

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 13252/2022

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED: YES / NO	
..... DATE SIGNATURE

In the matter between:

PETERSON, IZAK SMOLLY N.O

First Plaintiff

ASMAL, RIDWAAN N.O

Second Plaintiff

AZIZOLLAHOFF, BRIAN HILTON N.O

Third Plaintiff

JUNKOON, JUJDEESHIN N.O

Fourth Plaintiff

and

**TMNS BUSINESS ENTERPRISES CC t/a PROTEA
CENTRE**

First Defendant

THULANI CHRISTOPHER SHABALALA

Second Defendant

JUDGMENT

FLATELA J**Introduction**

[1] This is an application for summary judgement against the first to the third defendants for the payment of the sum of R496,050.50 (four hundred and ninety-six thousand, fifty rand and fifty cents) for rental arrears. The plaintiffs also seek interest on the above amounts at 2% per annum above the premium rate compounded monthly in arrears at tempora morae to the date of payment and costs of suit on an attorney and client scale.

[2] The plaintiffs sue the defendants in their capacities as trustees of **MERGENCE AFRICAN PROPERTY INVESTMENT TRUST (IT NO 11263/2006(T))**, a trust duly registered as such with the Master of the High Court (herein after referred to as “**the Trust**”), conducting business in the property investment market. The plaintiffs are claiming the following:

Claim 1

2.1 Payment of the amount of 496,050.50 and interest on the above amount calculated at the prevailing prime rate as from time to time plus 2% per annum, compounded monthly in arrears in tempora morae to date of the final payment and costs of the suit on attorney and client scale as together with disbursements so incurred, and such collection commission as the plaintiffs may be obliged to pay their attorneys and further and/or alternative relief.

2.2 damages as a result of termination of the lease agreement entered into between themselves and the first defendant, duly authorized by its member, the second defendant. The plaintiffs allege they suffered fair and reasonable damages (positive interest) in the amount of R472,848.33

(VAT at 15% incl) being from a period of 1 May 2022 to 31 March 2023, and computed and discounted at the rate of 9%.

[3] The Plaintiffs are not seeking summary judgement in respect of claim 2.

The Parties

[4] The first defendant is **TMNS BUSINESS ENTERPRISES CC t/a PROTEA CENTRE** a close corporation, duly registered and incorporated in terms of the laws of the republic of South Africa

[5] The second defendant is Thulani Christopher Shabalala, an adult male business person and member of the first defendant.

[6] The third defendant is Mirriam Mngejane Masinah, an adult female business person and member of the first defendant doing business as such.

[7] On or about 3 April 2018 and at Soweto, Gauteng, the second and third defendants bound themselves jointly and severally as sureties and co-principal debtors of the first defendant in favour of the plaintiffs.

[8] The plaintiffs also seek payment against the second and third defendants as surety and co-principal debtors.

Facts

[9] On the 18th of April 2018 and at Dunked West, Johannesburg, Gauteng the first Plaintiff duly authorised by the trustees entered into a written lease agreement with the first defendant duly represented by the second defendant in terms whereof the plaintiff leased to the first defendant commercially leased premises known as

Shop 01-02, ground floor at Protea Point Shopping Centre, Ndaba Drive, Pretoria north, Soweto, Gauteng (measuring approximately 151m), (the **premises**).

[10] In terms of the lease agreement, the first defendant was to pay monthly rentals as follows:

- i. R26,800.00 (excluding VAT) for the period 1 April 2018 to 31 March 2019; and
- ii. R29,212.00 (excluding VAT) for the period 1 April 2019 to 31 March 2020; and
- iii. R31,841.08 (excluding VAT) for the period 1 April 2020 to 31 March 2021; and
- iv. R34,706.77 (excluding VAT) for the period 1 April 2021 to 31 March 2022; and
- v. R37,830.38 (excluding VAT) for the period 1 April 2022 to 31 March 2023; and

[11] The terms of the lease agreement are not in dispute.

[12] The Plaintiffs contend that they have duly complied with all their obligations in terms of the lease agreement.

[13] The Plaintiffs contend that first defendant absconded/vacated from the premises on or about 29 October 2021.

Breach

[14] The first defendant agreed that the lease period would run for a period of 5 (five) years from 1 April 2018 and ending on 31st March 2023.

[15] The Plaintiffs allege that the first defendant breached the terms of the lease agreement by failing to make payment of the monthly rental in respect of the period and up to inclusive of April 2022 and agreed associated charges. The defendants are presently in rental in arrears in the consolidated amount/balance of R496,050.58

as set out in the computed reconciliation statements of the first defendant's account, of which a copy was attached.

Defendants' plea

[16] The defendants filed a plea. In terms of their plea, they aver as follows:

- i. On 11th August 2021 the plaintiffs' representatives sent a mandate to re-let which was an acknowledgement of their notice to terminate the lease agreement, sent to them on 20 July 2021.
- ii. On 31st August 2021 the second defendant communicated with the plaintiffs' representatives and informed them that they are no longer trading on the premises as from July 2021 political unrest period. No response came from this communication,
- iii. the first defendant cancelled the lease agreement on August 2021 following the July and the trade limitations imposed by the national lockdown. As such they were unable to operate on the premises and use them for the purposes they were leased for – to make income.
- iv. The premises were handed back to the plaintiffs on 29 October 2021. Therefore, there are no damages suffered by the plaintiffs as they are in possession of the premises.
- v. The amount claimed by the plaintiffs is not a fair and reasonable amount; nor did they suffer damages as the premises can be re-let to another affording company.

Application for summary judgment

[17] In support of the application for summary judgement, the plaintiffs Portfolio Manager of the Dipula Property Fund Limited (hereinafter **Dipula**), the sole beneficiary of the Mergence African Property Investment Trust, Luvo Mdlazi, deposed to an affidavit stating that Dipula manages the day-to-day affairs of the plaintiffs' portfolio and specifically the property wherein the premises are let.

[18] He has in his possession and under his control the documents and claims forming the subject matter of the plaintiffs claim against the defendant and has personal knowledge of the facts set out herein.

[19] He swore positively to verify the facts, the cause of the action and amounts set out in the summons, particulars of claim, the founding affidavit and confirm same to be both true and correct.

[20] The plaintiff states that the defendant has not raised any bona fide defence and has failed to raise triable issues on the following basis:

- i. The lease agreement remains binding between the parties.
- ii. The lease was not cancelled.
- iii. The mandate to re-let the property did not cancel the lease.
- iv. The lease can only be cancelled by a written cancellation agreement and only once a replacement tenant has been found and paid a deposit.
- v. The mandate was not signed by the plaintiff; therefore, no cancellation agreed to between the parties.
- vi. The lease agreement specifically provides that no cancellation will take place unless it is stipulated in writing and signed by both parties.
- vii. Even if the lease agreement was cancelled by mutual consent the defendants remained in occupation up until October 2021 and on its own version remain liable for all amounts due up until that date.

Defendant's affidavit resisting summary judgment

[21] The second defendant, Thulani Christopher Shabalala, deposed to an affidavit on behalf of the first defendant. His main defences are as follows:

- i. The first defendant could not trade profitably from March 2020 due to the declaration of the National State of Disaster and the lockdown regulations imposed in terms of the Disaster Management Act of 2002.
- ii. From January 2021 to July the defendants tried as best as they could to pick up business, but then they were once more shut by the July unrests. At this point, the defendants were already falling behind with rental payments and were struggling to keep up.
- iii. It was around this time when the second defendant spoke to Ceranne Hitchens of Mergence Africa Property Investment Trust about cancellation of the lease agreement due to financial constraints. No answer came forth from Hitchens or the plaintiffs' representatives' agents.
- iv. A follow up email was sent on 31st August 2021. This email was a follow up to a conversation held by the second defendant and representative agents of the plaintiffs whereby it was agreed that the defendants would re-let the property.
- v. The mandate to re-let was advancing the termination of the lease agreement conversation then ongoing between parties.
- vi. At all material times the plaintiffs knew the defendant's financial position and they were the ones who wilfully declined the defendants' lease termination request. It is submitted that the plaintiff's decision to officially cancel the lease at a late stage of their choosing, to the detriment of the defendants, should be frowned upon by this court.
- vii. The mandate to re-let sent by the plaintiffs to the second defendant was signed and sent back to the plaintiff for signature. The plaintiff failed to sign.
- viii. The first defendant vacated the premises in October 2021 and communicated this with the plaintiff as it became impossible for the defendant to trade having regard to the July unrest of 2021.

Issue

[22] The issue to be determined by this court is whether the defendants have raised triable issues, and whether they have raised a bona fide defence.

Legal principles

[23] Rule 32 of the Uniform Rules governs summary judgement applications. They were amended with effect from 19 July 2012. The new Rule 32 now stipulates that:

‘(1) The plaintiff may after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only-

- (a) on a liquid document;
- (b) for a liquidated amount in money;
- (c) for delivery of specified movable property; or
- (d) for ejectment;

together with any claim for interest and costs.

(2) (a) Within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts;

(b) The plaintiff shall, in the affidavit referred to in subrule (2)(a) verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial;

(c) If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for

summary judgment shall state that the application will be set down for hearing on a stated day not being less than 15 days from the date of the delivery thereof.

(3) The defendant may

(a) give security to the plaintiff to the satisfaction of the court for any judgment including costs which may be given; or

(b) satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon thereof.

(4) No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2), nor may either party cross-examine any person who gives evidence orally or on affidavit: Provided that the court may put to any person who gives oral evidence such questions as it considers may elucidate the matter.

[24] Despite the changes introduced by the amendment of rules governing summary judgment, *Maharaj v Barclays National Bank Limited*¹ remains authoritative. Therein, Corbet J said the following:

Accordingly, one of the ways in which a defendant may successfully oppose summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Whether 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 has “fully” disclosed the nature and grounds of his defence and the material facts upon which it is

¹ *Maharaj v Barclays National Bank Limited* 1976(1) SA418 A at 426

founded, and (b) whether on the facts so disclosed the defendant appears to have as either whole or part of the claim, a defence which is both bona fide and good in law.

Discussion

[25] The defendant's defences briefly summarized are as follows;

- i. The National State of Disaster and the regulations imposed in terms of the Disaster Management Act 57 of 2002 made it impossible to trade profitable. Covid-19 pandemic affected the business negatively.
- ii. From January 2021 to July the defendants started to trade but the July unrests caused much damage to the business. At this point, they were already falling behind with rental payments and were struggling to keep up.

Covid -19 Pandemic and its effect

[26] On 15 March 2020, the head of National Disaster Management Centre after assessing the potential magnitude and severity of Covid-19 pandemic classified the pandemic as a national disaster in terms of sec 23(1) (b) of National Disaster Management Act 57 of 2002.

[27] On the same day, Dr Nkosazana Zuma, in her capacity as the Minister of Co-Operative Governance and Traditional Affairs declared a national state of disaster after considering the magnitude and severity of Covid-19.

[28] It was argued on behalf of the defendants that the Covid-19 pandemic and lock down regulations made it impossible for the first respondent to trade because the regulations restricted the movement of the persons and the defendant's trade was dependant on people buying stock from the business.

[29] It is common cause that the plaintiff leased to the first defendant commercially leased premises known as Shop 01-02, ground floor at Protea Point Shopping Centre, Ndaba Drive, Pretoria north, Soweto, Gauteng from April 2018.

[30] It is the defendant's case that from March 2020 business was affected by the Covid-19 pandemic and the hard lockdown regulations made it impossible for it to trade. The second defendant sent a notice of termination of the lease agreement as early as 20 June 2021 to the plaintiffs. The second defendant avers that the plaintiffs never responded to this email. Another follow up email was sent on 31st August 2021, this was preceded by a conversation about termination of the lease agreement held between the second defendant and plaintiffs' representatives' agents. At this stage, he also informed them that the first defendant is no longer trading at the premises due to financial constraints which was exacerbated by the July political unrest.

[31] It seems from the email trajectory that the plaintiffs' Ceranne Hitchens sent a mandate to re-let to the second defendant on 11th August 2021. It is unclear when the mandate to re-let was sent back to the plaintiffs but it has the second defendant's signature and dated 8th September 2021.

[32] It is common cause that the mandate to re-let was never signed by the plaintiffs.

[33] The second defendant contends that the mandate to re-let terminated the lease agreement notwithstanding it not being signed by the plaintiffs. If not, then it is the plaintiff's own doing that they suffered any alleged damages as they had wilfully declined the first defendant's request to cancel the lease agreement.

[34] The plaintiffs contend that the mandate to re-let did not cancel the lease agreement. I agree. Clause 5 of the mandate to re-let expressly states that the defendants confirm that the mandate to re-let does not entitle them to cancel the lease agreement which has been granted to them in good faith. However, the matter does not end there.

[35] And a closer look at the email correspondence between the second defendant and Hitchens, one would find in the 31st August email references to the conversations alleged by the defendant and a phone call held between them on the 20th of July. The exact email content states:

'this is a follow up on the request that I have emailed to you and also follow up with the phone call on the 20th of July 2021 and was told that the directors have not taken the decision and... this request will be followed up. Could you please assist me in this matter. I am in deep stress as I cannot cope with the debts that I am drowning in, also note that I am no longer trading on the Protea premises since the unrest and had took back some stock back to the suppliers'

[36] The defendants in essence pleaded the supervening impossibility of performance to the plaintiffs in their request for termination of the lease agreement. It seems as if this request was not granted and/or declined by the plaintiffs.

The Doctrine of supervening performance

[37] Dealing with similar matter where the plaintiff sought ejectment of the first defendant and damages matter Gibert AJ in Freestone² said

“The doctrine of supervening impossibility performance is firmly entrenched in our law. If performance of a contract has become impossible through no fault of the party concerned, the obligations under the contract are generally extinguished.³ But the doctrine is not absolute. For example, the doctrine may be overridden by the terms or the implications of the agreement in regard to

² Property Investments (PTY) Limited v Remake Consultants CC and Another (2020/29927) [2021] ZAGPJHC

³ For example, *Oerlikon South Africa (Pty) Limited v Johannesburg City Council* 1970 (3) SA 579 (A) at 585A-C.

which the defence is invoked⁴ and is not available where the impossibility of performance is self-created.⁵

[38] The Learned Judge refused to grant summary judgement on arrear rental including the period of hard lockdown.

[39] Similarly, in this matter the plaintiffs acknowledged that there was a short period where the first defendant could not trade during the July unrest but stated credit was granted to the first defendant for the that period's rental; therefore, there is no reason why the first defendant could not continue to trade thereafter, nor has any been set out.

[40] Whilst I am not convinced that the defendants had validly terminated the lease agreement; the Plaintiff's papers give no support to the arrear rental either. And neither is it the Court's duty to look for them from their computed reconciliation statements. For example, they plead *'first defendant breached the terms of the lease agreement by failing to make payment of the monthly rental in respect of the period and up to inclusive of April 2022'*. What is this period *'up to inclusive of April 2022'*?

[41] There are no specific averments in the plaintiff's affidavit regarding the periods upon which the defendant fell into arrears.

[42] They further claim rental credit, which I assume means exemption from paying rent, for the short period of the unrest was given to the defendants. However, the exact span of this rental and amount of it credited to the defendant's account is not clearly stated.

[43] In my view, all of these issues are triable as determination of any one or more of them would eventually boils down to interpretation of the lease agreement and proper ventilation of the law of contract, which may very well proffer a bona fide defence to the defendants against the plaintiffs' claims.

⁴ *Hersman v Shapiro & Co* 1926 TPD 367 at 372, cited with approval in *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 (4) SA 1190 (A) at 1206B.

⁵ *King Sabata Dalindyebo Municipality v Landmark Mthatha (Pty) Ltd and another* [2013] 3 All SA 251 (SCA) para 28.

[44] On the papers alone I am unable to confirm that the defendant indeed owes to the plaintiffs the rental arrears claimed. To the contrary, I am of the view that the defendants raised triable issues.

[45] In the result, the following order is made

1. The application for summary judgement is refused.
2. The defendant is granted leave to defend claim 1 and claim 2.
3. The costs of this application are costs in the cause.

FLATELA L

JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and/or their representatives by email and by being uploaded to Caselines. The date and time for the hand down is deemed to be 10h00 on 10 February 2023

Date of Hearing: 22 November 2022

Date of Judgment: 10 February 2023

Counsel for the Plaintiffs: JG Dobie

Instructed by: Rooseboom Attorneys

Tel: 011 678 2280

Email: chris@rooslaw.co.za

Counsel for the defendants:

T Mloi

Email: advmolio@gmail.com

Instructed by:

T Matubatuba Attorneys Incorporated

Email:

litigation2@matubattorneys.co.za

Tel: 071 825 1161