Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 28875/19

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

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30 JUNE 2023

In the matter between:

PETERSEN, ISAK SMOLLY N.O. in his capacity as trustee of the

MERGENCE AFRICA PROPERTY INVESTMENT TRUST

(IT NO. 11263/2006) **First Plaintiff**

ASMAL, RIDWAAN N.O. in his capacity as trustee of the

MERGENCE AFRICA PROPERTY INVESTMENT TRUST

(IT NO. 11263/2006) **Second Plaintiff**

AZIZOLLAHOFF, BRIAN HILTON N.O. in his capacity as trustee of the

MERGENCE AFRICA PROPERTY INVESTMENT TRUST

(IT NO. 11263/2006) **Third Plaintiff**

JUNKOON, JUJDEESHIN N.O. in his capacity as trustee of the

MERGENCE AFRICA PROPERTY INVESTMENT TRUST

(IT NO. 11263/2006) **Fourth Plaintiff**

And

CPLM EXPORTS CC

(REG NO. 2010/052435/23) trading as ROOTS **First Defendant**

LINDA MARIA DE SOUZA FERNANDES

(ID NO. […]) **Second Defendant**

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand-down is deemed to be 10h00 on 30 June 2023.

JUDGMENT

OLIVIER, AJ:

1. This is an application for summary judgment. The plaintiffs seek payment of R 228, 617.03 from the defendants jointly and severally, together with interest and costs on the scale as between attorney and client. In their affidavit resisting summary judgment, the defendants raise certain defences of a technical nature, as well as defences on the merits.

2. For the sake of convenience, I shall refer to the parties as they are cited in the action. The four plaintiffs are the trustees of the MERGENCE AFRICA PROPERTY INVESTMENT TRUST (IT NO. 11263/2006). The first defendant is CPLM EXPORTS CC, a close corporation incorporated in accordance with the company laws of the Republic of South Africa. It trades as "Roots". The second defendant is LINDA MARIA DE SOUZA FERNANDES, who is a member of the first defendant.

BACKGROUND FACTS

3. The Trust, duly represented, and the first defendant, duly represented, concluded a lease agreement on 15 June 2016, in respect of the commercial premises described as shop 2A, 2B & 3, Nquthu Plaza, Nquthu, Kwazulu-Natal. The second defendant signed a suretyship agreement in which she bound herself as surety and co-principal debtor for the debts of the first defendant.

4. The lease period was 5 years. The agreement provided for a basic monthly rental amount, with annual escalation. The amounts were specifically stated in the agreement. The first defendant was liable also for a contribution towards rates and taxes, refuse charges, sewerage charges, security charges and cleaning charges.

5. The plaintiffs allege that the first defendant had breached the lease agreement by failing to make payment of the agreed monthly rental payments and other charges. The first defendant vacated the property on 31 August 2019. The agreement was cancelled by the plaintiffs.

6. Summons was issued on 21 August 2019 against the first and second defendants: in claim 1, the plaintiffs claimed R 313, 137.73 for arrear rentals and charges; in claim 2, the plaintiffs claimed R 1, 217, 649.02 for damages.

7. The defendants failed to deliver a notice of intention to defend. The plaintiffs applied for default judgment, which was granted on 21 November 2019. The defendants became aware of default judgment only in late January 2020. They launched a rescission application on 17 July 2020. The opposed application for rescission of judgment was heard by Dukada AJ on 27 January 2021. After hearing argument, the learned acting judge made the following order, but without giving reasons: “The application is granted and the applicants are to pay the costs.”

8. On 15 February 2022 the plaintiffs gave notice of amendment of their particulars of claim. The amendments affected the amounts claimed in respect of arrears and damages; claim 3 was also added. The plaintiffs delivered their amended pages on 7 March 2022. In respect of claim 1, the amount claimed was reduced from R 313, 137.73 (in the original summons) to R 228, 617.03.

9. The defendants delivered their plea to the amended particulars of claim on 20 April 2022. This summary judgment application was launched on 10 May 2022. The affidavit resisting summary judgment was filed on 22 June 2022.

10. The plaintiffs submit that the defendants have failed to set out a valid and *bona fide* defence to the entirety of claim 1, and that as a result the plaintiffs are entitled to summary judgment for the full amount claimed, alternatively “such lesser amount as the court might find fit.”

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RELEVANT LAW

11. Summary judgment proceedings are regulated by Rule 32 (as amended). It is designed to prevent a plaintiff's claim, based upon certain circumstances, from being delayed by what amounts to an abuse of the process of the court. In certain circumstances, the law allows a plaintiff to apply to the court for judgment to be entered summarily against a defendant, thus disposing of the matter without putting a plaintiff to the expense of a trial.

12. Summary judgment supposes that a plaintiff's claim is unimpeachable because the defendant has no proper defence.[1] It has the "hallmark of a final judgment and closes the door to the defendant to ventilate his defence at the trial".[2] However, a defendant can escape a summary judgment against him by showing that he has a *bona fide* defence to the action. The facts that he provides must be such that if proven at trial, they will constitute an answer to the plaintiff's claim. The court must determine whether the defendant has fully disclosed the nature and grounds of his defence and the material facts upon which it is founded, and 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. And while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must a least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable to the court to decide whether the affidavit discloses a *bona fide* defence.[3]

13. In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* the Supreme Court of Appeal summarised Corbett JA's approach as follows:[4]

[1] See *Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 (SCA) at [25[.
[2] *First National Bank of SA Ltd v Myburgh and Another* 2002 (2=4) SA 176 (C) at para [7].
[3] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 425G-426E.
[4] *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at para [32].

In the *Maharaj* case at 425G-426E, Corbett JA, was keen to ensure first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both *bona fide* and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.

14. There can be no claim for summary judgment on an illiquid claim such as a claim for damages or specific performance. A claim cannot be regarded as one for 'a liquidated amount in money' unless it is based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a matter of mere calculation.[5] The plaintiffs' claim is based on arrear rental amounts and service charges which have not been paid. Such amounts are easily ascertainable by mere calculation.

15. Considering the nature of summary judgment, 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 accordingly be refused.[6]

DEFENDANTS' POINTS IN LIMINE & DEFENCES

16. The defendants raised several points in their papers, but most of them were not pursued at the hearing. These include whether the deponent to the founding affidavit had been authorised to depose to the affidavit, whether the application for summary judgment had been brought timeously, whether the plaintiffs had taken a further step by amending their particulars of claim and as such had

[5] *Oos Randse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk (2)* 1978 (1) SA 164 (W) at 168H.
[6] See *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) at 347H.

waived their right to apply for summary judgment; and whether the lease had been validly cancelled. I do not consider these points to have much merit.

17. The defendants' main argument was their contention that Dukada AJ, in making his order rescinding the default judgment, also granted the defendants leave to defend the instituted action. In the result, they say, this application for summary judgment is not competent. Their argument is that the court found that the defendants had a *bona fide* defence against the claim of the plaintiffs for arrear rental and charges; otherwise, the court would not have granted leave to defend.

18. As stated above, the presiding judge simply granted the application without giving reasons or referring to the specific relief sought by the defendants in their notice of motion.

19. It is necessary to consider the notice of motion in the rescission application, which consisted of four prayers: prayer 1 (condonation for the late filing of the application); prayer 2 (that the default judgment granted on 21 November 2019, be rescinded and set aside); and prayer 4 (costs of the application to be costs in the main action, unless opposed). The basis for the defendants' argument lies in prayer 3: "that leave be granted to the Applicants to defend the instituted action and that the Applicants be ordered to file a plea, within 10 (ten) days from date of this order."

20. Defendants' counsel argued that the situation is akin to issue estoppel, as the parties are the same and the issue is the same. The court was, therefore, functus officio.

21. Plaintiffs' counsel argued that granting a rescission of judgment does not mean that there is a defence, or that the defendants were given leave to defend in respect of a summary judgment application. Plaintiffs' counsel submitted that the order simply opened the door for the defendants to enter the case, whereafter the ordinary rules would apply; in other words, the court did not

rule that the defendants had a *bona fide* defence for purposes of summary judgment. The court did not consider the exact orders in the notice of motion but merely granted rescission of the default judgment. The order was not premised on the basis that payment had been made. Under these circumstances, the plaintiffs may therefore avail themselves of summary judgment.

22. It would have been preferable for the court to state in the order which prayers it was granting, rather than to state simply that the application was granted. Furthermore, it is unfortunate that the learned acting judge merely granted the application without giving reasons, particularly as the application was opposed and the court had the benefit of comprehensive heads of argument.

23. A question that arises is whether this court should take into account the arguments made by the parties in the rescission application, in considering this summary judgment application. In *First National Bank SA Ltd v Myburgh,* in deciding a summary judgment application, the court had regard to other material in the file, namely the additional facts deposed to by the second defendant in the founding affidavit to his application for the earlier rescission of judgment.[7] Harms calls this approach "doubtful".[8] I consider it unnecessary for me to take those arguments into account.

24. The approach to interpreting a court order was recently considered by Goosen AJA (as he then was) in *Martrade Shipping and Transport GmbH v United Enterprises Corporation and MV 'Unity'*.[9] The essence of the judgment is as follows:

> [2] The principles which apply to the interpretation of court orders are well-established. Trollip JA observed in Firestone South Africa (Pty) Ltd v Gentiruco AG that the same principles apply as apply to construing documents. Thus, '..(T)he court's intention is to be ascertained from the

[7] *Myburgh supra.*
[8] Harms *Civil Procedure in the Superior Courts* (2021) B-222(6).
[9] [2020] ZASCA 120 (2 October 2020).

language of the judgment or order as construed according to the usual, well-known rules… Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole to ascertain its intention.'

[3] The starting point, it was held in Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Limited and others, is to determine the manifest purpose of the order. This was endorsed by the Constitutional Court in Eke v Parsons. This court, in Natal Joint Municipal Pension Fund v Endumeni Municipality, described the process of interpretation as involving a unitary exercise of considering language, context and purpose. It is an objective exercise where, in the face of ambiguity, a sensible [approach] is to be preferred to one which undermines the purpose of the document or order. (footnotes omitted)

25. It is clear that the court granted the relief sought in the notice of motion. This included granting leave to defend. The critical question is whether this implies a *bona fide* defence to the claim that would successfully defeat summary judgment, or whether it merely allowed the defendants to enter the case, as argued by the plaintiffs' counsel.

26. A sensible approach is preferable to one which undermines the purpose of the order. I am of the view that Dukada AJ's order cannot be construed as giving the defendants a 'free pass'. An application for rescission of a default judgment is different in procedure and substance to an application for summary judgment. They are regulated by different Rules. The context in which each of the applications is considered, is different. In each case the purpose, scope and nature of the enquiry is different.

27. It is correct that in an application for rescission of default judgment in terms of Rule 31(2)(b), a court must determine if 'good cause' exists to set aside the default judgment. This would include the court establishing whether an

applicant (defendant) has a *bona fide* defence to the plaintiff's claim. However, the existence of a *bona fide* defence is merely one of several factors that a court must consider when it adjudicates a rescission application; it is not the primary focus of the enquiry.

28. I take the view that an order rescinding a default judgment cannot be used as an automatic 'defence' against a summary judgment application. Should a defendant oppose a summary judgment application, it would not be sufficient for them merely to say that previously a rescission order had been granted in their favour, even if the court had specifically granted leave to defend. The mere fact that a default judgment was rescinded, and the court granted leave to defend, does not immunize a defendant against a subsequent summary judgment application. If this were the case, it would amount to a circumvention of Rule 32 and essentially bar a plaintiff from seeking summary judgment against a defendant who was successful in having a default judgment rescinded and who was granted leave to defend by the court.

29. Furthermore, the plaintiffs subsequently amended their particulars of claim, and it is in respect of the *amended* particulars of claim that the defendants delivered their plea – and it is based on that plea that the plaintiffs have applied for summary judgment.

30. A further defence argued by the defendants at the hearing is that they deny indebtedness to the plaintiffs for the stipulated amounts set out in Annexure D (a reconciliation statement). In the resisting affidavit, the allegation is made that Annexure D is inadmissible evidence, but no grounds are given for this allegation. They plead that certain amounts had been paid by them (proof is attached) and that the amount being claimed is incorrect. The defendants give a detailed account of their objection. They assert that they had paid rental and ancillary charges for June, July and August in the aggregate amount of R 392, 353.11. They take particular issue with the claims in respect of September to

November 2019, considering that the first defendant had already vacated the premises on 31 August 2019.

31. In respect of September, October and November 2019, it is clear from Annexure D that rental was claimed incorrectly for the month of September. This was conceded by the plaintiffs' counsel. However, the reconciliation statement also shows that no rental was charged for October and November 2019. Any amount awarded to the plaintiffs should summary judgment be granted, should reflect a deduction of the September rental amount.

32. According to the plaintiffs' counsel, all the payments referred to by the defendants are reflected in Annexure D and have been considered in calculating the arrears. The remaining amounts are in respect of consumption charges, not rental, whilst the first defendant remained in occupation of the premises; These consumption charges were raised in arrears and the first defendant remains liable for payment thereof.

33. Plaintiffs' counsel further explained that the last payment which the defendants paid, was in fact payment of a deposit. This is not a payment in the true sense; it is an exercise by the plaintiffs of their rights under and in terms of the lease agreement to utilise the full deposit as soon as the first defendant fell into arrears. Once the plaintiffs had exercised this right, the defendants in terms of the lease agreement are obliged to reinstate the deposit until all the defendants' obligations under and in terms of the lease agreement have come to an end. The plaintiffs are entitled to allocate the deposit to any amount and to allocate and re-allocate any payments made as they deem fit.[10] Even taking into consideration these payments, the defendants have not settled their indebtedness in any manner or form.

34. The defendants contend that they have disclosed more than a *bona fide* defence and they are entitled to be granted leave to defend. I disagree. The objection

[10] See clause 8.2 of the agreement.

which the defendants had to the rental claim for September 2019 was conceded by the applicants. The reconciliation statement also shows that no rental amounts were charged for October and November 2019, contrary to what was alleged by the defendants.

35. In respect of the remainder of the claim, relating to consumption charges, the defendants, in my view, have failed to convince me that they have a *bona fide* defence.

36. Under the circumstances, the plaintiffs are entitled to summary judgment, but for a reduced amount, calculated as follows: R 228, 617.03 (amount of claim 1) minus R 95, 438.29 (September rental incl VAT) = R 133, 178.74.

COSTS

37. In terms of clause 29.3 of the agreement, the plaintiffs are entitled to costs on the scale as between attorney and client.

I MAKE THE FOLLOWING ORDER:

1. Summary judgment is granted against the First and Second Defendant, jointly and severally, the one paying the other to be so absolved for:

    a. Payment of the amount of R 133, 178.74.

    b. Interest thereon at the prevailing prime rate from time to time (currently 9.75%) plus 2% per annum compounded monthly in arrears from the date of service of the summons to the date of final payment.

    c. Costs on the scale as between attorney and client.

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M. Olivier

Judge of the High Court (Acting)

Gauteng Division, Johannesburg

Date of judgment: 30 June 2023

On behalf of Plaintiffs:	J.G. Dobie
Instructed by:	Rooseboom Attorneys
On behalf of Defendants:	J. Eastes
Instructed by:	Southey Attorneys Inc