REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 58806/2020

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

27/10/2022 .....
DATE SIGNATURE

In the matter between:

OZMIK PROPERTY INVESTMENTS (PTY) LTD **PLAINTIFF**

and

DIPLOBOX (PTY) LTD **First Defendant**

T/A PRETORIA INSTITUTE OF LEARNING

ABDUL TANYWA **Second Defendant**

HARRY HLATYWAYO **Third Defendant**

PRETORIA INSTITUTE OF LEARNING NPC **Fourth Defendant**

JEPPE COLLEGE OF COMMERCE AND COMPUTER (Pty) Ltd **Fifth Defendant**

JUDGEMENT

Barit AJ

Introduction

[1] This is a matter between the plaintiff, Ozmik Property Investments (Pty) Ltd (Ozmik) and five defendants, namely Diplobox (Pty) Ltd t/a Pretoria Institute of Learning (the first defendant); Abdul Tanywa (second defendant); Harry Hlatywayo (third defendant); Pretoria Institute of Learning (NPC) (fourth defendant) and Jeppe College of Commerce and Computer Studies (Pty) Ltd (fifth defendant).

[2] The plaintiff is Ozmik Property Investments (Pty) Ltd, a company with registration number 1999 / 010501/07, duly incorporated in accordance with the company laws of South Africa.

[3] The first defendant is Diplobox Investments trading as Pretoria Institute of Learning, with registration number 2010/03288/07, duly incorporated in accordance with the company laws of South Africa,

[4] The cause of this action is based on an agreement of lease with respect to certain premises Diplobox leased from Ozmik.

[5] Diplobox maintains deprivation either wholly or partially, with respect to the use of the leased property, referring to this as "deprivation". This was with respect to Diplobox's use of the premises for school purposes.

[6] Whilst Diplobox (the first defendant) leased the premises, defendants two, three, four and five entered into agreements of suretyship with respect to the main agreement.

[7] In terms of the facts supplied to this Court, Diplobox did make payments to Ozmik, up to a certain point. The claim by Ozmik is based on a balance owing. Hence, Ozmik launching this application.

Striking out

[8] Diplobox has applied for a striking out of certain paragraphs from Ozmik's affidavit in support of its application for summary judgement. This, Diplobox has applied for in terms of, as they so state, Uniform Law 6 (15) or alternatively in terms of the common law.

[9] Diplobox's application for striking out, in their own words, is the result that the "plaintiff's affidavit in support of summary judgement contains evidence which is irrelevant" (paragraph 3.1 of the defendant's heads of argument).

[10] Diplobox however go on to state (in paragraph 3.3) that if the *evidence is not struck out of the plaintiff's affidavit: then failing this at the very least the evidence ought to be ignored by this Court, in its adjudication of the merits of the application for summary judgement.*

[11] The question to be considered is whether Diplobox has a bona fide defence. This is the crux of the matter that has to be decided by the Court. The striking out would therefore serve no purpose in answering this question, and without striking out the Court could ignore those matters which the defendant wishes to have struck out, in the adjudication of the merits.

[12] I, after due consideration have decided to follow the latter course (re the request by Diplobox) by ignoring what can be considered as "irrelevant" in the Plaintiff's affidavit in support of summary judgement.

Current situation

[13] In terms of the current situation, Ozmik and Diplobox appear to be wide apart with respect to coming to any agreement. This was further confirmed by the following two factors:

(a) Diplobox has approached the matter on the basis of not being willing to pay anything whatsoever

(b) Ozmik and Diplobox, in the course of the proceedings in Court, attempted to reach agreements in the foyer of the Court building

on two separate occasions. However, the Court was informed that the two parties are still wide apart.

Details

[14] A document entitled "Agreement of Lease" was signed on behalf of Ozmik and the five defendants.

[15] Ozmik and Diplobox signed an Agreement of Lease on 15 January 2020 The second, third, fourth and fifth defendants signed the Agreement of Lease on 19 December 2019.

[16] This agreement included the identification of the property as well as the terms of payment together with further details, terms and conditions. Included was the suretyship clause affecting the second, third, fourth and fifth defendants. The effective date of occupation being 1 January 2020.

[17] During the course of the lease, circumstances beyond the control of the plaintiff and the defendant came into play. Namely the onset of Covid 19.

[18] On 27 March 2020 certain regulations were promulgated in terms of Section 27(2) of the disaster management act 57 of 2020.

[19] Diplobox maintains that due to factors not in the actual lease agreement, full and effective use of the said premises became problematic (i.e. the deprivation).

[20] Hence the current action in which Ozmik is claiming a payment from the defendants.

[21] The plaintiff and the defendant, in terms of the agreement, could have made use of mediation. However the plaintiff maintained that same would be a useless exercise, and in terms of the contract of lease, the option of the use of mediation rested on the shoulders of the applicant. Hence mediation did not take place.

The law

[22] Gibson, in *South African Mercantile and Company Law* (6th Edition, 1988 p10) gives a definition which is all encompassing, of a contract:

"A contract is a lawful agreement made by two or more persons within the limits of their contractual capacity, with a serious intention of creating a legal obligation, communicating such intention, without vagueness, each to the other and being of the same mind as to the subject-matter, to perform positive or negative acts, which are possible of performance."

Gibson maintains that all the essentials as listed in this definition must be part of any valid contract. Without these essentials the contract becomes a nullity. Hence, Gibson subdivides the definition into 7 specific items, any one of which if missing will invalidate or what might be believed to be a contract.

(a) The agreement must be lawful
(b) The agreement must be made within the limits of the party's contractual capacity.
(c) The parties must seriously intend to contract
(d) The parties must communicate their intention to each other
(e) The agreement must not be vague
(f) The parties must be of the same mind as to the subject matter
(g) Performance must be possible.

[23] The question this Court is faced with is whether there is a valid contract between Ozmik and Diplobox.

(a) The contract between Ozmik and Diplobox is headed with the words "Agreement of Lease", and then proceeds with various clauses clearly for the lawful use of premises. In addition there are attached Schedules of Conditions, Resolutions and Deeds of Suretyship.
(b) The parties representing the plaintiff and the defendant are named including their capacities.
(c) The nature of the agreement between Ozmik and Diplobox, including the signing thereof shows the intent to contract
(d) The detailed subheadings to the contract clearly indicate the mutual obligations in terms of the agreement.

(e) The agreement in terms of essentials (eg address of premises, rents, period of lease) are all determinable and not vague.

(f) The signed contract clearly contains a meeting of minds

(g) Performance of the intended lease, at the time of contracting, was possible.

[24] From the above the following is pertinent:

(a) In terms of the law as to what a contract is, all the essentials are present in the agreement between Ozmik and Diplobox.

(b) Secondly Diplobox has made certain payments to Ozmik but then stopped.

(c) Thirdly, in addition the parties had freedom to contract in the manner that they themselves deemed fit.

[25] Paragraph 17.6 of the Agreement of Lease reads as follows:

> *"Any dispute between the LESSOR and the LESSEE arising out of this lease shall at the option of the LESSOR be submitted to arbitration in terms of the provision of the arbitration act 1985, or any amendments thereto. Alternatively should the LESSOR so decide, it shall be entitled to proceed against the LESSEE by way of action or application, and the LESSEE hereby consents to the jurisdiction of the appropriate Magistrate's Court in regard to any such proceedings arising thereto or indirectly out of this issue. Notwithstanding that the amount claimed would otherwise exceed the jurisdiction of the Magistrate's Court. Nothing contained in this clause, however, shall be deemed to oblige the LESSOR to proceed against the LESSEE in the Magistrate's Court and the LESSOR shall be entitled should it be so decided to proceed against the LESSEE out of the appropriate division of the Supreme Court. The LESSEE agrees and undertakes not to appeal against any decision of such Arbitration or Court of Law."*

[26] With respect to the arbitration mentioned in this paragraph the same ties in with the refusal of the applicant to submit to arbitration, in which it has exercised its right to not proceed in the direction of arbitration.

[27] Under "General", the following is recorded in paragraph 18.2:

> *"No alteration or variation of the deed shall be of any force or effect unless it is produced in writing and signed by both the LESSOR and the LESSEE".*

The following aspects are noted:

(a) There, from the information supplied, appears to be nothing further with respect to the lease agreement to make any substitution or variation of the agreement possible.

(b) Ozmik claims that based on the contractual agreement Diplobox is liable for an amount of R2 409 690.66. Such being due and payable for rent and other amounts based on the agreement.

(c) Ozmik has on their part agreed to a remission of rental in the amount of R600 000.

(d) From information supplied to the Court, Diplobox at all times had beneficial occupation of the premises in question.

[28] Ozmik has stated that it is willing to reduce the balance due by Diplobox. Whereas Diplobox has stated that it is not willing to pay anything.

[29] In this respect the Court must decide whether any amount should be paid by Diplobox to Ozmik, and if an amount is to be paid, the amount must be just and equitable.

[30] It is also noted that in the agreement of lease, there is a provision which states that the decision of either the mediator or the Court of Law would be final and not subject to appeal (see paragraph 26).

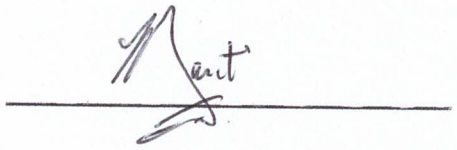
[31] Ozmik, with respect to costs, has in a draft order submitted to the Court, relied on this clause in the "Agreement of Lease" with respect to what the "cost order" should be. This is indicated as clause 17:1:7, by Ozmik.

However nowhere in the clause in question (ie 17:1:7) is there support for that contention nor are "costs" mentioned therein.

[32] I therefore make the following order:

(a) Payment in the amount of R1,800,000 by the defendants to the plaintiff, one paying the others to be absolved.

(b) The defendants are to pay the costs of this application on a party and party scale, one paying the others to be absolved.



L BARIT
Acting Judge of the High Court
Gauteng Division, Pretoria

Appearances

For the Plaintiff:

Adv. C.B. Ellis
Instructed by: E.J. Steyn Attorneys Incorporated

For the Defendant
Adv. A Bester SC:
Instructed by Fairbridges Wertheim Bekker Attorneys