

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 28935/2021

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

Date: 28 August 2023 E van der  
Schvff

In the matter between:

EMIRA PROPERTY FUND LIMITED

FIRST APPLICANT

PILOT PERIDOT INVESTMENTS 1 (PTY) LTD

SECOND APPLICANT

and

BRAMLOU PROJECTS SOLUTIONS (PTY) LTD

FIRST RESPONDENT

WILLEM JOHANNES HENDRIK COETZEE

SECOND RESPONDENT

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JUDGMENT

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Van der Schvff J

**Introduction**

- [1] This is an application for summary judgment. The parties are referred to as the plaintiffs and defendants.
- [2] The plaintiffs' claim against the defendants is based on a standard lease agreement. The defendants' affidavit resisting summary judgment was filed one day late, and the second defendant seeks condonation for this late filing. The late filing stands to be condoned.
- [3] Chesley Jonathan Moorcroft, a senior portfolio manager from Broll Property Group (Pty) Ltd, the plaintiffs' management agent, deposed the affidavit supporting the summary judgment application. The plaintiffs submit that Mr. Moorcroft, by virtue of being the senior portfolio manager of the Broll Property Group, has the necessary personal knowledge, after having regard to the records and the facts, to confirm the causes of action and the amounts set out in the summons with the particulars of claim. Counsel referred to *Rees and Another v Investec Bank Ltd*,<sup>1</sup> where the Supreme Court of Appeal held that where an applicant for summary judgment is a corporation, the deponent to its affidavit need not have first-hand knowledge of every fact comprising its cause of action. The deponent can rely, for its knowledge, on documents in the corporation's possession.
- [4] *In casu*, the deponent states that he has read the lease agreement and the accounting records and has personal knowledge of the defendants' billing accounts, as well as how the management of the property, conclusion of the lease agreements, and billing of the plaintiff's tenants are executed.
- [5] The plaintiffs state that a written lease agreement was concluded with the first defendant, duly represented by the second defendant. The second defendant was authorised to sign the lease agreement by virtue of a resolution passed at a meeting of the first defendant's board of directors. The plaintiffs complied with all obligations in terms of the agreement from the commencement of the lease. During

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<sup>1</sup> 2014 (4) SA 220 (SCA)

2020, the plaintiffs, as a result of the economic shock from the COVID-19 pandemic, deferred payment of some of the charges levied in terms of the lease on the basis that the deferred amounts would be payable at the plaintiffs' discretion at a later stage to be determined by the plaintiffs. The amendment to the written terms of the lease was done unilaterally by the plaintiffs. The plaintiffs deferred payments from November 2020 to June 2021, whereafter the plaintiffs reloaded the deferred amounts to the first defendant's account on a monthly basis. The first defendant failed to comply with the terms of the agreement by failing to maintain proper payments of rentals due and payable in terms of the agreement. The second defendant bound himself jointly and severally as surety and co-principal debtor in solidum to the plaintiffs for the due fulfillment of the first defendants' responsibilities regarding the lease or any renewal thereof.

- [6] The second defendant denies binding himself as surety and co-principal debtor to the plaintiffs for the due fulfillment by the first defendant of all the terms of the lease agreement. The defendants deny that the plaintiffs have complied with all obligations in terms of the lease agreement. The first defendant pleads that:

'Since the plaintiffs were unable to afford the first defendant beneficial occupation of the premises [during the Covid-19 pandemic] and the fact that the first defendant was unable to occupy the premises and enjoy the benefits they were offered during the hard lockdown, and level 4 lockdown, the plaintiffs' performance of its obligation to afford the first defendant beneficial occupation was rendered impossible by the March 2020 regulations.

The first defendant is entitled to a rental remission in respect of the period of 27 March 2020 until 31 May 2020.

As a result of the COVID-19 lockdown, the plaintiffs offered the first defendant at discount of 50% on the rent and parking during the period of 27 March 2020 and June 2020. The aforesaid discount was accepted. The first defendant is consequently and in addition to the aforesaid remission ... entitled to an additional discount...

The first defendant canceled the agreement and vacated the leased premises on or about 12 June 2021. The leased premises was (*sic.*) occupied since about July 2021 by new tenants. The plaintiffs are consequently not entitled to claim rental and ancillary charges for the period of July 2021 until March 2022.'

[7] The defendants instituted a counterclaim. They contend that in terms of regulation 11B(4) of the March 2020 Covid-regulations, landlords were obliged to close premises under their control, save for essential goods and services. Tenants were obliged to keep rental premises under their control closed. The defendants claim back the payments made to the plaintiffs in excess of the 50% discount agreed to by the parties.

[8] The defendants aver that the amounts claimed by the plaintiffs are not liquidated nor based on a liquid document. For the reasons indicated below, I need not deal with this issue.

## **Discussion**

*Re: Deponent to the plaintiffs' affidavit*

[9] The plaintiffs do not indicate in the particulars of claim who acted on their behalf when the written lease agreement was unilaterally amended to provide for the deferment of payment. The plaintiffs did not indicate how this decision was communicated to the defendants. I agree with the defendants that sufficient and direct knowledge of the salient facts regarding the amendment of the written lease agreement cannot be ascribed to Mr. Moorcroft, the deponent to the plaintiffs' affidavit in support of summary judgment, in the absence of him expressly stating that he was aware of the arrangement.

*Re: Triable issues*

[10] The plaintiffs claim that payments in terms of the written lease agreement were unilaterally deferred, while the defendants claim that the first defendant was provided a 50% discount. I am alive thereto that the written lease agreement contains a non-variation clause, but the plaintiffs pleaded that an 'amendment to the written terms of the lease was done unilaterally by the plaintiffs.' I am of the view that this aspect raises a triable issue.

[11] The defendants referred to *Butcher Shop and Grill CC v Trustees for the Time Being of the Bymyan Trust*,<sup>2</sup> where the Supreme Court of Appeal reiterated that unless the right to claim remission of rent in circumstances of *vis major* is expressly limited or excluded in an agreement, a lessee is entitled to remission of rent either wholly or in part.

[12] Clause 23.1 deals with remission of rent and provides as follows:

'The Tenant shall have no claim or right of action of whatsoever nature against the Landlord for damages, loss or otherwise, nor shall it be entitled to withhold or defer payment of rent, nor shall the Tenant be entitled to a remission of rent, by reason of an overflow of water supply or fire or any leakage or any electrical fault or by reason of the elements of the weather or by reason of the Leased Premises or any part of the Building or Property being in a defective condition or falling into despair or any particular repairs not being affected by the Landlord or by reason of their being any defect in the equipment of the Landlord or as a result of any other cause whatsoever.'

[13] Clause 23.1 of the agreement needs to be interpreted in order to determine whether the consequences of the Covid-19 pandemic and the regulatory restriction on conducting business are included in the term 'any other cause whatsoever'.

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<sup>2</sup> 2023 JDR 1219 (SCA) at para [13].

[14] The Supreme Court of Appeal explained in *Novartis v Maphil*:<sup>3</sup>

'[27] I do not understand these judgments to mean that interpretation is a process that takes into account only the objective meaning of the words (if that is ascertainable), and does not have regard to the contract as a whole or the circumstances in which it was entered into. This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. KPMG, in the passage cited, explains that parole evidence is inadmissible to modify, vary or add to the written terms of the agreement, and that it is the role of the court, and not witnesses, to interpret a document. It adds, importantly, that there is no real distinction between background circumstances, and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded – the context – to determine the parties' intention.

[28] The passage cited from the judgment of Wallis JA in *Endumeni* summarizes the state of the law as it was in 2012. This court did not change the law, and it certainly did not introduce an objective approach in the sense argued by *Norvatis*, which was to have regard only to the words on the paper. That much was made clear in a subsequent judgment of Wallis JA in *Bothma-Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA), paragraphs 10 to 12 and in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) paragraphs 24 and 25. A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.

[29] Referring to the earlier approach to interpretation adopted by this court in *Coopers & Lybrand & others v Bryant* [1995] ZASCA 64; 1995 (3) SA 761 (A) at 768A-E, where Joubert JA had drawn a distinction between background and

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<sup>3</sup> [2015] ZASCA 111 at paras [27] – [30].

surrounding circumstances, and held that only where there is an ambiguity in the language, should a court look at surrounding circumstances, Wallis JA said (para 12 of *Bothma-Botha*):

'That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. While the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise" [a reference to a statement of Lord Clarke SCJ in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2012] Lloyd's Rep 34 (SC) para 21].'

[15] Admissible evidence of context may be led in a trial.<sup>4</sup> As a result, this application for summary judgment stands to be dismissed for the trial court to determine the issues raised.

## **ORDER**

**In the result, the following order is granted:**

- 1. The late filing of the affidavit resisting summary judgment is condoned;**
- 2. The application for summary judgment is dismissed, and the defendants are granted leave to defend the action;**
- 3. Costs are costs in the cause.**

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<sup>4</sup> *Bothma & Others v Bothma N.O. & Another* (748/2019) [2021] ZASCA 46 (15 April 2021).

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E van der Schyff  
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the applicants/plaintiffs:	Adv. W. R. Du Preez
Instructed by:	GILDENHUYS MALATJI INC.
For the respondents/defendants:	Adv. K. Fitzroy
Instructed by:	JAPIE VAN ZYL ATTORNEYS
Date of the hearing:	23 August 2023
Date of judgment:	28 August 2023