signed copy hereof to Caselines.**

Practice — Judgments and orders — Summary judgment — Liquidated amount in money under Rule 32(1) of Uniform Rules — What constitutes — Claim for damages arising from breach of contract not constituting liquid amount — Discretion under

Rule 32(9)(a) relating to order stay of action until plaintiff has paid the defendant's costs taxed as between attorney and client not exercised.

## MOULTRIE AJ

- [1] The plaintiff seeks summary judgment on a claim that it instituted against the defendant arising out of the latter's alleged repudiation of an agreement in terms of which the plaintiff leased four vehicles to the defendant for a period of 5 years. The claim is formulated in the particulars of claim as one for damages, being the total amount payable by Plaintiff to Defendant in terms of the agreement less payments received in terms of the agreement plus the cost of repairing physical damage caused to the vehicles. The application for summary judgment does not include that portion of the amount claimed in respect of the physical damage allegedly sustained to the vehicles.
- [2] Rule 32(1) of the Uniform Rules of Court, which contemplates a Court granting judgment without a trial even though notice of intention to defend has been properly given<sup>1</sup> and the plea has been delivered, stipulates that summary judgment may be granted "only" in relation to certain categories of claims. Summary judgment cannot be granted in relation to a claim falling outside of these categories, no matter how weak the defence set out in the plea (and evidenced in the affidavit opposing summary judgment) may be.
- [3] According to the plaintiff, the portion of the claim in respect of which summary judgment is sought is one for a liquidated amount in money, as contemplated in Rule 32(1)(b). It is by now trite law that a liquidated amount in money is an amount which is either agreed upon or which is capable of speedy and prompt ascertainment or, put differently, where ascertainment of the amount in issue is a mere matter of calculation.<sup>2</sup>
- [4] Had the current claim been one for payment of arrear rentals,<sup>3</sup> or for payment

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<sup>1</sup> *Van den Bergh v Weiner* 1976 (2) SA 297 (T) at 300B.

<sup>2</sup> *Botha v Swanson & Co (Pty) Ltd* 1968 (2) P.H. F85; *Tredoux v Kellerman* 2010 (1) SA 160 (C) para 18, approved by the Supreme Court of Appeal in *Blakes Maphanga Inc v Outsurance Ins Co Ltd* 2010 (4) SA 232 (SCA) para 17.

of a pre-agreed sum of damages,<sup>4</sup> or one in which the word ‘damages’ had been used loosely to refer to what is in fact a liquidated amount,<sup>5</sup> it would potentially have constituted a claim for a liquidated amount in money. However, the claim is one for damages arising out of losses allegedly suffered by the plaintiff as a result of the defendant’s alleged repudiation of the lease agreement.

[5] Although the plaintiff alleges in the combined summons that the damages fall to be assessed on the simple basis of the amount that the plaintiff would have received in rental had the agreement continued in force until the expiry of the lease, I cannot agree that the mere simplicity of the formulation of the claim has the effect of converting it into a liquidated amount in money. In my view, the claim remains one for damages and as such, the Court would be required to assess them in accordance with the established rules in that regard.

[6] On the assumption that the defendant has indeed breached the agreement and that there is a causal connection between the alleged breach and any loss that the plaintiff may have suffered, the assessment of damages for breach of contract involves what was seminally described by Innes CJ as “*that most difficult question of fact*”, namely that the innocent party “*should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party*”.<sup>6</sup> This is an exercise that involves proof by the plaintiff, and not mere presumption.<sup>7</sup> The court must consider the evidence tendered to assess the damages as best it can so as “*to arrive at some amount, which in the opinion of the court will meet the justice of the*

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<sup>3</sup> Cf *Hyprop Investment Ltd v Sophia's Restaurant CC and Another* 2012 (5) SA 220 (GSJ).

<sup>4</sup> Cf *Leymac Distributors Ltd v Hoosen* 1974 (4) SA 524 (D) at 527H, where it was agreed in a hire purchase agreement “*that the plaintiff's loss would be the difference between the unpaid balance of the price and the value of the bus as determined by the valuation*” and thus held that “*the quantum of the damages does not have to be assessed by the Court on the basis of what the Court considers reasonable and just*”. See also *Probert v Baker* 1983 (3) SA 229 (D) at 236 – 237.

<sup>5</sup> Cf *Pick 'n Pay Retailers (Pty) Ltd t/a Hypermarkets v Dednam* 1984 (4) SA 673 (O) at 677F – I.

<sup>6</sup> *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22.

<sup>7</sup> *Swart v Van der Vyver* 1970 (1) SA 633 (A) at 643D and *Sommer v Wilding* 1984 (3) SA 647 (A) at 664D – 665H.

case”.<sup>8</sup>

- [7] In *Solomon NO v Spur Cool Corporation (Pty) Ltd*, Binns-Ward J observed that “[t]his entails the application of pragmatism and common sense rather than formalism. It will in general be appropriate in quantifying contractual damages which ... involve a component of prospective loss, to have regard to the effect of relevant events intervening between those dates and the trial insofar as that will facilitate a more accurate achievement of the object.”<sup>9</sup>
- [8] In the current instance, it would appear to me that it cannot possibly be the case that the damages to be awarded by a court to the plaintiff as a result of the defendant’s alleged breach could amount to the full value of the revenue generated by the lease for the remainder of its term. A range of questions would be relevant in this regard, not least of which would be the fact that it is the plaintiff’s net loss that has to be ascertained and, where there is a difference, it is not entitled to be compensated for its gross loss.<sup>10</sup> This means that any expenses that would be incurred by the plaintiff in maintaining and licensing the vehicles over the course of the lease period (which the plaintiff itself pleads it was obliged to do under the lease) would have to be deducted. There is also the issue of whether plaintiff would be able to mitigate its damages, for example by leasing the vehicles to some other lessee, and if so, at what rentals?
- [9] Thus, even though it is correct that the exercise of assessing damages for breach of contract is intended to put the innocent party in the position it would have been had the contract had been properly performed,<sup>11</sup> that cannot be done in this case by simply assuming that the plaintiff would have profited by the amount it would have earned in rental over the remainder of the lease

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<sup>8</sup> *Stolte v Tietze* 1928 SWA 51 at 52.

<sup>9</sup> *Solomon NO and Others v Spur Cool Corporation (Pty) Ltd and Others* 2002 (5) SA 214 (C) para 46. The case was overruled in *Picardi Hotels Ltd v Thekwini Prop (Pty) Ltd* 2009 (1) SA 493 (SCA) para 15, but in relation to a different aspect.

<sup>10</sup> *Cooper NNO v Syfrets Trust Ltd* 2001 (1) SA 122 (SCA) para 24; *One Nought Seven Fourways (Pty) Ltd t/a Property Mart v Shady Woods Retirement Village Development (Pty) Ltd* 1992 (3) SA 756 (W) at 757 - 758

<sup>11</sup> *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 (2) SA 118 (SCA) para 18.

period. A claim for damages for breach of contract such as the one advanced by the plaintiff in this case cannot be regarded as one for a liquidated amount in money. In my view, the position is best expressed by Howard J in *Leymac*: “*the amount of these damages will not be liquidated until the Court has assessed the quantum thereof, by the exercise of its own judgment*”.<sup>12</sup>

[10] The defendant referred in its heads of argument to the judgment of Sutherland J (as he then was) in *Standard Bank of South Africa v Renico Construction (Pty) Ltd*,<sup>13</sup> in which the defendant lessor (Renico) advanced five different counterclaims against the cessionary of its lessee (Standard Bank) arising from a lease agreement. The claims were for (i) arrear rentals; (ii) damages in the sum paid to an agent to relet the premises; (iii) damages in respect of loss of revenue over the period of the lease, owing to the premises being relet at a lower rental level; (iv) damages in respect of the value of physical improvements made to the premises by the lessee which were removed without consent; and (v) an unrelated damages claim arising from the lessee’s breach of contract in not finishing a particular construction job.<sup>14</sup> Of these claims, the court found that “*only one 'claim' can be said to be obviously liquidated: the arrear rental claim*”,<sup>15</sup> and that “*all the other claims having to do with the breached lease are damages claims. The individualisation of these claims may be useful for analytical purposes but it has to be recognised that the differentiation is artificial; there is only a single cause of action: damages caused by the breach of contract by [the lessee]. Splitting them up does not, by such a contrivance, afford them distinct and different status.*”<sup>16</sup> The court went on to hold, with reference to the *Solomon* case, that:

*The correct computation of contractual damages can never, in principle, be mere arithmetic. A value judgment is an element of the computation of the quantum, which computation embraces the effects*

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<sup>12</sup> *Leymac Distributors* (above) at 528F – G.

<sup>13</sup> *Standard Bank of South Africa v Renico Construction (Pty) Ltd* 2015 (2) SA 89 (GJ).

<sup>14</sup> *Id* para 19.

<sup>15</sup> *Id* para 21.

<sup>16</sup> *Id* para 22.

*of a reasonable effort to mitigate the damages. The figure of damages cannot under such circumstances be determined until that debate is exhausted, as a rule, before a court.*

...

*Moreover, until a court has pronounced, no sum is yet due and payable, save perhaps the arrear-rental claim ... It bears emphasis to remark that the condition of 'illiquidity' is not a result of the absence of evidence or proof of the indebtedness; rather it is the result of an inability to compute a figure in the absence of an investigation that is more than a mechanical exercise.<sup>17</sup>*

- [11] Although the *Renico* case did not involve a summary judgment application, and was concerned with the question whether the counterclaims were liquidated and could be set off against the claim in convention (which is very much a similar enquiry), a similar conclusion was reached by the court in *Lovemore v White*. In that case, the plaintiff sought to quantify the damages that it suffered as a result of the defendant's holding over under a lease agreement on the basis of a *pro rata* calculation of the annual rental from the date of the breach until the date upon which the defendant vacated the property. While summary judgment was granted for the defendant's ejection, the court held that the plaintiff's counsel had correctly "*conceded that he could not ask for [such] damages in an application for summary judgment*".<sup>18</sup>
- [12] In the circumstances, I find that the plaintiff's claim is not one contemplated in Rule 32(1)(b), and that the application falls to be dismissed.
- [13] It was clearly alleged in paragraphs 9 to 11 of the defendant's opposing affidavit that the plaintiff's claim was not one which is amenable to summary judgment. Despite this, the plaintiff not only persisted with the application but failed to address this obviously critical issue in its heads of argument, save to note that "*a minor portion of the Plaintiff's claim [i.e. arising out of physical*

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<sup>17</sup> *Id* paras 25 and 26.

<sup>18</sup> *Lovemore v White* 1978 (3) SA 254 (E) at 256B and 261B

*damage to the vehicles] constitutes a claim for damages [and] is not included in [the] application for summary judgment and shall be abandoned if necessary”.*

[14] The plaintiff continued to persist even after the issue was placed ‘front and centre’ in the defendant’s heads of argument. At the hearing of the matter, the plaintiff’s representative ignored the issue, and focused his argument on the defendant’s breaches of the agreement and the absence of a *bona fide* defence. When I raised the issue of the nature of the claim with him, he was unable to advance any cogent argument as to why the claim constitutes one for a liquidated amount in money. He contended (without explaining why) that the authorities relied upon by the defendant (i.e. *Renico* and *Solomon*) were distinguishable, and sought to rely on the judgment in *Liberty Group Limited v La Kandyan Trading (Pty) Limited*.<sup>19</sup> In my view, it is the *Liberty Group* case that is distinguishable. Although that was a summary judgment application involving a lease, there was no claim for damages, but only for payment under an acknowledgment of debt and for “*arrear rentals and charges under the lease agreement*”.<sup>20</sup>

[15] In terms of Uniform Rule 32(9), a court hearing a summary judgment application “*may make such order as to costs as to it may seem just*”. Rule 32(9)(a) furthermore stipulates that “*where the case is not within the terms of subrule (1)*”, the court may order that the action be stayed until the plaintiff has paid the defendant’s costs and may also order that such costs be taxed as between attorney and client. This is a wide discretion.<sup>21</sup>

[16] An application for summary judgment affords a plaintiff considerable strategic advantages: even if it is unsuccessful it forces the defendant to put its defence on affidavit, and this gives rise to concerns that the procedure could be abused by plaintiffs for purely strategic reasons. Indeed, the recent changes to the rule, which require a plaintiff to wait until the defendant has pleaded, appear to be a response to such concerns. In view of this, it seems to me that

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<sup>19</sup> *Liberty Group Limited v La Kandyan Trading (Pty) Limited* 2021 JDR 2118 (GJ).

<sup>20</sup> *Id* paras 3.2 and 13.

<sup>21</sup> *Tredoux* (above) para 15.

there has recently been a clear shift in legal policy towards the discouragement of unmeritorious summary judgment applications.

[17] In that context, it is relevant that it has (in my view correctly) been observed that the purpose of Rule 32(9)(a) is to discourage patently unmeritorious applications for summary judgment, not only because they put the defendant to unnecessary trouble and expense, but also because they are a waste of the court's time.<sup>22</sup> To these reasons, I would add that such unmeritorious applications only serve to drive up the cost of litigation, which is a significant barrier to access to justice.

[18] Although I would have been open to a consideration of whether this application is an example of one which justifies the exercise of the discretion referred to in Rule 32(9)(a), the defendant does not seek either a stay of the action or punitive costs order, but expressly indicates in its heads of argument that it seeks an order of costs "*on a party and party scale*". In the circumstances, and in the absence of any notice to the plaintiff,<sup>23</sup> it would not be appropriate for me to make a punitive order as to costs.

[19] The application for summary judgment is dismissed with costs.

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RJ Moultrie AJ

Acting Judge of the High Court

Gauteng Division, Johannesburg

DATE HEARD:

3 October 2022

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<sup>22</sup> *Absa Bank Ltd (Volkskas Bank Div) v SJ du Toit & Sons Earthmovers (Pty) Ltd* 1995 (3) SA 265 (C) at 267H – 268I and *South African Bureau of Standards v GGS/AU (Pty) Ltd* 2003 (6) SA 588 (T) para 10. See also *Floridar Construction Co (SWA) (Pty) Ltd v Kriess* 1975 (1) SA 875 (SWA) at 878A.

<sup>23</sup> Cf *Abdi v Minister of Home Affairs* 2011 (3) SA 37 (SCA) para 36.



JUDGMENT SUBMITTED FOR DELIVERY:

25 October 2022

APPEARANCES

For the Plaintiff: Attorney J Berkowitz of J Berkowitz Attorneys

For the Defendant: S Maziba, instructed by Bongani Khanyile Attorneys