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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 018914/2023

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

DATE: 15 January 2024

SIGNATURE:

In the matter between:

BUSINESS VENTURE INVESTMENTS (PTY) LTD

PLAINTIFF

And

MENLYN MOZ (PTY) LTD

DEFENDANT

Delivery: *This judgment is issued by the Judge whose name appears herein and is submitted electronically to the parties /legal representatives by email. It is also uploaded on CaseLines and its date of delivery is deemed 15 January 2024.*

Summary: *Rule 32-summary judgment; breach - lease agreement and suretyship agreement – commercial premises. Resistance - summary judgment – tacit agreement-reduced rent (pactum de non pretend); COVID-19 economic activity; s22 Constitution 1996, sanctity-agreement and application granted.*

JUDGMENT

NTLAMA-MAKHANYA AJ

[1] This is an application in terms of Rule 32 of the Uniform Rules of the Court for a summary judgment in respect of the breach of a lease agreement regarding the failure to pay the monthly rental. The breach relates to the use of commercial leased premises in which the defendants had not honoured the terms of the lease agreement. The parties entered into the said agreement on or about 05 March 2020.

[2] The respondents opposed the application, and I will deal with the grounds hereunder.

[3] The plaintiff contended that the defendants breached the terms of the lease agreement by failing to pay the due monthly rental and whereof sought:

[3.1] payment of the sum of R414 530.08.

[3.2] interest on the said sum of R414 530.08 at the rate of 10.75% per annum *a temporae morae*.

[3.3] confirmation of the cancellation of the lease agreement.

[3.4] eviction of the first defendant and or any other occupant from the leased premises.

[3.5] plaintiff's damages to be postponed *sine die*.

[3.6] costs of suite on an attorney and client scale.

[3.7] further and or alternative relief.

Background

- [4] The parties entered into a commercial lease agreement as noted above that entails the shop and outside seating rentals. The terms of the agreement were that the plaintiff, as the landlord, would let commercial premises known as Shop L[...] of the Menlyn Park Shopping Centre with effect from 01 April 2020 until 31 March 2025 to the defendants. Before the signing of the lease agreement, on 31 October 2019, the second defendant signed a Deed of Suretyship binding herself as surety and co-principal debtor jointly and severally for the fulfilment of the obligations of the first defendant arising from the said lease agreement. The defendants, with effect from 01 April 2020 in addition to the monthly rental which is payable in advance on the first day of each calendar month (clause 6.1), were liable for operating costs, marketing fund for contribution to rates / taxes; liable for any charges arising out of the use of electricity; emergency power system; gas and water in respect of the premises including signage and air-conditioning based on consumption as metered (clause 9.1). The plaintiff placed before this court that the defendants have since been indebted for arrear rental and other charges in the amount of R414 530.08 for the period of April 2020 to February 2023. The plaintiff pleaded for cancellation of the lease agreement; eviction of the defendants and claim for damages from the defendants (clause 40) until a new tenant is found to take over the rental of the premises.
- [5] The defendants, on the other hand, having filed their notice to defend, and affidavits raised various defences denying their indebtedness to the plaintiff. They disagreed with the correctness of the claimed arrear amount. They alleged that the original date for occupation of the leased property was suspended from 01 April 2020 to 01 November 2020 due to the global wave of the COVID-19 pandemic. They, therefore, occupied the premises on 01 November 2020 and not on 01 April 2020 as contended by the plaintiff which meant that they have been in occupation since the former date. They deny that the plaintiff is entitled to

the legal redress in the context of the cancellation of the lease agreement and eviction of the defendants or any other person that might be in occupation of the leased premises. They contend that the plaintiff was not entitled to the 'once and for all rule' in litigation and claim unquantified and alleged damages. Further, deny any entitlement of the plaintiff to the costs whatsoever. The defendants submitted special pleas before this court in that they engaged in discussions with the plaintiff in resolving the impasse and a rebate or a discounted payback of the arrear rental was agreed upon. The first related to the *pactum de non pretendo* whereby an arrear rental of R493 986.96 would be played in three tranches until July 2022. The second *pactum de non pretendo* was entered on or 04 August 2022 for the *ad hoc* rental for the months of August-October capped at R76 244.00 per month excluding vat. The defendants ended with paying a discounted monthly rental which was accepted by the plaintiff without protest. This meant, as per the defendant's view and understanding the review or waiver of the terms of the original lease by conduct. By virtue of the plaintiff's conduct, this meant that a tacit lease agreement or by conduct was entered into as a third and implied *pactum de non pretendo*. However, on 30 November 2022 the plaintiff unilaterally reneged from the tacit agreement. The second plea relates to the plaintiff's compliance with Rule 41A of the Rules of the Court regarding the consideration of the matter through the mediation process which was declined by the plaintiff. The defendants also denied the enforceability of the suretyship agreement in that it was entered into before the signage of the original lease. They contended that the second defendant was not advised of the renunciation benefits of excursion, and division and cession of action. They further contended that the application was '**on a piece-meal fashion**' in that:

- (i) it would constitute a fragmentation fraction against finality in one hearing.
- (ii) constitutes an abuse of the uniform rules of the court.

- (iii) seeks an unfair advantage of the defendants a monetary claim whilst being evicted and incurring further costs in defending the alleged damages costs.

[6] With these facts, the summons were issued against the defendants and in turn entered a notice to defend inclusive of an affidavit that resisted and pleaded the plaintiff's action. Of particular importance from these facts is whether the resistance of the application by the defendants is *bona fide*? In addition, whether the alleged tacit agreement amounts to the waiver of the original lease agreement?

Assessment

[7] The application for a summary judgment is grounded on the prescripts of Rule 32 as amended on 01 July 2019 of the Uniform Rules of the Court as noted above. The said Rule states that:

- (1) *The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only:*
 - (a) *on a liquid document;*
 - (b) *for a liquidated amount in money;*
 - (c) *for delivery of specified movable property; or*
 - (d) *for ejectment; together with any claim for interest and costs.*

(2) (a) *Within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.*

(b) *The plaintiff shall, in the affidavit referred to in subrule (2)(a), verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial. ...*

(3) *The defendant may:*

(a) *give security to the plaintiff to the satisfaction of the court for any judgment including costs which may be given; or*

(b) *satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), 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.*

(4) *No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2), nor may either party cross-examine any person who gives evidence orally or on affidavit: Provided that the court may put to any person who gives oral*

evidence such questions as it considers may elucidate the matter’.
... (further provisions omitted).

- [8] What is drawn from the above Rule is that the defendant must deliver the plea before the plaintiff can proceed with the application for a summary judgment. It is also evident from the 15-day period that the plaintiff may approach the court for a summary judgment which in turn gives an opportunity for the defendant to state the case and provide an insight on the existence of a *bona fide* defence on the claim and absence of prejudice against the plaintiff. These factors are a justification for the determination of the existence of a legitimate claim for a summary judgment. However, Kesevitsky J in **AHMR Hospitality (Pty) Ltd v Da Silva (A161/2022) [2023] ZAWCHC 206** highlighted the difficulty associated with the application and interpretation of the summary judgment principles and stated that *‘the rules relating to summary judgment need no restatement, [thus, they are not clear as] it is an exercise of sorting out the wheat from the chaff’, (para 13, my emphasis)*. Kesevitsky J in the same judgment contextualised the new amendment and its implications on the adjudication of summary judgements and held:

unlike in the past, a plaintiff, as well as a presiding officer, will now have the benefit of having both the defendant’s plea and affidavit resisting summary judgment at its disposal; in the case of the former, to decide whether or not to proceed with the summary judgment application in light of the defences so raised by the defendant in its plea; and in the case of the latter, to decide whether or not a defendant is entitled to have its defences which it has raised in its plea, adjudicated at a trial. It is also trite that the defence so pleaded need not be an exercise of mastery or model of precision. All that is required from a defendant is to put forward a bona fide defence and to fully disclose the material facts relied upon for such a defence in order for the parties and ultimately the court, to make a determination as to whether the door should be shut on a time-wasting

recalcitrant defendant, or whether the defences so raised, if it is proved at trial, would constitute a defence to the plaintiff's claim. If a court is of the view that a defendant has an unanswerable case to answer, much less no case as pleaded, then a plaintiff will be entitled to summary judgment, (para 13).

- [9] In this case, the resistance of the summary judgment by the defendants and their continued occupation of the leased premises requires this court to immediately address the contention whether the alleged variation of the original lease agreement amounted to the waiver of the terms of the latter agreement. I acknowledge that with the requisites of the new dispensation for the transformative imperatives of the branches of the law, contract law is also in a trajectory for reform and development from the concept of a '**gentlemen's agreement**' that will constitute a binding contract between the parties. The defendant's reliance on the plaintiff's conduct on acceptance of the discounted monthly rental without being reduced into writing amounted to waiver of the rights and obligations attached in the original agreement is without merit. Counsel for the applicant provided this court with the Supreme Court of Appeal (SCA) judgment in ***Ba-Gat Motors CC t/a v Kempster Sedgwick (Pty) Ltd (511/2022) [2023] ZASCA 137*** quoting the ***SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren 1964 (4) SA 670 (A) (Shrifren*** principle) in that the waiver of the original terms of the agreement into writing eliminates any uncertainties regarding the intention of the parties in a contract and any party relying on such conduct will be estopped, (**para 1**). Clearly, commercial certainty has become integral in regulating the rights and obligations of each party to the agreement that will prevent future disputes and resolution of conflicts such as in this case about the variation of the monthly rental. This means the protection of each party in the agreement and not the '**slipping out of the fingers**' of what each party '**might had agreed upon**' and create doubt about the terms of the oral agreement.

[10] The argument for the payment of a reduced monthly rental under the pretext of a *tacit* agreement is not sustainable. It generates vagueness and subjects the economic viability of the plaintiff's business at the mercy of the defendants. This is a very misguided approach, and it would be unwise for this court in the exercise of its discretion with voluminous jurisprudence guiding this area of the law would fall prey to unsound reasons which are also not in good law. I am encouraged by Mabindla-Boqwana JA in **Ba-Gat Motors** judgment above in that '*a reasonable person in the position of the plaintiff would, having knowledge of the true facts, release the defendants from the agreement in paying the agreed amount and receive a reduced rental income*', (**para 29**). It is not for this court to pre-empt and assume the acceptance of the reduced rental which could have been motivated by factors that were not before this court. Any contract, not just a commercial one as in this case, is founded on the principles of a trust relationship between the parties. The parties need not be anxious and '**skate on a thin ice**' in the regulation of their contractual relationship. Each one must have full confidence of each other's commitment to the terms and conditions of the agreement. It is not for either party to try and find a gap in avoiding compliance with the agreement. In this case, the sphere of economic activity requires both parties to be more aware of the '**legal blinds**' that may or not compromise the legitimacy of the relationship and the waiver of the terms is not an undertaking to be done without being reduced into writing as confirmed in the **Shrifren** principles.

[11] Another contentious issue in this matter was the rejection of the reasonableness of the suretyship agreement. The second defendant argued against the legitimacy of the surety agreement claiming that she was not advised of the excussion benefits and of great concern for this court was the contention that it was entered into prior the signage of the original agreement. The second defendant was opportunistic and economically with the principles underlying the suretyship agreement. A surety is bound as a principal contractor to the terms of the agreement by incurring the responsibilities and obligations of the first

defendant. Section 6 of the General Law Amendment Act 50 of 1956 is explicit and endorses suretyship agreements reading as follows:

no contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety: Provided that nothing in this section contained shall affect the liability of the signer of an aval under the laws relating to negotiable instruments.

[12] A suretyship agreement was then contextualised and defined in the Respondent's Heads of Arguments to the Constitutional Court quoting ***Sapirstein v Anglo African Shipping Co (SA) Ltd 1978 (4) SA 1 (A) at 11*** and cited with approval ***Shabangu v Land & Agricultural Development Bank of South Africa Case No: CCT 215/2018*** in that '*a suretyship is accessory in the sense that it is of the essence of suretyship that there be a valid principal obligation. However, it is not essential that the principal obligation exists at the time when the suretyship contract is entered into: a suretyship may be contracted with reference to a principal obligation which is to come into existence in the future*' (para 44, my emphasis). In the context of this case, Menlyn Moz (Pty) Ltd is not in dispute that it was the principal debtor and the first defendant. In essence, the principal creditor, principal debtor and the surety for the principal obligations were easily identifiable and not in dispute. As correctly captured in ***Shabangu judgment***, as is the case in this matter, the existence of the suretyship agreement before the signage of the original agreement is not a bar to the incurring of the rights and obligations that arose out of the said contract.

[13] Therefore, it is my considered view that the signage of the surety agreement in the year 2019, before the original agreement came into existence cannot be raised as a '***before-the fact***' defence that is not binding on the second defendant. Accordingly, the second defendant was economical with the truth in

advancing this argument before this court and undermined its intellectual capacity on its understanding of the principles of suretyship in contract law. The acceptance of a reduced monthly rental is very remote from a clear demonstration of an understanding of the waiver of the original lease agreement.

- [14] The second defendant's defence that she is a lay person was not in line with the needed expectations of the sphere of her profession in the regulation of commercial relationships. Her defence invoked a considered view as expressed by Kgomo J in **Coetze v Steenkamp (579/2009) [2010] ZANCHC 25** citing with approval **S v Blom 1977 (3) (SA) 513 A** in that:

the approach that it can be expected of a person who, in a modern State, wherein many facets of the acts and omissions of the legal subject are controlled by legal provisions, involves himself in a particular sphere, that he should keep himself informed of the legal provisions which are applicable to that particular sphere, can be approved, (para 10, my emphasis).

- [15] In this case, the claim by the second defendant of being a lay person whilst confidently defining herself as '**surety**' in the affidavit and being the originator of the commercial contract in which she bound herself to the terms and conditions of the agreement long before the initial agreement was signed attests to her own obliviousness of the rules and principles that regulate the legal field that is part of her own '**blood stream**'. It is worth repeating that the second defendant, even on discussions with the plaintiffs regarding the payment of the arrear rental, she was part of the representatives that attempted to resolve the deadlock between them. The affidavit resisting the application was also endorsed by her confirming to be bound by the legal advice provided by their legal representatives which meant a clear understanding of what '**suretyship**' entails. I must restate that the second defendant was '**economical**' on the justification of the signing of the suretyship agreement in that there was nothing placed before this court that could have

created a doubt on the true intentions to be bound by the terms of the agreement. There was no alleged misrepresentation of being induced to sign the said agreement and I need not traverse this matter as it was not raised in papers and during argument.

[16] This court, also acknowledges that the year 2020, was hard hit by the global wave of the COVID-19 pandemic which had a severe impact on private and public lives. This meant '**learning by doing**' in addressing the devastating effects it had on all aspects of human lives including commercial relationships. In the case *in casu*, the defendants were just about to start their operations on 01 April 2020 when the state of national disaster was declared by the President on 15 March 2020. Of particular significance for this declaration was the defendants' contention of the suspension of the occupation of the premises from 01 April until 01 November 2020. The plaintiff claimed the arrear rental as per the agreed dates from the original lease agreement. This court is in no position not to acknowledge the devastating effects it had on both the lessors and lessees and the general effect on South Africa's economy as noted above. The COVID-19 pandemic had a greater effect and restricted movement and limited the people that accessed the business premises (in)directly, affected the profitability of the business, (Spilg J in ***Kalagadi Manganese (Pty) Ltd v Industrial Development Corporation of South Africa Ltd Case NO: 2020/12468 para 24***).

[17] However, as claimed by the defendants, the period of occupation was suspended from the original date to 01 November which meant that the plaintiff was not justified in claiming the due rent from the original date (April 2020). The suspension of occupation touches on the core content of the '**gentlemen's agreement**' as noted above, where the parties struck a compromise without amending and reduce the original terms into writing to accommodate the period in which the defendants would not have been able to operate and pay due rental. The letters which entailed the agreed '*pactas*' did not constitute the waiver of the lease agreement. Given that the defendants had been in an undisturbed

occupation which meant that the purpose in which the property was leased was fulfilled, it is my considered opinion that the defendants could not be relieved of the attached obligations as per the agreed original lease and COVID-19 could not be used as a '**shield**' for non-performance because business had become unviable due to its effects without having prepared for such eventualities in the original agreement, (***Hennops Sport (Pty) Ltd v Luhan Auto (Pty Ltd (A52/2022) [2022] ZAGPPHC 953, para 22***).

[18] Furthermore, the grave concern in this matter is the indirect limitation of the plaintiff's rights to the fulfilment of the right to economic activity as envisaged in section 22 of the Constitution, 1996 by the defendants' conduct to pay the due monthly rental. The latter section provides that '*every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law*'. The plaintiff's choosing of this area of trade in commercial practice which entail the renting and leasing out of property is a direct contribution to the fulfilment of this right. It is the considered view of this court that limitation of rights could not be limited by 'tacit conducts' and the defendant's own exercise of the right to economic activity should not be enjoyed at the prejudice of the plaintiff. Rights are limited only in terms of the broad law of general application as envisaged in section 36 of the Constitution, 1996. It is not justified that the plaintiff's economic advancement is limited by the defendant's conduct which is far from the approach that serves as a determinant for the limitation of rights.

[19] Throughout this judgment, a great emphasis has been made for the defendants' compliance with the terms of the original agreement and dismissed any purported variation of the said agreement by 'conduct' despite any contributory factors such as the COVID-19 pandemic. It is still the considered view of this court to be wary of moving from the goal in consolidating the sanctity of a contractual relationship between the parties. It is not for this court to renegotiate the terms of the agreement between the parties. Clause 33.1 of the agreement

entitles the plaintiff to cancel and evict the defendants from the leased premises should they fail to honour its intended obligations and pay the due rental. This was not a '**mere legal conundrum**' but the defendant's clear understanding of clause 6.1 of the agreement which effectively required an advanced payment of rental or on the first day of each calendar month. There was nothing ambiguous about this clause as the defendants, even if they were granted such discounted rental, they were still in default in February 2023. This court exercise restraint on its discretion and avoids the attempt to re-write the parties agreement by reading in '**conduct**' as a waiver of the said original agreement where the terms are explicitly clear. I wish to express no further comment on the sanctity of this contract and the defendant's obligations in that the SCA, Molemela JA in **Slabbert v Ma-Afrika Hotels t/a Rivierbos Guest House (772/2021) [2022] ZASCA 152** put the similarly situated matter into rest and held:

in this case the parties freely and with the requisite animus contrahendi agreed to negotiate in good faith and to conclude further substantive agreements which were renewed over a period of time. It would be untenable to relax the maxim pacta sunt servanda in this case because that would be tantamount to the court then making the agreement for the parties,' (para 32).

- [20] The sanctity of the agreement in this case waters down any argument about the '**piecemeal fashion**' of the relief sought by the plaintiff as the defendants exercised their independence to contract and agreed to be bound by the terms as envisaged in the agreement. This was meant to '**act**' in accordance with the prescripts of the agreement and '**not just to agree**' without which the plaintiff would be entitled to enforce the provisions of clause 40 regarding the failure to pay the due rental. I am persuaded by Mathopho JA in **Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd (183/17) [2017] ZASCA 176** who endorsed that '*the notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract. Taking into considerations the*

requirements of a valid contract, freedom to contract denotes that parties are free to enter into contracts and decide on the terms of the contract’ (para 23). As in the present matter, the entering into the contract was designed to achieve a certain result of co-rights responsibility on economic advancement and freedom to contract as *per* the terms of the agreement. It is disingenuous of the defendants to contend the fragmentation of the relief sought whilst being aware of the terms of the agreement that they voluntarily contracted.

[21] The defendants were also opportunistic with the plaintiff’s non-compliance Rule 41A allegation. Rightly so, the plaintiff declined the invitation at the instance of the defendants that is owing the due rental as the prescripts of sub-rule (2a) requires a party instituting the proceedings on the issuance of summons be the one that delivers a Rule 41A notice and not the other way round. The defendants are only required in sub-rule (2)(b) to give an indication of agreeing or opposing the process before filing the plea. In this case, the defendants attempted to distract this court by making a mere reference of the plaintiff’s non-compliance with the prescripts of Rule 41A whilst showing the misinterpretation of the said Rule in this matter. The defendants were misdirected in seeking the dismissal of the relief sought by the plaintiff based on an inapplicable rule on their defence. Thus, given that the plaintiff, on its summons, as prescribed by sub-rule 2(a) did not include the latter notice indicating the likelihood of the matter being resolved through the mediation process, I need not pursue this matter any further.

[22] The plaintiff sought costs on an attorney and client scale against the defendant which are punitive in nature. The defendants prayed for the dismissal of the relief sought. Thus, due to the considered order to be indicated below, each party in each sphere has to acquaint him/herself, which in the context of this case, the sphere of his/her area of economic activity or operation.

[23] In the results, I make the following order:

[23.1] The defendants are ordered to pay the plaintiff R414 530.08.

[23.2] An amount in respect of arrear rental and penalties in terms of the arrear rental.

[23.3] Interests on the amount with effect from 01 April 2020-February 2023.

[23.4] The defendants and those in occupation of Shop L[...] of the Menlyn Park Shopping Centre are ordered to vacate the said premises within three months (90 days) of the receipt of this order.

[23.4] The costs of this application in accordance with the clause 40 of the lease agreement on an attorney and client scale against the defendants.

**N NTLAMA-MAKHANYA
ACTING JUDGE, THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Date Heard: 31 October 2023

Date Delivered: 15 January 2024

Appearances:

Plaintiff:

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Defendants:

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