DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

DATE 13-10-11 SIGNATURE

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Date: 2011-10-13

Case Number: 40226/11

In the matter between:

ARTIO INVESTMENTS (PROPRIETARY) LIMITED Plaintiff

and

LEENDERT GELDENHUYS First Defendant

ERICA GELDENHUYS Second Defendant

JUDGMENT

SOUTHWOOD J

[1] The plaintiff applies for summary judgment against the defendants, jointly and severally, the one paying the other to be absolved, for –

(1) Payment of the sum of R1 046 574,72;

(2) Interest on the sum of R1 046 574,72 calculated at the rate of 2 % above the prime overdraft rate charged by the plaintiff's banker *a tempore more* to date of payment;

(3) Costs of suit on the scale as between attorney and client.

[2] The plaintiff's claim is based on a written lease agreement entered into between the plaintiff and the defendants on 18 January 2008 in terms of which –

(1) the plaintiff leased to the defendants for a period of 5 years Shop No 47 in the Brits Platinum Mall for the rental and other charges stipulated in the agreement;

(2) the commencement date of the lease was 1 May 2007 and the termination date was 30 April 2012;

(3) the lease was subject to the comprehensive 'General Conditions of Lease' attached to the Lease Agreement as Annexure 'A' which include clause 40 which reads as follows:

> 'WHOLE AGREEMENT
>
> This lease constitutes the whole agreement between the parties and no warranties or representations whether express or implied not stated herein shall be binding on the parties. No agreement at variance with the terms and conditions of this lease nor any consensual cancellation thereof shall be binding on the parties unless reduced to a written agreement signed by or on behalf of the parties. No relaxation or indulgence which the Landlord may

> show to Tenant shall in any way prejudice its rights hereunder and in particular no acceptance by the Landlord of rental after due date (whether on one or more occasions) shall preclude or stop it from exercising any rights enjoyed by it hereunder by reason of any subsequent payment not being made strictly on due date. Unless otherwise stated by the Landlord in writing, the receipt by the Landlord or its agents of any rental or other payments shall in no way whatsoever prejudice or operate as a waiver, rescission or abandonment of any cancellation effected or acquired prior to such receipt.'

[3] The plaintiff alleges that the defendant took occupation of Shop 47 on the occupation date and that by 1 July 2011 they were indebted to the plaintiff in the sum of R1 046 574,72 in respect of arrear rental and other charges. The plaintiff also alleges that as a result of the respondents' failure to pay the rental and other charges in accordance with the agreement the plaintiff cancelled the lease agreement. (Since the defendants have already vacated the premises it is not necessary to consider the claim for eviction).

[4] In order to avoid summary judgment the defendants were required to file an affidavit in which they set out a *bona fide* defence to the plaintiff's claim. Rule 32(3)(b) requires that such affidavit shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor. These requirements were considered in ***Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T)** which held that what is required of a defendant is firstly, to set out facts in the affidavit, which,

if proved at the trial, will constitute an answer to the plaintiff's claim; and secondly, to set out these facts, in a manner which is not inherently and seriously unconvincing. The court held that the statement of facts must be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim and that these facts must not be averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, as that will tend to show that the defence is not *bona fide* (227G-228F).

[5] The defendants' counsel suggested *in limine* that the plaintiff's affidavit does not show that the deponent has personal knowledge of the facts – see ***Schackleton Credit Management (Pty) Ltd v Microzone Trading* 2010 (5) SA 112 (KZP); *First Rand Bank Ltd v Breyer* 2011 (1) SA 196 (GNP).** In my view there is sufficient in the papers to show that he does have such knowledge of the facts and the point cannot be upheld.

[6] The defendants have not disputed the facts alleged in the particulars of claim but have raised the following defences (I summarise):

(1) The agreement must be rectified to reflect the defendants' close corporation as the lessee.

The defendants alleged that the plaintiff's authorised agent informed them during 2007 that as soon as the close corporation was 'finalised' the agreement would be amended to reflect the close corporation as the lessee. The defendants do not explain why the close corporation, which was registered in 2004, was not the tenant from the outset;

(2) The plaintiff's representative made certain misrepresentations to the defendants.

The defendants allege that during the negotiations prior to the signature of the agreement the plaintiff's representative represented to them that the tenant mix would be that set out in Annexure B to their affidavit but some of the prospective tenants did not take up premises in the centre and others only entered into short term leases. This resulted in fewer people visiting the centre and it became a 'ghost centre'. As a result the defendants' business suffered losses of R2,5 million in respect of a bank loan and R1 282 727,49 in respect of trading losses.

(3) The plaintiff's representatives failed to inform the defendants about the opening of the new mall nearby which drew a number of tenants from the Platinum Mall. This also contributed to the defendants' losses.

[7] The defendants have not made out a case for rectification of the agreement. Clearly the close corporation was in existence but they intended to and in fact did enter into the agreement and at best they have been told that the agreement will be amended. However as appears from clause 40 such an amendment must be in writing and signed by the parties.

[8] The representations and/or omissions made are not alleged to be fraudulent and they have not been incorporated as terms into the agreement. Accordingly clause 40 precludes reliance on these representations.

[9] The defendants have therefore not set out facts which constitute a defence. It remains to add that in view of the manner in which the defence is alleged I would not find that the defence is *bona fide*.

[10] I grant summary judgment against the defendants, jointly and severally, the one paying the other to be absolved for:

(1) Payment of the sum of R1 046 574,72;

(2) Interest on the sum of R1 046 574,72 calculated at the rate of 2 % per annum above the prime overdraft rate charged by the plaintiff's banker (to be proved by a certificate in accordance

with clause 34 of the General Conditions of Lease) from 27 July 2011 to date of payment;

(3) Costs of suit on the scale as between attorney and client.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 40226/2011

HEARD ON: 26 September 2011 and 28 September 2011

FOR THE APPLICANT: ADV. G.T. AVVAKOUMIDES

INSTRUCTED BY: Mark Efstratiou Inc.

FOR THE RESPONDENTS: ADV. M. VAN TWISK

INSTRUCTED BY: MESSRS. LOURENS ATTORNEYS

DATE OF JUDGMENT: 13 October 2011