

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

.25/9/2023
DATE

CASE NO: 024617/2022

In the matter between

IZAK SMOLLY PETERSON N.O.

Plaintiff

and

ADONAROZA'S KITCHEN

Defendant

JUDGMENT

WANLESS AJ

Introduction

[1] This is an application by IZAK SMOLLY PETERSEN, adult male (*"the First Plaintiff"*); RIDWAAN ASMAAL, adult male (*"the Second Plaintiff"*); BRIAN HILTON AZIZOLLAHOFF (*"the Third Plaintiff"*) and JUJDEESHIN JUNKOON,

adult male (*“the Fourth Plaintiff”*) in their representative capacities as Trustees of the MERGENCE AFRICA PROPERTY INVESTMENT TRUST (*“the Trust”*) for Summary Judgment against ADONAROZA PROJECTS AND SERVICES (PTY) LTD (*“the First Defendant”*); CONSTANCE DONAH NXELE, adult female (*“the Second Defendant”*) and SIFISO JACOBS NXELE, adult male (*“the Third Defendant”*).

- [2] At the outset, it is important to note that Summary Judgment is sought by the Plaintiffs against the Defendants jointly and severally, the one paying the others to be absolved, in respect of CLAIM 1 only, as set out in the Particulars of Claim. This claim is for, *inter alia*, arrear rentals and ancillary charges due by the First Defendant in terms of a written agreement of lease (*“the agreement”*) entered into between the Trust and the First Defendant on or about 2 June 2021 at Rosebank, Johannesburg, Gauteng. Summary Judgment is also sought in respect of interest thereon, together with the ejectment of the First Defendant from the leased premises and costs. The indebtedness of the Second and Third Defendants is on the basis of Deeds of Suretyship entered into on behalf of the First Defendant which is common cause in this application.

- [3] It was always the intention of this Court to deliver a written judgment in this matter. In light of, *inter alia*, the onerous workload under which this Court has been placed, this has simply not been possible without incurring further delays in the handing down thereof. In the premises, this judgment is being delivered *ex tempore*. Once transcribed, it will be “converted”, or more correctly

“transformed”, into a written judgment and provided to the parties. In this manner, neither the quality of the judgment nor the time in which the judgement is delivered, will be compromised. This Court is indebted to the transcription services of this Division who generally provide transcripts of judgments emanating from this Court within a short period of time following the delivery thereof on an *ex tempore* basis.

The facts

[4] The relevant facts which are either common cause or which cannot seriously be disputed in this matter by either of the parties, are the following:

- 4.1 the material terms of the agreement and the Deeds of Suretyship entered into by the Second and the Third Defendants;
- 4.2 the First Defendant has failed to pay to the Trust the amount of R298 445,02 in respect of rental and agreed associated charges up to and inclusive of the period September 2022;
- 4.3 the First Defendant continues to occupy and trade from the premises leased in terms of the agreement.

The law

- [5] The principles in respect of Summary Judgment are fairly trite and it is not the intention of this Court to burden this judgment unnecessarily with a detailed examination thereof. Suffice it to say the most important principles to bear in mind when deciding whether or not this Court should, in its discretion, grant Summary Judgment in favour of the Plaintiffs, is whether or not the Defendants have, in terms of the Plea, read with the Affidavit Resisting Summary Judgment, satisfied this Court that the First Defendant has a *bona fide* defence to the action and that the said affidavit has disclosed fully the nature and grounds of the defence together with the material facts relied upon therefor¹.
- [6] Of course, it is also trite that the Defendant in Summary Judgment proceedings is not expected to prove that his or her defence will succeed at trial but that he or she, at Summary Judgment stage has, at the very least, raised a genuine and *bona fide* issue for trial.
- [7] What the rule requires is that a Defendant sets out in the affidavit sufficient facts which, if proven at trial, would constitute an answer to the Plaintiffs' claim and the Court must be apprised of the facts upon which the Defendant relies with sufficient particularity and completeness so as to be able to hold that if these

¹¹ *Subrule 32(3); PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd 2009(4) SA 68 (SCA) at paragraph 8.*

statements of fact are found at trial to be correct, judgment should be given for the Defendant². The provisions of the rule that the Defendant must disclose *fully* the nature and grounds of his defence are peremptory³. The grounds of the defence relate to the facts upon which the defence is based⁴. A party cannot in an affidavit set out facts in the alternative to one another as it must depose to a specific version and cannot rely on mutually destructive versions⁵.

The opposition of the Defendants to the Summary Judgment application

[8] The Defendants filed their Plea in terms whereof they raised no less than eight (8) defences, namely:-

- 8.1 the Plaintiffs' representative lacked authority to enter into the agreement;
- 8.2 the Plaintiffs terminated the electricity supply to the premises and denied the First Defendant beneficial occupation of the premises;
- 8.3 there is no explanation as to how the amount claimed is arrived at;
- 8.4 the Defendants are not in arrears as they have paid a deposit;
- 8.5 certain clauses of the agreement are contrary to public policy;
- 8.6 the clause providing for rates and taxes is inconsistent with the Municipal Systems Act;

² *Marsh and Another v Standard Bank of SA Limited* 2000(4) SA 947 (W) at 949 A.

³ *PCL Consulting (supra)*

⁴ *Chairperson Independent Electoral Commission v Die Krans Ontspanningsoord (Edms) Beperk* 1997(1) SA 244 (T) at 249 G – 250 F

⁵ *Three Ball Construction (Pty) Limited v Lipschitz* 1987(2) SA 633 (W)

- 8.7 the Second and Third Defendants are not bound by the Deeds of Suretyship as the person signing on behalf of the Plaintiff was not authorised to enter into the Agreement; and
- 8.8 the Plaintiff had to make an election prior to the issuing of the summons to cancel the Agreement.

[9] In respect of the aforesaid defences the Defendants persisted with only six (6) of these defences (or defences related thereto) in their Affidavit Resisting Summary Judgment, namely:-

- 9.1 the signatory to the agreement did not have authority to bind the Trust;
- 9.2 the Trustees delegated their powers to Byron Wilson and that neither the law nor the Trust Deed authorises them to do so;
- 9.3 the First Defendant has a counterclaim for R3 million in relation to renovations for which there has been no reply;
- 9.4 the Deeds of Suretyship are not valid if the agreement is not valid;
- 9.5 the First Defendant has now been provided with statements in relation to water and electricity but these were not provided for in the summons and, as such, it was the Plaintiffs that made it impossible for the First Defendant to pay; and
- 9.6 the agreement in respect of which the Plaintiffs can claim rates and taxes is invalid.

The merits

[10] It is now necessary for this Court to deal (or attempt to deal) with each of those defences as raised by the Defendants to the claim by the Plaintiffs for Summary Judgment. As dealt with above, these defences do, to one extent or another, overlap with one another and/or share certain features. Nevertheless, for convenience and in an attempt to clarify each defence being dealt with, this Court will deal therewith separately and under designated headings.

The defence of authority

[11] The Defendants aver that the Plaintiffs' representative did not have the requisite authority to enter into the agreement. As correctly submitted by Adv Dobie on behalf of the Plaintiffs, if this is indeed the case, there is no valid agreement between the parties and the First Defendant would be required to vacate the premises. The sole basis upon which the First Defendant would be entitled to remain in occupation of the premises would be if the First Defendant had a right of retention. This will be dealt with later in this judgment.

[12] As further submitted by Adv Dobie the Defendants depose to mutually destructive versions insofar as the Defendants simultaneously allege that there is no valid agreement whilst remaining in occupation of the premises and attempting to resolve the dispute between the Plaintiffs and the First Defendant by seeking accounts and other documents from the Plaintiffs by which the

Defendants submit they are entitled to under and in terms of the agreement. In this regard, Adv Dobie correctly points out that there is nothing in the agreement that entitles the Defendants to withhold payment to the Plaintiffs on that basis. In the premises, Adv Dobie further submits that the Defendants cannot simultaneously allege that there is no agreement whilst attempting to hold the Plaintiff to such lease (the agreement).

[13] In relation to the authority of the signatory, it is clear from both the Plea and the Affidavit Resisting Summary Judgment that the Defendants do not deny that he was delegated with authority, however, the Defendants are of the view that the Plaintiffs were not entitled to delegate such authority. On this point the Plaintiffs submit that there is nothing in fact or in law which prevents the Plaintiffs from delegating any of their authorities. Adv Dobie, during the course of argument before this Court, directed the attention of this Court to the fact that the Trust Deed specifically provides for the Trustees to conclude agreements ordinarily concluded in the running of a property letting business. Further, the Trust Deed also empowers the Trustees to do whatever may be effected by natural persons with full legal capacity and any natural person may delegate his powers to a third party.

[14] In this regard, the relevant portion of clause 11 of the Trust Deed in this matter reads as follows:-

"11. Trustees' powers

11.1 The trustees shall, having regard to the trust objects, have all powers enjoyed by trustees under the common law or by a statute, for the benefit and purposes of the trust to do whatever may be effected by a natural person with full legal capacity (subject to restrictions imposed in this deed and by the Memorandum of Incorporation in respect of restrictions on the directors of the company) to enable it to give effect to the trust objects and the provisions of this deed including, but without limitation, the following:

11.1.1 to conclude lease agreements;"

[15] To further support the validity of the agreement and the authority of the signatory to enter into thereto, it was submitted on behalf of the Plaintiffs that even if there was a lack of authority, such authority could be ratified at any stage⁶. Accordingly, as submitted by Adv Dobie, even if the signatory did not have authority, it is clear that the Trust ratified the signatory's authority insofar as:-

15.1 the Trust gave occupation to the First Defendant;

15.2 the Trust accepted monies from the First Defendant into its account;

⁶ *Hyde Construction CC v Deuchar Family Trust & Another* 2015(5) SA 388 (WCC); *Smith v Kwanonqubela Town Council* 1999(4) SA 947 (SCA)

15.3 the Trust allowed the First Defendant, in terms of the agreement, to occupy the premises and remain in occupation thereof; and

15.4 upon the First Defendant's breach the Trust instituted the action and the Defendants have never challenged the authority of the Plaintiffs' attorneys to act herein.

[16] In the premises, this defence cannot be accepted as a *bona fide* defence to the claim of the Plaintiffs for Summary Judgment.

Right of retention

[17] Insofar as the Defendants attempt to rely on an improvement or enrichment lien in support of a right of retention to enable the First Defendant to continue to occupy the premises, it was correctly submitted on behalf of the Plaintiffs that the Defendants have failed to place before this Court, at Summary Judgment stage, any material facts to support the contention that the Plaintiffs have been enriched by works carried out by the First Defendant to the premises and that what has been done, has attached to the premises or improved the premises.

[18] In any event, even if the First Defendant has made improvements to the premises of a permanent nature, the First Defendant has, in terms of the agreement, specifically waived the right of retention in respect thereof. As pointed out by Adv Dobie, clause 15.2 of the Agreement reads as follows:

"15.2 The tenant will not be entitled to grant and hereby waives any right of retention resulting from alterations, additions or improvements effected by it to the leased premises for any reason whatsoever and indemnifies the landlord against the rights of retention and any claims and/or liens of any other person in connection with such alterations."

[19] During the course of argument before this Court, this Court understood Counsel for the Defendants to concede (correctly) that he could take the Defendants' case in respect of continued occupation of the premises no further. In the premises, this defence is not a *bona fide* defence for the purposes of Summary Judgment.

Defendants' alleged counterclaim

[20] All of the foregoing and what has already been stated herein pertaining to the defence of the First Defendant remaining in occupation of the premises and having an alleged lien, is relevant in relation to this defence raised on behalf of the Defendants. In addition, thereto, the Defendants have failed to place before this Court any such counterclaim as they were entitled to do when pleading to the Plaintiffs' Particulars of Claim.

Arrears

[21] Whilst potentially a "defence" to Summary Judgment, it will be noted that in setting out the common cause facts or facts not in dispute at the commencement of this judgment, this Court has noted that it is common cause or not in dispute that the First Defendant is in arrears in respect of rental and agreed associated amounts payable to the trust in terms of the agreement⁷. Whilst the Defendants do not dispute being in arrears with the provisions of the agreement, they did however allege that the First Defendant was not in a position to make payment prior to having been furnished with the accounts. Despite the foregoing, it is clear from the Affidavit Resisting Summary Judgment that now that the accounts have been rendered, there can be no *bona fide* dispute in relation to this issue. Despite this, the First Defendant has given no indication that it has paid these amounts.

[22] Further, the averments made by the Plaintiffs as to the payments made by the First Defendant as set out in the Particulars of Claim and the annexures thereto are not disputed, with particular reference to the payments not made in the months of August or September and the late payments in other months. Ultimately, it cannot be disputed that the Plaintiffs are entitled to cancel the agreement and claim the relief sought at Summary Judgment stage. Indeed,

⁷ Subparagraph 4.2 *ibid*

the argument of Counsel for the Defendants was confined largely, if not solely, to the validity of the agreement itself.

Election prior to institution of proceedings

[23] As correctly submitted by Adv Dobie for the Plaintiffs, there is no reason to contend that the Plaintiffs are obliged to indicate their cancellation of the agreement prior to the institution of proceedings. The Plaintiffs are entitled to communicate their cancellation by virtue of service of the summons⁸.

Other possible defences raised by the Defendants

[24] In the Heads of Argument filed by the Defendants' erstwhile Counsel, reference was made to the decision of *Malatji v Ledwaba N.O. & Others*⁹ as being authority for the proposition that the Trustees do not have powers to delegate under common law and any legislation and can only do so if provided for in the Trust Deed. Not only was this matter not raised in argument by the present Counsel for the Defendants but, as held above, the Trust Deed in this case clearly does provide therefor.

⁸ *Win Twice Properties (Pty) Limited v Binos & Another* 2004(4) SA 436 (W)

⁹ *Case no 1136/2019* [2021] ZASCA 29 (30 March 2021)

[25] Insofar as reference was made to both the Municipal Systems Act and/or the Trust Property Control Act, neither of these Acts were raised in argument on behalf of the Defendants. In the premises, this Court regards any reliance upon these statutes to have been abandoned by the Defendants.

Conclusion

[26] It is clear from the foregoing that none of the defences as raised by the Defendants in the Plea, read with the Affidavit Resisting Summary Judgment, have complied with the requirements of subrule 32(3)(b) to satisfy this Court that the First Defendant has a *bona fide* defence to the action instituted by the Plaintiffs by disclosing *fully* the nature and grounds of that defence and, more particularly, the material facts relied upon therefor. Moreover, the so-called defences raised have failed to even place before this Court an issue for trial. In the premises, this Court should, in its discretion, grant Summary Judgment in favour of the Plaintiffs as prayed.

[27] The claim for Summary Judgment by the Plaintiffs is in respect of a liquidated amount of money in terms of subrule 32(1)(b) and for ejectment in terms of subrule 32(1)(d), together with interest and costs. Insofar as the claim for ejectment is concerned, Adv Dobie asked that in light of, *inter alia*, the time that

the First Defendant had occupied the premises without making any payments in respect thereof and the time that it would take the Trust to actually execute the writ, that the order for ejectment should be forthwith and this Court should not, in the exercise of its discretion, stay the execution of same. This Court agrees therewith.

[28] As to the order in respect of costs, whilst this Court has a general discretion in respect thereof, provision in relation to the scale thereof, is made therefor in the agreement and same was relied upon (as was the case in respect of interest claimed) in the Particulars of Claim. There are no special or unusual circumstances which would cause this Court to deviate therefrom. In the premises, costs are awarded on the attorney and client scale.

Order

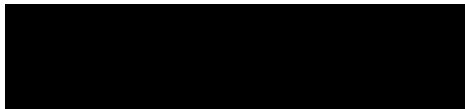
[29] This Court grants Summary Judgment against the First Defendant, the Second Defendant and the Third Defendant, jointly and severally, the one paying the others to be absolved for:-

[1] Payment of the amount of R298 445,02;

[2] Interest thereon at the prevailing prime rate from time to time plus 2% per annum compounded monthly from 19 September 2022 to date of final payment;

[3] Ejectment of the First Defendant and anyone claiming occupation through the First Defendant from the commercially leased premises situated at Shop Nos. 10 to 11, Alberton Crossing, corner of Voortrekker Road and Ring Road West, New Redruth, Alberton, Gauteng (measuring approximately 790.50 square metres) situated on the Ground Floor;

[4] Costs of suit on the scale as between attorney and client.


B.C. WANLESS
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

Date of hearing: 31 July 2023
 Date of judgment: 7 August 2023

Appearances

On behalf of the Applicant:	Adv. J.G.Dobie
Instructed by:	Rooseboom Attorneys
On behalf of the Defendant:	Adv. L. Pilusa
Instructed by:	Sukwana Motshabi Incorporated