



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

CASE NO: 2022 - 033617

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

DATE
SIGNATURE

In the application by

VUKILE PROPERTY FUND L TD

Plaintiff

and

NALEDI BAKERIES CC (2000/008994/23)

First Defendant

KHUMALO, KABELO ERIC

Second Defendant

KHUMALO, GOLDIE WILHELMINA ZONDIWE

Third Defendant

JUDGMENT

MOORCROFT AJ:

Summary

Summary judgement – bona fide defence

Order

[1] In this matter I make the following order:

1. *Summary judgment is granted in favour of the plaintiff in the amount of R189 854,97;*
2. *Interest thereon at the rate of 7.25% per annum compounded monthly from 1 December 2022 to date of payment;*
3. *Ejection forthwith of the First Defendant and anyone claiming occupation through the First Defendant from the commercial leased premises described as Shop No. 55 (measuring approximately 160.39 square metres), Daveyton Shopping Centre, Eiselen Street, Daveyton, Gauteng;*
4. *Costs of the suit.*

[2] The reasons for the order follow below.

Introduction

[3] This is an application for summary judgement in terms of rule 32 of the uniform rules. The rule was amended by government notice (GN) R842 of 31 May 2019 when a substantially revised summary judgement procedure was introduced.¹ Summary judgement is now applied for not after the entry of appearance to defend but after the filing of a plea. The plaintiff is then required to file an affidavit in support of the application for summary judgement to explain why the defences as pleaded do not raise triable issues and cannot be regarded as *bona fide*. This the plaintiff can only do when it knows what the defences relied upon by the defendant are. The defendant is therefore

¹ *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) para 22, *Nedbank v Weideman* 2020 JDR 2746 (FB) para 5, *Marsh and Another v Standard Bank of SA Ltd* 2000 (4) SA 947 (A) 949.

required to set out its defences in the plea and to raise triable issues² which may be further elaborated upon in the defendant's affidavit resisting summary judgment. The plea contains *facta probanda*; the affidavit also contains *facta probantia*.

[4] Rule 32 (3) requires a defendant to give security to the plaintiff to the satisfaction of the court for any judgement which may be given, or to satisfy the court by affidavit or with the leave of the court by oral evidence that the defendant has a *bona fide* defence.³ The defendant's evidence "*shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.*"

[5] The plaintiff's claim arises from the alleged breach of a written lease agreement between the plaintiff and the first defendant relating to commercial premises. The initial lease commenced on 1 December 2014 and terminated on 30 November 2019. After November 2019 the lease was relocated and continued as a monthly lease in terms of clause 10.4 of the lease. The lease continued on a monthly basis "*as recorded herein.*"

[6] The lease provided for the payment of a monthly rental together with rates and taxes, a contribution to a marketing fund, charges for the supply of electricity and water and other municipal expenses, as well as other associated charges and costs. Interest was to be calculated at the rate of 7.25% *per annum* compounded monthly in terms of clause 4.4 of the lease. The lease provided in clause 18.13 that a certificate signed by a director, manager, or internal accountant of the plaintiff whose authority need not be proved shall for all purposes be *prima facie* proof of the matters stated therein.

The breach

[7] The plaintiff alleges a breach and subsequent cancellation of the lease agreement. The lease was terminated in a letter dated 3 October 2022⁴ which purported to be cancellation upon one month's notice terminating the lease at the end of October 2022. If the intention was to cancel the lease on one month's notice the cancellation

² *PCL Consulting (Pty) Ltd trading as Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) para 8.

³ See *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) and the authorities referred to.

⁴ The date at the top of the letter refers to 2021 which is an obvious typographical error.

was not effectual as less than one month's notice was given. However, the plaintiff was also entitled to cancel on seven days' notice in the event of non-payment of any amount due and payable and if an amount was indeed outstanding and not paid then the letter served as termination of the lease at the end of October 2022. All it means is that the plaintiff gave more than seven days' notice.

[8] In the letter the plaintiff claimed payment of R247,167.90 in respect of arrear rental alleged to be outstanding at the time.

The disputed amount

[9] In their plea the defendants disputed the amount claimed and stated that the amount was in dispute because of inaccuracies in the account relating to the billing of the supply of electricity to the premises. The defendants also pleaded that it would be unreasonable to evict them from the premises. The dispute raised by the defendants in respect of the consumption of electricity is based on the fact that while the bakery at the premises continued to operate during the lockdown there were fewer customers and therefore the consumption of electricity should have been lower. The ability of the plaintiff to accurately record the consumption during the lockdown period was also questioned by the defendants.

[10] The defendants' defences are based on conjecture in that it is stated that the bakery did not operate "*at its optimum*" during the covid lockdown period. The defendants are however unable to present any evidence in this regard and in the absence of evidence the *prima facie* case made out by the certificates relied upon by the plaintiff must be accepted.

[11] The plaintiff point out however that the calculation complained of did not relate to the period March to July 2022 as alleged by the defendants, but related instead to the period 15 July to 17 August 2022. The readings were based on actual readings taken and not on estimates.

[12] The defendants do not dispute the correctness of the payments made and also do

not dispute receipt of the letter of demand of 3 October 2022.

[13] The defendants made certain payments during the period since summons was issued and the plaintiff now claims R189,854.97 together with interest at the rate of 7.25% *per annum* from 1 December 2022 to date of payment. The plaintiff attached a certificate of balance as well as a new statement of account to the affidavit in support of the application for summary judgement and reflecting payments made after the summons was prepared. Certificates that provide *prima facie* proof of calculations are acceptable⁵ in our law.

Rule 32 (4) provides that no evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in rule 32 (2) that this does not mean that a revised certificate reflecting the latest balances may not be presented in a summary judgement application. To hold otherwise would deprive a defendant who paid part of the debt of a defence in respect of part of the claim,⁶ and would deprive the court and all the parties of the opportunity to consider the latest financial details that are relevant to the litigation.

Supervening impossibility of performance and *vis maior*

[14] It is common cause that the bakery continue to operate during the lockdown period and it is commonly accepted in business that trade was slow during the lockdown period. The risk of a business downturn was a risk undertaken by the defendants' business and not a risk that can be allocated to the plaintiff.

[15] The bakery operated by the first defendant remained open during the lockdown period and the first defendant was able to use the premises for its intended purpose. Supervening impossibility does not arise from a difficulty in performing under a contract;⁷ it arises from an absolute impossibility.⁸ Commercial impossibility or undesirability does not give rise to supervening impossibility.⁹

⁵ *Berlesell (edms) bpk v Lehae Development Corporation BK en Andere* 1998 (3) SA 220 (O).

⁶ See *Rossouw v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) 454.

⁷ See *Nogoduka-Ngumbela Consortium (Pty) Ltd v Rage Distribution (Pty) Ltd* 2021 JDR2 2622 (GJ)

⁸ Compare *Heyneke v Abercrombie* 1974 (3) SA 338 (T) 344H to 345F.

⁹ Compare *Hennops Sports (Pty) Ltd v Luhan Auto (Pty) Ltd* 2022 JDR 3763 (GP) para 22. The question whether the covid-19 pandemic and the resultant lockdown resulted in *vis*

[16] The defendant cannot rely on *vis maior* and the performance of either parties' obligations never became impossible or prohibited by legislation.

The suretyship

[17] The second and third defendants bound themselves to the plaintiff jointly and severally with the first defendant as surety and co-principal debtor in April 2015. They stood surety for the due and punctual payment of all amounts due by the first defendant to the plaintiff "*arising out of*" the lease. It was also agreed that a certificate under the hand of a financial manager of the plaintiff or its agent certifying the indebtedness of the first defendant to the plaintiff will be *prima facie* evidence of the amount stated therein.

[18] The plaintiff's claim is one arising out of the lease and the second and third defendants are liable jointly and severally together with the first defendant for the outstanding debt.

[19] I therefore make the order in paragraph 1 above.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **7 MARCH 2024**

maior was discussed in some detail by Moshoana J and Cajee AJ in this judgment.

COUNSEL FOR THE PLAINTIFFS

G DOBIE

INSTRUCTED BY:

REAAN SWANEPOEL INC

COUNSEL FOR DEFENDANT

N T MABALA

INSTRUCTED BY

MABOTHE & GQWEDE
ATTORNEYS; previously
MATSEMELA AND BEZUIDENHOUT
ATTORNEYS

DATE OF ARGUMENT:

21 FEBRUARY 2024

DATE OF JUDGMENT:

7 MARCH 2024