



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

Case no: 52750/2021

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

Signed: Date: 20 June 2023

In the matter between:

MIDNIGHT FEAST PROP 92 (PTY) LTD

Plaintiff

and

AF Q PHARMA (PTY) LTD

Defendant

JUDGMENT (SUMMARY JUDGMENT)

MOULTRIE AJ

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 14h00 on 20 June 2023.

- [1] The plaintiff seeks summary judgment in the sum of R160,000 that it alleges is owing by the defendant in respect of eight months' occupational rental pursuant to an agreement concluded during December 2020 in terms of which the plaintiff sold a portion of certain immovable property to the defendant.
- [2] Clause 16.2 of the sale agreement provides in relevant part that "*in the event of the PURCHASER taking occupation (for the purpose of constructing the units) of the premises, before the date of registration the PURCHASER shall pay to the SELLER occupational rent in the amount of R20,000,00 (Twenty Thousand Rand) per month*".
- [3] The plaintiff alleges in its amended particulars of claim that the defendant took occupation of the property for the purposes of construction during July 2021 when it commenced with the construction of boundary walls, but that it did not make payment of any occupational rental for the period July 2021 to February 2022.
- [4] Despite the fact that it appears from paragraph 32 of its affidavit opposing summary judgment that the defendant does not dispute that there was "*performance in terms of the agreement*", it pleads *inter alia* that the sale agreement contained certain suspensive conditions which were not met or waived and that the sale agreement is consequently "*void and/or invalid*". The defendant furthermore pleads a number of alternative defences, including (i) that the plaintiff has no right to seek specific performance of the agreement because it failed to make a proper demand as required by the breach clause contained in the agreement; and (ii) that the plaintiff had failed to plead "*what the date of registration of the property is (if applicable)*".¹
- [5] In its affidavit opposing summary judgment, the defendant's deponent alleges that "*since the conditions ... had not been met [or waived] within the stipulated periods, the [defendant] was not bound by the agreement as no contract had come into existence and that the contract had lapsed due to non-fulfilment of the said conditions ... notwithstanding the fact that there has been performance in terms of*

¹ It is not clear to me whether the defendant has pertinently pleaded that it did not take occupation of the property for the purposes of construction, but in view of the approach that I take to the matter, it is not necessary for me to determine whether it has done so or not.

the agreement thereafter".²

- [6] I am satisfied that insofar as the plaintiff's claim is based solely on the sale agreement, the defendant has set out a *bona fide* defence in the sense contemplated in Rule 32(3)(b), namely the allegation on oath of facts which, if proved at the trial, will constitute an answer to the plaintiff's claim.³ The questions regarding the nature and effect of the conditions pleaded by the defendant, whether they were met or waived, the question of compliance with the breach clause, the relevance of the parties' subsequent compliance with the agreement, and the enforceability of the sale agreement are all triable issues between the parties.
- [7] However, one portion of the plaintiff's cause of action is not solely based on the sale agreement. The plaintiff also relies on an acknowledgement in writing by the defendant that it would pay the plaintiff three occupational rent and pleads that "[o]n the 14th of October 2021 the Defendant through its attorneys of record addressed an email to the Plaintiff's attorneys in which it advised that the defendant will pay 3 months occupational interest". The email and the plaintiff's attorney's response, as well as a subsequent letter of demand, are all attached to the particulars of claim.
- [8] Although these allegations are expressly admitted in the plea, the defendant (i) reiterates its contention that the sale agreement is not enforceable in view of the suspensive conditions; and (ii) alleges that the email of 14 October 2021 constituted "*an offer*" which was "*not accepted*" by the plaintiff. In the affidavit opposing summary judgment, the defendant's deponent expands and adds to these allegations as follows:
47. *The offer for payment of occupational interest made by my attorney of record on my behalf on 14 October 2021 to the respondent was made obligation free and without any acceptance of liability. The respondent's offer does not make any concession in respect of the*

² Confusingly, the defendant also alleges that the plaintiff's claim based on the sale agreement is "excipiable" for failure to plead fulfilment or waiver of the suspensive conditions. This contention is unsustainable in view of the fact that the defendant has already pleaded to the claim.

³ *Zephan (Pty) Ltd v De Lange* 2016 JDR 2263 (SCA) para 10.

respondent's occupation of the property and/or for what purpose. The applicant has misled this Court in its application by it having misinterpreted the respondent's offer by alleging that the respondent confirmed its occupation of the property for purposes of construction. The respondent's offer is clearly silent on this aspect.

48. *This offer was made with the impression that the agreement was valid and had not lapsed. If the agreement had lapsed there was no contractual obligation on the respondent to make payment for occupational rentals. Therefore, by the time its offer was made, it was made in error. ...*

...

50. *[In the event that the court finds that the agreement has not lapsed ...], the offer was rejected if this Court has regard to the contents of the [plaintiff's] attorney's letter dated 28 October 2021 ... in which the [plaintiff] claims occupational rentals from the period July 2021 to November 2021.*

[9] I am not satisfied that these contentions raise a *bona fide* defence to this aspect of the plaintiff's claim.

[10] In the first place, nothing in the email of 14 October 2021 suggests that the undertaking to pay 3 months occupational rent depended for its enforceability on the validity of the agreement. If indeed it was an offer made "*obligation free and without any acceptance of liability*" under the sale agreement and without any concession as to the defendant's occupation or for what purpose (which allegations I have no reason to reject), then it is wholly irrelevant that it was made under the erroneous impression that the sale agreement was valid and had not lapsed. In any event, the plea is limited to disputing the acceptance of the "offer": it contains no allegation that it was made in error.

[11] Secondly, even accepting that the email was merely an offer (as opposed to a unilateral undertaking as its terms suggest), it was undoubtedly accepted. The relevant emails indicate that following an earlier exchange between the parties' attorneys in relation whether the defendant had in fact taken occupation of the property and whether construction had commenced, and in which the plaintiff's

attorney had demanded payment of occupational rental, the defendant's attorney wrote on 14 October 2021 as follows: "*Dear Sir My instructions are that our client will pay 3 months occupational interest – kindly let us have your clients banking details*", to which the plaintiff's attorney responded "*Thanks. My client has instructed that we receive payments on its behalf. Details of our Trust Account are [as follows ...]*". There is simply no possible basis upon which this response could be regarded as anything other than an acceptance of the "offer". The plaintiff's attorney's subsequent letter of 28 October 2021 referring to this exchange and demanding payment of R100,000 in no way undermines my view in this regard.

- [12] In the circumstances, the defendant has failed to satisfy me that it has a *bona fide* defence to the plaintiff's claim in the action insofar as it is founded on the email of 14 October 2021, and the plaintiff is entitled to summary judgment on the basis thereof in respect of three months' occupational rental at R20,000 per month, amounting to R60,000. The plaintiff sought and is entitled an order for interest on its claim from the date of the letter of demand (28 October 2021) to date of payment.
- [13] Both parties have achieved material success, but only on a partial basis. I consider that the fairest approach would be to make no order as to costs.
- [14] I make the following order:
1. Summary judgement is granted in favour of the plaintiff against the defendant for:
 - a. payment of the sum of R60,000.00;
 - b. interest on the above amount at the rate of 10.5% per annum from 28 October 2021 to date of payment.
 2. The defendant is granted leave to defend in respect of the balance of the plaintiff's claim.



RJ Moultrie AJ

Acting Judge of the High Court

Gauteng Division, Johannesburg

Heard on: 17 Jan 2023

Date of judgement: 20 June 2023

APPEARANCES

For the Plaintiff:	PH Malungana of Matojane Malungana Inc.
For the Defendant:	V Vergano instructed by Casper Le Roux Inc.