



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO. D3406/2022

SHREE PROPERTY HOLDINGS (PTY) LTD

Plaintiff

And

CLARKS AUTO HOLDINGS (PTY) LTD

T/A CLINT PANEL BEATERS

SHANTAL NAIDOO

CRAIG KARUNAKARUM

RICHARD NAIDOO

First Defendant

Second Defendant

Third Defendant

Fourth Defendant

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be 28 October 2022 (Friday) at 12:30.

ORDER

It is ordered:

- 1 Summary judgement is refused;
- 2 The defendants are hereby given leave to defend; and
- 3 Costs are to be costs in the cause.

JUDGMENT

C M Mlaba AJ:

Introduction

[1] This is an opposed application for summary judgment, in which the plaintiff seeks an order against the first to the fourth defendants jointly and severally, the one paying the other to be absolved for:

- (a) Payment of R2 174 4520.58, being the arrear rentals and utilities;
- (b) Payment of R344 889.25 damages per month of unlawful occupation;
- (c) Interest thereon at the rate of prime plus 2% per annum from 25 January 2022 to date of payment;
- (d) Ejectment of the first defendant and all those who occupy the premises through the first defendant from the premises at Erf 701, La Mercy, (Pran 4B, Unit 2), Dube Trade Port, Off Umzimkhulu/Umkhomazi Drive and Umlazi Close, La Mercy, KwaZulu-Natal; and
- (e) Costs of suits as between attorney and client.

[2] The plaintiff contends that the defendants' plea does not raise triable issues in that:

- (a) In paragraph 3.1 of its plea, the first defendant alleges that it fell into arrears with payment of its rent as a result of the plaintiff's alleged breach of the lease agreement by obstructing the first defendant's premises through excavations outside the entrance from 15 June 2021 to 15 December 2021. The plaintiff refutes this allegation on the following grounds:
 - (i) A photograph in annexure "C" of the founding affidavit depicts a clear, unobstructed path of entry into the first defendant's premises as excavations were filled in and boards were placed over the fill to permit entry of vehicles into the premises without being damaged.
 - (ii) If this allegation was true, the first defendant failed to serve it with a breach notice in compliance with clause 29 of the lease agreement.
- (b) Furthermore, in paragraph 3.1 of the plea, the defendants claim that the plaintiff's alleged breach occurred on 15 June 2021, which resulted in its business failing. The plaintiff refutes this allegation on the following grounds:

- (i) The first defendant fell into arrears before 15 June 2021. In support of this the plaintiff refers to the following clauses of the addendum to the lease agreement which was signed on 28 May 2021:
 - (aa) Clause 2.2 records that the first defendant has regularly been in arrears with its payments...despite an agreed staggered payment plan which was recorded in a letter dated 25 June 2020 when its arrears totalled R1 580 159.75.
 - (bb) In terms of clause 4.2, the first defendant was obliged to make payment of utility arrears by no later than 01 June 2021 and rental arrears of R1 472 168.68 in seven (7) equal monthly instalments but failed to honour the full terms of the addendum causing it to be liable for the full amount as per the provisions of clause 4.4.
- (c) In subparagraph 3.1.2 of the defendants' plea they allege that the delay of seven months in obtaining original equipment manufacturer accreditation caused the first defendant to fall into arrears. The plaintiff refutes this allegation on the following grounds:
 - (i) Clause 16.5.1 of the lease agreement states that the plaintiff does not warrant that the premises are fit for any purpose whatsoever.
 - (ii) Clause 16.5.2 of the lease agreement states that the any permit or license that may be required in respect of the premises for conduct of the first defendant's business will be granted or that the premises are suitable for the use the tenant wishes to put the premises.
- (d) In paragraph 4 of its plea, the first defendant admits that the addendum was signed its authorised representative but contends that it is "contra bonos mores" and contrary to "ubuntu" as it was signed under duress after it claims that the plaintiff threatened to close its doors. The plaintiff refutes this allegation on the following ground:
 - (i) The first defendant was legally represented by its attorney, Mrs Nishan Panday of Jay Pundit & Co, who received the addendum and oversaw the entire process, including ensuring that it was signed by the first defendant's representatives. The first defendant's legal representative did not raise the issue of duress at the time.
- (e) In paragraph 6 of the defendants' plea, they make a conditional tender to pay all arrear rent and utilities, less its claimed damages to be awarded to it, in

instalments. The plaintiff does not accept the unilateral tender and sees it as further evidence of the first defendant's inability to meet its obligation.

- (f) In paragraph 4.2 of its counterclaim, the first defendant alleges that 50% of its customers declined to drive onto its premises given the unstable access as a result of the continuing excavations. This contradicts paragraph 3 of the plea which states that access was obstructed by the excavations. The plaintiff refutes this claim on the basis that:
 - (i) Access remained intact by boards across the covered excavated section.
 - (ii) The premises has two entrances and the first defendant elected not to use the second entrance which was not obstructed in anyway.
- (g) In paragraph 7 of its counterclaim, the first defendant relies on annexure "CA3", which records that the ramp at the back of the premises could not be used because it was unstable and rusted and will not be able to carry the weight of the vehicles. The plaintiff refutes this allegation on the following grounds:
 - (i) Clause 15.6 of the lease agreement provides that it is the responsibility of the first defendant, as a tenant, to maintain all external and internal works of whatsoever nature on the premises.
 - (ii) Clause 15.2.1.13 of the lease agreement placed on the first defendant the responsibility to repair any damages, both interior and exterior, howsoever caused.
- (h) The plaintiff refutes that the first defendant is entitled to a claim for damages, in light of the provisions of clause 15.16.1 of the lease agreement, which stipulates that the first defendant shall not have any claim against the plaintiff for loss or damages which it may suffer.
- (i) The plaintiff denies the defendants are entitled to request, as they do in paragraph 9 of their plea, that the plaintiff's claim be suspended pending the determination of its counterclaim, as it contends that clause 15.18 of the lease agreement does not entitle the first defendant under any circumstances to withhold or delay payment of any amount due to the plaintiff.
- (j) The plaintiff contends that this allegation is not true. In support thereof, the plaintiff refers to clause 3.2 of the addendum to the lease agreement found in annexure "B" of the particulars, signed on 28 May 2021, in which it is recorded that the first defendant has always been in arrears with its payments... despite an agreed staggered payment plan.

[3] In paragraph 3.3. of their answering affidavit, the defendants dispute the plaintiff's allegation that they have no bona fide defence to the plaintiff's claim.

[4] The defendants set out their defence in their answering affidavit as follows:

- (a) The first defendant fell into arrears with payment of its rent as a result of the plaintiff's breach of the agreement of lease by the plaintiff obstructing the first defendant, its customers and potential customers access to the leased premises, through continuing excavations outside the entire entrance to the leased premises as indicated in photographs in annexures "BB1" to "BB7" from 15 June 2021 to 15 December 2021, which culminated in:
- (i) The failure of a substantial part of the first defendant's business operations, and its inability to meet its financial commitment such as the payment of rent and utilities to the plaintiff.
 - (ii) Delay of a period of seven months in the first defendant obtaining the "original manufacturer accreditation" which would entitle it to receive repair work on more vehicles and vehicle dealerships eg Volkswagen, motor insurance repairs and fleet repairs (paragraph 4.1 of the answering affidavit).
- (b) In paragraph 5.4 of defendants' answering affidavit reference is made to annexure "CA3" of the defendants' counterclaim, which is the first defendant's correspondence to the plaintiff regarding excavation, which reads:

'as per conversation with Richard this morning, Please advise as to when you will be able to patch up the area and allow our clients to move freely into and out of our drive.

We have failed Audits due to the entrance way being restricted and we have another Audit that is a major contribution to our Revenue

The contractors are back on site and are cutting through the remainder small area which we were using to entre and exit. This new area that s being worked on now does not allow for any entry and as mentioned we cannot use the ramp at the back due it being unstable and rusted and will not be able to carry the weight of the vehicle.

I await your response'

- (c) In paragraph 4.3 of their answering affidavit, they state that 50% of the first defendant's potential customers declined to drive their motor vehicles onto the leased premises given the unstable access to the leased premises as a result of such continuing over a period from 15 June 2021 to 15 December 2021.
- (d) In paragraph 4.4 of their answering affidavit, the defendants alleged that first defendant suffered substantial damages as a result of the plaintiff's conduct, which forms the subject matter of its counterclaim.
- (e) In clause 5.20 of the defendants' answering affidavit it states the following:
'...and therefore its attempt to impose clauses in the leased agreement that are, under the circumstances, contra *bono mores* and contrary to "ubuntu", cannot be countenanced. It will be argued at trial, on good authority and evidence adduced in support of such evidence that the Plaintiff's reliance repeatedly in its affidavit on such purported "liability exemption" provisions is unsustainable.'

[5] The application was set down for hearing on 25 October 2022.

[6] The parties delivered heads of arguments in which they effectively reiterated their respective case as per their affidavits.

[7] The address by both legal representatives also mirrored their heads of arguments and their respective cases as per their papers.

[8] The issue for determination in casu is whether defendants have a bona fide defence?

[9] The starting point is Uniform rule 32(3)(b), which reads:

- '(3) upon the hearing of an application for summary judgement the defendant may –
- (b) satisfy the court by affidavit. . . 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 therefor.'

[10] The court has first to examine whether there has been sufficient disclosure by the defendants of the nature and grounds of their defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must both be bona fide and good in law.¹ Bona fide means to allege facts which, if proved at trial, would constitute a good defence to the claim against the defendant.²

[11] All that the court enquires in deciding whether the defendant has set out a bona fide defence is:

- (a) Whether the defendant has disclosed the nature and grounds of his defense.
- (b) Whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim which is bona fide and good in law.

[12] It is not intended in summary judgment proceedings, that a court should investigate the defence and decide whether the probabilities of success are with the defendant or not.³

[13] The defendants' defence, as articulated by defendants' counsel during the hearing, and on its papers, can be summarized as follows:

- (a) The plaintiff failed to give the first defendant unhindered access to the leased premises due to excavations over a period of time.
- (b) The abovementioned conduct of the plaintiff led to the failure of a substantial part of the first defendant's business operations, and its inability to meet its financial commitment such as the payment of rent and utilities to the plaintiff.
- (c) Consequently, the first defendant suffered damages which are the subject matter of the first defendant's counterclaim in these proceedings.
- (d) The plaintiff cannot rely on liability exemption clauses in the lease agreement to escape its liability to the first defendant given its own conduct in casu.
- (e) The liability exemption clauses in the lease agreement, which the plaintiff seeks to invoke in the circumstances of this case, are contra bonos mores and contrary to ubuntu as adumbrated by our courts. The plaintiff will argue at trial

¹ *Nedbank Ltd v Zevoli 208 (Pty) Ltd and others* 2017 (6) SA 318 (KZP) para 19.

² *Nedbank v Zevoli* para 21.

³ *Venter v Kruger* 1971 (3) SA 848 (N) at 852.

on good authority and will adduce evidence that the plaintiff's reliance on such purported liability exemption provisions is unsustainable.

[14] The plaintiff's legal representative in argument and in papers has countered each defence raised by the defendants and argued that the defendants' allegations are unsubstantiated, fabricated, without merit, do not constitute defence, and should be dismissed.

[15] The defendants have produced photographs in the form of annexures "BB1" to "BB7" in support of their allegations, and correspondence exchanged between the parties wherein the first defendant placed on record the negative impact of the plaintiff's conduct on its business operation (annexure "CC2"). Furthermore, in support of their allegations, the defendants have attached the report of an engineer (annexure "DD").

[16] In the premises, I am satisfied that the defendants have provided a bona fide defence to the plaintiff's claim which is good in law, and that such defence has not been delivered solely for the purpose of delay. In coming to this conclusion, I am mindful that in summary judgment proceedings, the court is not required to investigate the defence and decide whether the probabilities of success are with the defendants or not.

Order

[17] In the result, I make an order in the following terms:

- 1 Summary judgement is refused;
- 2 The defendants are hereby given leave to defend; and
- 3 Costs are to be costs in the cause.



Mlaba AJ

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Judgment reserved on: 25 October 2022
Judgment handed down: 28 October 2022 – Electronically

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