

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 2012/29190
DATE: 26/10/2012

In the matter between:

GUMEDE, NYANGENI SAUL N.O.
in his capacity as trustee of
MERGENCE AFRICA PROPERTY INVESTMENT TRUST
(IT 11263/2003)

First Plaintiff

DE BRUYN, BRIGITTE N.O.
in her capacity as trustee of
MERGENCE AFRICA PROPERTY INVESTMENT TRUST
(IT 11263/2003)

Second Plaintiff

PETERSEN, ISAK SMOLLY N.O.
in his capacity as trustee of
MERGENCE AFRICA PROPERTY INVESTMENT TRUST
(IT 11263/2003)

Third Plaintiff

and

DENYSSCHEN, HERMEN STEPHEN t/a
CHELSEA SEAFOOD & GRILL

Defendant

JUDGMENT

[1] This is an application for summary judgment.

[2] The plaintiffs and defendant concluded a written agreement of lease on 9 February 2011. The period of the lease was from 1 March 2011 to 28 February 2014. It is common cause that the defendant stopped operating his business on 30 June 2012 and vacated the premises.

- [3] Although the claim is for both arrear rental and, separately, damages allegedly arising from the early cancellation of the lease, only arrear rental is sought in the application for summary judgment in the amount of R83,861.36.
- [4] The defendant has filed an affidavit opposing summary judgment, essentially raising the following defences –
- [4.1] The deponent to the affidavit in support of the summary judgment application, Cynthia Ranjapedi, lacks the requisite personal knowledge to swear positively to the facts verifying the cause of action and the amount claimed; and
- [4.2] The plaintiff allegedly failed to provide *commodus usus* of the premises as a result of having allowed a competitor, namely Jimmy's Killer Fish and Chips, to lease the premises next door to the defendant's premises.
- [5] In the affidavit filed in support of the summary judgment application, Ms Ranjapedi says the following :
- "In my capacity as Portfolio Manager for the plaintiffs, the claims of plaintiffs / applicants against the defendant / respondent fall under my control and I have personal knowledge of the records and facts relating thereto and of the amounts owing by defendant/ respondent to plaintiffs / applicants. I have in fact studied the records relating hereto. I am able to and do swear positively to and verify the facts, the causes of action and the amounts set out in the plaintiffs' / applicants' summons with particulars of claim as well as in this affidavit and confirm such to be both true and correct."*
- [6] The defendant contends that all his dealings in relation to the matter were with one Susan Swanepoel and she will be the only person having the requisite personal knowledge to be able to depose to the founding affidavit, more

particularly because she would be aware of the defences sought to be raised by the defendant.

- [7] The defendant relies in this regard on the decision of the Western Cape High Court in *First Rand Bank v Huganel Trust*¹ where the following was said:

“By contrast, there will be cases where, given the defence raised, some further knowledge is required beyond an examination of the documentation. In other words, knowledge of a personal nature may be required if it is relevant to the contractual relationship as alleged by the defendant and, if the defendant’s version is proved, could constitute an adequate defence to the claim.”

- [8] The defendant’s contentions are not, however, borne out by his own affidavit. Both Cynthia Ranjapedi and one Nozipho Mgaga were included in email correspondence pertaining to the matter which is attached to his affidavit. In any event, it seems to me that the requirement of some knowledge in relation to the factual circumstances relevant to the defendant’s defence, assuming the correctness of the judgment relied on, would only arise where the defence was one available to the defendant.

- [9] That brings me to the defence upon which the defendant seeks to rely, namely that he was denied *commodus usus* of the premises by the plaintiffs.

- [10] As pointed out above, the interference with the defendant’s *commodus usus* which is alleged by the defendant is the plaintiffs’ conduct in concluding a lease agreement with Jimmy’s Killer Fish and Chips, a competitor, in respect of the next door premises. This, it is alleged, resulted in a serious decline in the profitability of the defendant’s business ultimately resulting in his being forced

¹ 2012 (3) SA 167 (WCC) at 177.

to close the business and vacate the premises. Reliance is placed in this regard on the decision of the Appellate Division in *Sishen Hotel (Edms) Bpk v Suid-Afrikaanse Yster en Staal Industriële Korporasie Bpk*².

[11] In this regard, I am in agreement with counsel for the plaintiff that the defendant can only rely on the alleged interference with his *commodus usus* if the interference is not permitted by the express terms of the lease.

[12] In this regard, clause 7.1 of the lease agreement provides as follows:

“The landlord does not warrant that any other premises in the building or property shall not be let for any of the purposes set out in item 11 of the Schedule to any person, or that any other tenant in the building shall not compete with any business of the tenant.”
(emphasis added)

[13] Item 11 of the schedule reads as follows:

*“11. USE OF LEASED PREMISES
Solely for the purposes of a seafood and grill restaurant.”*

[14] In my view, the defendant is not entitled to rely on the breach complained of when it is specifically permitted by the terms of the lease agreement.³

[15] The defendant alleges further that the act of the plaintiff in leasing the neighbouring property to Jimmy’s Killer Fish and Chips was mala fides and for that reason, the plaintiffs are precluded from placing any reliance on clause 7.1 of the lease agreement. However, he provides no factual, let alone legal, basis for these allegations.

² 1987 (2) SA 932 (A).

³ See *Sweets from Heaven (Pty) Ltd and Another v Ster Kinekor Films (Pty) Ltd and Another* 1999 (1) SA 796 (W) at para 9.

[16] In the circumstances, I am of the view that the plaintiff is entitled to summary judgment.

[17] Judgment is accordingly granted for-

[17.1] Payment of the sum of R83 861,36;

[17.2] Interest on the above amount at the rate of 10,5% per annum from 2 August 2012 to date of payment;

[17.3] Costs of suit.