

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 29234/22

(1)	<u>REPORTABLE: NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: NO</u>
(3)	<u>REVISED.</u>
03/01/23 DATE	 SIGNATURE

In the matter between:

PACIFIC PARAMOUNT PROPERTIES (PTY) LTD

Plaintiff

and

APEXVIVA CONSTRUCTION (PTY) LTD

Defendant

J U D G M E N T

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time of hand down is deemed to be 3 January 2023 at 10:00.

TEFFO, J:

Introduction

[1] This is an opposed application for summary judgment in which the plaintiff seeks: (a) payment of arrear rental and related charges in the sum of R251 926,26 plus interest; (b) confirmation of the cancellation of the lease agreement; (c) eviction of the defendant and/or any other occupants from the premises; (d) that the plaintiff's damages be postponed *sine die*; and (e) costs on attorney and client scale on the Magistrate's Court tariff.

The parties

[2] The plaintiff is Pacific Paramount Properties (Pty) Ltd ("*Pacific Paramount*") and the defendant is Apexviva Construction (Pty) Ltd ("*Apexviva Construction*").

Background

[3] On 4 August 2021 and in Cape Town, the parties concluded a written lease agreement, a copy which appears as Annexure "A" to the particulars of claim. In terms of the lease agreement, the plaintiff, the owner of the shopping centre, Duncan Yard in Hatfield, Pretoria, let certain commercial premises in Duncan Yard (Shop 2-8 Duncan Yard) to the defendant for purposes of operating a supermarket and a liquor store.

[4] It was agreed that the lease would commence on 1 October 2021 and terminate on 30 September 2026. The monthly rental payable by the defendant for the period 1 October 2021 to 30 September 2022 was in the amount of R82 350,00 plus VAT per month. There were other related charges, namely, refuse charges, assessment rates, which were payable by the defendant on a monthly basis at a *pro rata* share of the municipal account

together with a deposit of R164 700,00 and administration costs in the amount of R2 500,00 plus VAT.

[5] On 3 November 2021 the parties concluded the first addendum to the lease agreement and a copy thereof appears as Annexure “B” to the particulars of claim. On 22 December 2021 the parties concluded the second addendum to the lease agreement which copy appears as Annexure “C” to the particulars of claim. The addenda to the lease agreement only relate to the alteration of the lease period and the rental amount payable. Both addenda stipulate that the remainder of the terms of the lease agreement will remain unaltered.

[6] The lease agreement and the two addenda to the lease agreement are not in dispute.

[7] Subsequently, the defendant took occupation of the premises. However, it failed to make full and punctual payment of the monthly rental amount and related charges. Eventually the plaintiff issued summons against the defendant for payment of arrear rental and related charges. The defendant defended the action. After filing a plea and counterclaim to the plaintiff's particulars of claim, the plaintiff applied for summary judgment. The defendant then filed an affidavit resisting summary judgment.

The plaintiff's case

[8] The plaintiff alleges in its particulars of claim that it has complied with its obligations under the lease agreement. The defendant took occupation of the premises and is still in occupation thereof. It did not comply with its

obligations in terms of the lease agreement, in that it has failed to pay the monthly rental and other amounts due to it. The defendant is indebted to it for arrear rental and other related charges for the period November 2021 to May 2022 in the amount of R251 926,26 calculated in terms of the tenant transaction which appears as Annexure "C" to the particulars of claim. It demanded payment of the amount owing to it from the defendant. Despite due and/or proper demand, the defendant failed/neglected and/or refused to pay.

[9] It is further alleged that the plaintiff's future gross monthly damages should the defendant remain in occupation of the leased premises equals the sum of R94 702,50 as per annexure "C" to the particulars of claim.

[10] The plaintiff avers that it has elected to cancel the lease agreement. The cancellation of the agreement entitles it to claim damages from the defendant. It also seeks the eviction of the defendant from the leased premises.

[11] The defendant raised two special pleas to the plaintiff's particulars of the claim. In the first special plea the defendant contended that the plaintiff failed to comply with the provisions of Rule 41A of the Uniform Rules of Court. In the second special plea it pleaded that this Court does not have jurisdiction to hear the matter in that the amount claimed falls within the monetary jurisdiction of the Regional Court. The second special plea has been abandoned in the defendant's affidavit resisting summary judgment.

[12] In its plea on the merits the defendant denies that the plaintiff complied with all its obligations under the lease agreement. It contends that the lease agreement specifically states that it leased the premises for purposes of

operating a supermarket and a liquor store. While clause 11 of the lease agreement obliges it to obtain all trading licences and other permissions which may be necessary for its use of the lease premises, it was at all material times within the contemplation of the parties that it would require the plaintiff's full co-operation in its capacity as the landlord in obtaining the liquor licence necessary and required for it to operate the liquor store within the leased premises. It has initiated the necessary application to obtain the required liquor licence for purposes of operating the liquor store within the leased premises.

[13] The representatives from the Liquor Board visited the leased premises for an inspection. Subsequently, the Liquor Board requested it to obtain a letter from the plaintiff as landlord stating that the supermarket and the liquor store will be operated in separated establishments, with distinct entrances, within the leased premises.

[14] It proceeded to request the letter from the plaintiff. The plaintiff has to date neglected, failed and/or refused to co-operate and assist it by furnishing the required letter for the liquor licence to be issued by the Liquor Board.

[15] The plaintiff's neglect, failure and/or refusal has hampered its ability to obtain the required liquor licence and to start operating its business of a liquor store within the leased premises.

[16] The plaintiff's conduct is deliberately obstructive to the purpose for which it specifically rented that portion of the leased premises pertaining to the liquor store. Through the plaintiff's aforementioned deliberate conduct, it has been denied beneficial use of that portion of the leased premises from

which the liquor store was to be conducted. Despite this conduct of the plaintiff, it proceeded to demand full payment of the rental amounts in respect of the entire rented space.

[17] The defendant asserts that the conduct of the plaintiff towards it, does not only constitute oppressive conduct. It equals to a constructive repudiation of the lease agreement. It contends that the principle of good faith in a contract demands from the plaintiff that it recognises that it cannot obtain the liquor licence without the plaintiff's full co-operation.

[18] The defendant further denies its alleged indebtedness to the plaintiff as claimed. It contends that it only admits liability for rent for that portion of the leased premises it is having and/or enjoys beneficial use (to the exclusion of that portion in respect to which the liquor store was to be conducted). It claims that the plaintiff is not entitled to rental amounts that are payable in relation to the space rented for the operation of the liquor store because it has not been able to operate the liquor store as a result of the plaintiff's conduct as pleaded above.

[19] The defendant has delivered a counterclaim in terms of which it maintains that the plaintiff is indebted to it in the amount of R260 000,00 which amount represents the loss of profit it has suffered as a result of the plaintiff's conduct. It denies that the plaintiff is entitled to any future gross monthly damages as alleged or at all. It claims that the provisions of the lease agreement providing for gross monthly damages constitute a penalty stipulation and the provisions of Act 15 of 1962 find application. It denies that

the plaintiff will suffer damages should it remain in occupation of the leased premises.

[20] The defendant further denies that it has breached any of the terms of lease agreement. It contends that it is the plaintiff that has constructively repudiated the lease agreement.

[21] The plaintiff claims that the defendant's plea does not raise any triable issues and that the defendant does not have a *bona fide* defence to its claim. It has entered appearance to defend for the purposes of delay.

Legal principles applicable to summary judgment applications

[22] The legal principles governing summary judgment proceedings are well-established. Corbett JA outlined these principles as follows in *Maharaj v Barclays National Bank Ltd*¹:

“[One] of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of one party or the other. All that the court enquires into is: (a) whether the defendant has fully disclosed the nature and grounds of his defence and the material facts upon which it

¹ 1976 (1) SA 418 (A) at 426A-D

is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the court must refuse summary judgment either wholly or in part, as the case may be. The word ‘fully’, as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence.”

[23] The court in *Phillips v Phillips and Another*² had the following to say:

“[38] The court has an overriding discretion whether on the facts averred by the plaintiff, it should grant summary judgment or on the basis of the defence raised by the defendants, it should refuse it. Such discretion is unfettered. If the court has a doubt as to whether the plaintiff’s case is unanswerable at trial, such doubt should be exercised in favour of the defendant and summary judgment should be refused. The court can exercise its discretion and refuse summary judgment even if the requirements resisting summary judgment have not been met. Referring to the extraordinary and drastic nature of the summary

² [2018] ZAECHGHC 40 at paras [38] and [39]

judgment remedy, Corbett JA stated the following in the Maharaj matter³:

‘The grant of the remedy is based on the supposition that the plaintiff’s claim is unimpeachable and that the defendant’s defence is bogus and bad in law.’

[39] The test is whether on the facts before it, the court is able to conclude that the defence raised by the defendant is bogus or bad in law. What falls to be determined by this Court is whether, on the facts alleged by the plaintiff in its particulars of claim, it should grant summary judgment or whether the defendant’s opposing affidavit discloses such a bona fide defence that it should refuse summary judgment.”

Discussion

The special plea

[24] The special plea pertaining to non-compliance with the provisions of Rule 41A has been disposed of. After hearing the arguments on the matter, I postponed the application *sine die* and ordered the parties as per the court order dated 4 October 2022 to comply with the provisions of Rule 41A within 30 days of the order. On 10 October 2022 the defendant delivered a notice of agreement to mediation in terms of Rule 41A(2)(b). The response from the plaintiff in compliance with the court order of 4 October 2022, was not uploaded on caselines. Having not had sight of the plaintiff’s response, after

³ *Supra*

the expiry of the 30 days, on 8 November 2022, I granted the defendant leave to defend and ordered that the costs of the application are to be costs in the trial.

[25] It appears from the papers that the response by the plaintiff to the court order of 4 October 2022, was only uploaded after I had granted the court order of 8 November 2022.

[26] On 17 November 2022 at a case management meeting with the parties, I was informed that the plaintiff had complied with the court order of 4 October 2022 in that an email was sent to the defendant's attorneys on 7 October 2022 stating that there was no possibility of mediation in the matter.

[27] At the time of granting the order of 8 November 2022, the court was not aware that the plaintiff had complied with its order of 4 October 2022. Had the court been aware of that fact, it would not have granted the order. It therefore follows that in terms of Rule 42(1)(b) of the Uniform Rules of Court, the order granted on 8 November 2022 falls to be rescinded.

Defences on the merits

[28] I now turn to discuss the defences pleaded on the merits.

[29] The gist of the defendant's defence to the plaintiff's claim is that the plaintiff failed to perform its contractual obligations towards it, in that it has failed to assist it in obtaining the necessary trading licences to enable it to conduct the business of a liquor store from the leased premises.

[30] It asserts that it has been deprived of the beneficial use of that portion of the leased premises from which the liquor store was to be conducted. Further that as a result of the plaintiff's breach of the contract, it is relieved of its obligation to pay rental either in whole or in part and can further claim damages that flow from the plaintiff's breach of the contract.

[31] The defendant's defence is based on the *exceptio non adimpleti contractus*. A lease of immovable property is generally a reciprocal agreement between the lessor and the lessee in terms of which the lessor agrees to give the lessee the temporary use and enjoyment of the property in return for the payment of rent. The temporary use and enjoyment of the leased property is an essential ingredient of a lease.⁴ Under the *exceptio non adimpleti contractus*, where a lessee is deprived of or disturbed in the use or enjoyment of the leased property to which it is entitled in terms of the lease, it can in appropriate circumstances be relieved of the obligation to pay rent, either in whole or in part.

[32] In support of its argument that as a result of the plaintiff's breach of the contract by depriving it beneficial use and enjoyment of the leased premises, it is relieved of its obligation to pay rental either in whole or in part, the defendant relies on the SCA judgments in *Thompson v Scholtz (Thompson)*⁵, *Herr v Innomet (Pty) Ltd (Herr)*⁶ and *Tudor Hotel Brasserie and Bar (Pty) Ltd v Hencetrade 15 (Pty) Ltd (Tudor Hotel)*⁷.

⁴ See AJ Kerr, *The Law of Sale and Lease* 3 ed (2004) at 245 and WE Cooper *Landlord and Tenant* 2 ed (1994) at 2

⁵ *Thompson v Scholtz* 1998 (1) SA 232 (SCA) 247A-D

⁶ *Herr v Innomet (Pty) Ltd (Herr)* [2016] ZASCA 82

⁷ *Tudor Hotel Brasserie and Bar (Pty) Ltd v Hencetrade 15 (Pty) Ltd* [2017] ZASCA 111

[33] In *Herr*, the dispute between the parties, the lessee (the appellant) and the lessor (the respondent) revolved around the payment of a rental deposit which the appellant had paid pursuant to the lease agreement they had concluded. The respondent withheld the rental deposit after the appellant had terminated the lease agreement. The appellant sued the respondent in the Magistrate's Court for payment of the rental deposit and the respondent brought a counterclaim in terms of which it sought damages based on the appellant's repudiation of the agreement which it had accepted. The Magistrate's Court dismissed the respondent's counterclaim and granted judgment in the appellant's favour. That order was reversed on appeal to the High Court and the further appeal at the Supreme Court of Appeal upheld the decision by the Magistrate's Court.

[34] In argument before the SCA the respondent conceded that the lease agreement imposed reciprocal obligations on the parties. Relying on the judgment in *Thompson*, the SCA held that Innomet's claim for contractual damages cannot succeed as it was obliged in terms of the lease agreement to provide the Herrs with peaceful and undisturbed occupation. In my view the two decisions, *Herr* and *Thompson* are distinguishable from the present matter and this will be shown later in the judgment when I deal with the other cases referred to and the provisions of the lease agreement.

[35] In *Baynes Fashions (Pty) Ltd t/a Gerani v Hyprop Investments (Pty) Ltd (Baynes Fashions)*⁸ a dispute arose about the entitlement of a lessee to withhold the rental payment or claim for losses to a business due to the lessor having interfered with the lessee's beneficial occupation by effecting building

⁸ *Baynes Fashions (Pty) Ltd t/a Gerani v Hyprop Investments (Pty) Ltd* 2005 JDR 1382 (SCA)

works on the property on which the leased premises were located. The SCA acknowledged that the common law principle of reciprocity, which imposes reciprocal duties on the part of the parties to the lease agreement, and which underpins the *exceptio non adimpleti contractus*, would ordinarily entitle the lessee to claim a reduction of rent from the lessor for the deprivation of or interference with the former's beneficial occupation. It held, however, that a contrary intention appeared clearly from two clauses of the lease agreement entered into by the parties. One of the clauses provided that all rentals payable by the lessee in terms of the lease were to be paid "*monthly in advance without any deduction or set off*". The other one provided that the tenant would not have any claim against the landlord "*by reason of any interference with his tenancy or his beneficial occupation of the premises*" caused by repairs or building works. It accordingly found that the terms of the lease excluded the principle of reciprocity.

[36] In *Tudor Hotel*, the SCA, relying on the principles laid down in *Baynes*, held that a lessee was not entitled to withhold rental on the basis of the *exceptio non adimpleti contractus* where the lease made it clear that the obligations were not reciprocal. It had this to say:

"[11] *The agreement that the rent was payable 'monthly in advance' had the effect of altering the usual position, that in the absence of contractual provisions, rent is payable in arrear at the end of each period in the case of a periodical lease, after the lessor has fulfilled his obligation. The lease agreement therefore altered the reciprocal nature of the obligations of the lessor and the lessee. The obligation of the*

lessee to make payment of the rent was no longer reciprocal to the obligation of the lessor to grant beneficial occupation of the premises to the lessee.

[12] The application of the principle of reciprocity to contracts is a matter of interpretation. It has to be determined whether the obligations are contractually so closely linked that the principle applies. Put differently, in cases such as the present the question to be posed is whether reciprocity has been contractually excluded ...

[17] The provision that the rental was to be paid 'on or before the first day of each month' had the effect that it was to be paid in advance by the appellant. The obligation of the appellant to pay rental was accordingly not reciprocal to the obligation of the respondent to provide beneficial occupation of the entire premises." (footnotes omitted)

[37] Having regard to the principles applicable to the interpretation of contracts enunciated in the various cases to the effect that the interpretation thereof has to be approached holistically, in other words, '*simultaneously considering the text, context and purpose*⁹, and the decisions referred to *supra*, it is clear that the following provisions contained in the lease agreement between the parties *in casu* exclude the application of the common law principle of reciprocity which imposes reciprocal obligations between the parties to a lease agreement:

⁹ *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) para [65]; *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] (4) SA 593 (SCA), *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments (194) (Pty) Ltd & Others* 2022 (1) SA 100 (SCA)

Clause 4.1 which reads:

“The total monthly rental herein is due and payable monthly in advance, on the first day of every month, free of deduction and without set-off ...”

Clause 4.4 which provides that the tenant may not withhold the payment of any amounts because he has been inconvenienced, or because its use of the leased premises has been impaired or restricted by repairs, renovation, interruption in the supply of services, or for any reason whatsoever.

Clause 30 which reads as follows:

“Holding over

If the tenant disputes any purported termination of this lease and remains in occupation of the leased premises, the tenant shall be obliged to comply with the provisions of this lease and to make all payments due in terms of this lease. If such dispute is determined in favour of the landlord, any amount so paid by the tenant shall be retained by the landlord as compensation for the tenant's use and occupation of the leased premises during the relevant period.”

[38] These provisions do not allow the defendant to withhold the payment of rent. It therefore follows that the defendant cannot succeed in this instance with his defence of the *exceptio non adimpleti contractus* to the plaintiff's claim.

[39] The defendant has been and is still occupying the premises. The premises are commercial premises. The defendant has not paid or offered to pay any cent towards its rental of the premises it is occupying. It continues to enjoy beneficial use of the premises. It has failed to comply with its obligations under the lease agreement.

[40] In the *Herr* matter it was accepted that the lease agreement imposed reciprocal obligations on the parties and the same applies in the *Thompson* matter. This is what distinguishes the matter *in casu* from these two decisions. The defendant also relied on the decision in *Ntshiqqa v Andreas Supermarket (Pty) Ltd (Ntshiqqa)*¹⁰ to support its case. I also had the opportunity of reading the *Ntshiqqa* decision and find it distinguishable in that the rental in the *Ntshiqqa* decision was payable on the last day of each month for the duration of the lease.

[41] Having found that the terms of the lease precluded the withholding of rental by the defendant as a result of the plaintiff's failure to grant beneficial use of the entire leased premises, it is immaterial whether there was an obligation on the plaintiff tacit or otherwise to assist the defendant in obtaining the trading licences and/or liquor licence to enable it to operate a liquor store.

[42] Clause 9.3 clearly states the following:

"The landlord does not warrant that ... the leased premises are suitable or fit for the purpose for which they have been let."

¹⁰ *Ntshiqqa v Andreas Supermarket (Pty) Ltd* 1997 (3) SA 60 (Tks) (at 66A/B-B/C and 67H-68B)

[43] Furthermore, clause 11 provides that the tenant shall obtain all trading licences and other permissions which may be necessary for its use of the leased premises. The risk of obtaining such licences rests with the tenant.

Was the cancellation of the lease by the plaintiff justified?

[44] It was a material term of the lease concluded by the parties that should the lessee fail to pay rental on the due date, then the lessor would be entitled to cancel the lease agreement and retake possession of the property, and claim the value of all arrear amounts owing in terms of the lease together with all damages suffered by the landlord.¹¹ A proper interpretation of the lease agreement leads to an inescapable conclusion that the lease agreement was validly cancelled.

Whether eviction is justified under the circumstances

[45] Having found that the lease was validly cancelled, it follows that the plaintiff is entitled to evict the defendant from the premises.

The defendant's counterclaim

[46] I find the defendant's counterclaim meritless based on the provisions of the lease agreement referred to above. The defendant signed the lease agreement knowing fully well what it was contracting for. It cannot blame anyone for its decision.

[47] I am persuaded on the papers that the plaintiff has complied with the requirements of Rule 32, as amended in that the total amount claimed is a

¹¹ Clause 28 of the lease agreement

liquidated amount as calculated in terms of the tenant transaction (Annexure “C”) referred to above. The contents thereof have not been disputed by the defendant.

[48] I remain unconvinced that the defendant has raised either any *bona fide* defence or sustainable defence such as to give rise to triable issues to the plaintiff’s claim.

Costs

[49] Clause 36 of the agreement provides for costs on attorney and client scale.

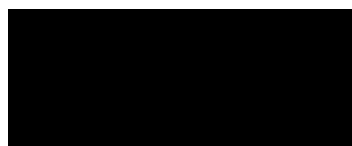
[50] Consequently, the following order is granted:

50.1 The order that was granted by this Court on 8 November 2022 granting the defendant leave to defend and directing that the costs of this application are to be costs in the trial is rescinded.

50.2 Summary judgment is hereby granted in favour of the plaintiff against the defendant as follows:

1. Payment of the sum of R251 926,26;
2. Interest on the said sum of R251 926,26 at the rate of 7.5% per annum from 7 June 2022, until date of final payment;
3. Confirmation of cancellation of the lease agreement;

4. Eviction of the defendant and/or any other occupant from the leased premises;
5. Plaintiff's claim for damages is postponed *sine die*;
6. Costs on the attorney and client scale on the applicable Magistrate's Court tariff.



**M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Appearances

For the Plaintiff	Adv L A Pretorius
Instructed by	Mark Efstratiou Inc
For the Defendant	Adv D Prinsloo
Instructed by	Ndumiso Voyi Incorporated
Heard on	19 September 2022
Handed down on	3 January 2023