



Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Before: Acting Justice Cockrell
Date of hearing: 30 January 2024
Date of judgment: 30 January 2024

Case No: 4851/22

REDEFINE PROPERTIES LIMITED

Plaintiff

and

**B MASIQHAME TRADING 224 CC T/A
TNT PROJECTS AND INVESTMENTS**

First Defendant

THOZAMA NANCY TONGO

Second Defendant

JUDGMENT

Judgment delivered by email to the parties' legal representatives and by release to SAFLII.

COCKRELL AJ:

[1] I shall refer to the parties as they are cited in the action.

[2] This is an exception by the defendants to the plaintiff's particulars of claim.

The postponement application

[3] At the commencement of the matter today, Ms Knozer appeared on behalf of the defendants. She explained from the bar that she had been briefed yesterday evening and was not in a position to address me on the merits of the exception. Ms Knozer indicated that her instructions were to apply for a postponement of the hearing today.

[4] Since there was no formal application for a postponement, I stood down to enable Ms Knozer to take an instruction on whether her client wished to bring a formal postponement application supported by a founding affidavit. On resumption, Ms Knozer indicated that her client did not wish to do so and that her instructions were to apply for a postponement from the bar (i.e. not supported by affidavit).

[5] After hearing argument, I refused the application for a postponement. My main reasons for doing so were as follows:

5.1. In *Psychological Society of SA v Qwelane* [2017] 8 BCLR 1039 (CC), the Constitutional Court held as follows:

“[30] Postponements are not merely for the taking. They have to be properly motivated and substantiated. And when considering an application for a postponement a court has to exercise its discretion whether to grant the application. It is a discretion in the true or narrow sense – meaning that, so long as it is judicially exercised, another court

cannot substitute its decision simply because it disagrees. The decision to postpone is primarily one for the first instance court to make.

[31] In exercising its discretion, a court will consider whether the application has been timeously made, whether the explanation for the postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed. All these factors will be weighed to determine whether it is in the interests of justice to grant the postponement. And, importantly, this Court has added to the mix. It has said that what is in the interests of justice is determined not only by what is in the interests of the immediate parties, but also by what is in the broader public interest.”

5.2. In the present case, there was no explanation at all for the defendants’ postponement application (let alone an explanation that was “full and satisfactory”) since the defendants’ attorneys did not put up an affidavit.

5.3. What we do know is that the defendants’ attorneys filed a practice note on 18 January 2024 in which they referred to the fact that the exception was set down for argument today. The practice note stated: “Counsel appointed: None at this stage.” That was almost two weeks ago. There was no explanation on affidavit, or from the bar, as to why the defendants’ attorneys had not briefed counsel in good time to argue the exception today.

5.4. On 22 January 2024, the defendants’ attorneys filed an Index to the pleadings without providing any indication that the hearing would not proceed on 30 January 2024.

5.5. The defendants have at no stage filed heads of argument in the exception or offered an explanation for their failure to do so.

[6] Since the defendants had not given any explanation for why the exception should not proceed today, I declined the application for a postponement.

[7] Ms Knozer then indicated that she had no brief to argue the exception for the defendants.

Ms Stansfield, who appeared for the plaintiff, indicated that the plaintiff would ask for the exceptions to be dismissed, and I proceeded to hear argument on the merits of the exception.

That is the issue to which I now turn.

The exception

[8] On 5 May 2022, the plaintiff instituted an action against the defendants by way of a combined summons. The action was based on a lease agreement concluded between the plaintiff and the first defendant (“the lease”). The plaintiff claimed rental and ancillary charges that were allegedly due when the lease was terminated, as well as damages for the remainder of the lease period.

[9] After several procedural skirmishes, an order was issued by Mantame J on 15 August 2023 requiring the defendants to “deliver their plea within 10 days”.

[10] For present purposes, I shall assume in the defendants’ favour that the order of Mantame J did not prohibit them from taking an exception rather than filing a plea.

[11] On 29 August 2023, the defendants lodged a document styled “Notice ito rules [sic] 23(1)”. I shall refer to it as “the Notice”. The Notice purported to “note exception against the plaintiff’s combined summons”. Confusingly, the Notice went on to afford the plaintiff 15 days “to remove the cause of the complaints as set out in accordance with the precepts of Uniform Rule 23(1)(a)”, and stated that should the plaintiff not remedy the defects “the exception will be set down for hearing”.

- [12] The plaintiff elected not to amend its particulars of claim in response to the Notice. Thereafter, the defendants did not deliver an exception in terms of Rule 23(1)(b) and took no steps to progress the matter. The plaintiff then set down the Notice for hearing.
- [13] Uniform Rule 23(1) provides that an exception may be taken against a pleading on the grounds that it is “vague and embarrassing” or “lacks averments which are necessary to sustain an action”. Although the Notice is drafted with conspicuous imprecision, it appears to be directed at taking exceptions falling into both categories. Paragraph 1 of the Notice appears to take an exception on the basis that the particulars of claim lack averments necessary to sustain an action, and paragraphs 2 to 15 appear to give notice of the defendants’ intention take an exception on the basis that the particulars of claim are vague and embarrassing.
- [14] The relevance of the distinction is that, in the case of exceptions falling into the second category, Rule 23(1) required the defendants to afford the plaintiff an opportunity to remove the cause of complaint and thereafter required the defendants to deliver an exception.
- [15] The Notice did, indeed, afford the plaintiff an opportunity to remove the cause of complaint in accordance with Rule 23(1)(a). However, no exception was thereafter filed in terms of Rule 23(1)(b).
- [16] I shall assume in the defendants’ favour that the Notice is an exception in relation to the “no cause of action” complaints advanced in paragraph 1. Even on the basis of this assumption, there is no exception before me in relation to the “vague and embarrassing” complaints because the defendants failed to comply with Rule 23(1)(b).

No cause of action

- [17] I have indicated that, at best for the defendants, what serves before me is an exception that the particulars of claim lack averments necessary to sustain an action. That exception is contained in paragraph 1 of the Notice.
- [18] It is no easy task to make sense of paragraph 1 of the Notice. On the most generous interpretation, it appears to advance the following complaints that are intended to demonstrate that the particulars of claim lack allegations necessary to sustain an action.
- [19] The defendants take exception on the basis that the particulars of claim aver that the occupation date was 1 December 2020 even though the lease was concluded after that date on 8 December 2020. The Notice states that “as the impugned stipulated occupation fell outside the perfect timeframe, no valid agreement existed between the parties” (para 1.2). There is no merit in this complaint. The particulars of claim aver that “the first defendant failed to take occupation of the leased premises on the occupation date or thereafter, thereby repudiating the lease agreement” (para 9, my underlining). It is the failure of the first defendant to take occupation after the occupation date that is alleged to have given rise to the repudiation that was accepted by the plaintiff.
- [20] The defendants take exception on the basis that “the plaintiff does not aver and/or set out any applicable onerous provision(s) in the lease agreement, which burden(s) the first defendant to be liable for payment of the claimed rentals” (para 1.4). There is no merit in this complaint. Paragraph 6 of the particulars of claim sets out the provisions of the lease that are said to give rise to an obligation on the part of the first defendant to pay rent.

[21] The defendants take exception on the basis that the plaintiff has no entitlement “to make concurrent claims for performance under lease agreement and damages” (para 1.5). There is no merit in this complaint. The particulars of claim ask for payment of the amount allegedly owed by the first defendant for arrear rental, ancillary charges and interest “as at 30 April 2021” (para 12). The particulars of claim then ask for damages for the period 1 May 2021 to 31 December 2023 (para 17). The first of these claims is for a debt and the second is for damages. It is not correct that the two claims overlap in the month of May 2021: although paragraph 8 of the particulars of claim avers that the first defendant failed to pay rent for May 2021, the debt is calculated as at 30 April 2021 (see para 12).

[22] The defendants take exception on the basis that the particulars of claim do not aver why the “alternative agreement” only lasted for six months. The defendants’ complaint appears to be that the plaintiff did not take reasonable steps to mitigate its damages by concluding the “alternative agreement” for a longer period. However, that is not a point for exception (and certainly not an exception going to lack of a cause of action). If the defendants’ attitude is that the plaintiff did not take reasonable steps to mitigate its damages, that would be a matter for evidence.

[23] It is unnecessary to consider on a paragraph-by-paragraphs basis all the other complaints that appear under this heading in the Notice. They are all lacking in merit.

Vague and embarrassing

[24] I have already indicated that there is no exception before me in relation to the “vague and embarrassing” complaints. In relation to those complaints, all that serves before me is a notice in terms of Rule 23(1)(a) affording the plaintiff an opportunity to remove

the complaints directed at the vague and embarrassing nature of the particulars of claim.

For this reason alone, the “vague and embarrassing” complaints should be dismissed.¹

[25] But in any event, there is no merit in any of the “vague and embarrassing” complaints.

For example:

25.1. The defendants complain that “the plaintiff does not aver exactly how the alleged nonperformance of a stipulation fallen [sic] outside the perfected timeframe of the agreement could amount to a breach and/or repudiation thereof” (para 2.3). The complaint is unfounded because, as I have already indicated, the particulars of claim aver that the “the first defendant failed to take occupation of the leased premises on the occupation date or thereafter, thereby repudiating the lease agreement” (para 9, my underlining).

25.2. The defendants complain that the plaintiff “does not aver, how and/or on terms of agreement, would the first defendant be indebted to the plaintiff [sic]” for arrear rental and ancillary charges (para 4). This complaint is unfounded because all the relevant terms of the lease are summarised in the particulars of claim.

25.3. The defendants complain that it is “unclear” how the plaintiff could be entitled to damages from 1 May 2021 to December 2023 when the plaintiff is alleged to have cancelled the lease with effect from 30 April 2021 (para 13). This complaint is unfounded: the particulars of claim aver that, after the plaintiff cancelled the lease pursuant to the first defendant’s repudiation, the first

¹ For present purposes, it is unnecessary for me to express a view on whether the “vague and embarrassing” exceptions are time-barred, as contended by the plaintiff.

defendant remained liable to pay the plaintiff damages for breach of contract. That accords with the principle in our law that cancellation has the effect of terminating a contracting party's "primary" obligation to perform, while activating "secondary" obligations such as an obligation to pay damages.²

Costs

[26] The plaintiff asks for punitive costs on the basis that the exception is an abuse of process or vexatious.

[27] Although I have found the exception is lacking in merit, there is insufficient evidence before me to conclude that the defendants are engaged in an abuse of process. I am also not persuaded that the exception can be characterised as vexatious. I am therefore not inclined to award punitive costs.

Order

[28] In the result, I make the following order:

1. The defendants' exceptions (as contained in the "Notice to Uniform Rules 23(1)" dated 29 August 2023) are dismissed.
2. The first and second defendants are to pay the costs of the exception on a joint and several basis, the one paying the other to be absolved.

² In *Atteridgeville Town Council v Livanos t/a Livanos Brothers Electrical* 1992 (1) SA 296 (A) 304D-E Smalberger JA held that cancellation "puts an end (in the case of a contract that is executory) to the primary obligations of the parties to perform in terms of their contract. Certain secondary obligations, for example, the duty to compensate for damages arising from wrongful repudiation, however, remain." In *CIR v Collins* 1992 (3) SA 698 (A) 711E-F Botha JA held that "in the case of a unilateral cancellation on breach it is to be noted that secondary rights and obligations flowing from the contract and its breach, for example in regard to damages, may be said to remain".

3. The first and second defendants are directed to deliver a plea within twenty days.

A. COCKRELL

Acting Judge of the High Court

Cape Town

30 January 2024

APPEARANCES

Plaintiff's counsel: L Stansfield

Plaintiff's attorneys: Bernard Vukic Potash & Getz

First and Second Defendants' counsel: S Knozer in the postponement application. No appearance in the exception.

First and Second Defendants' attorneys: Sharuh Attorneys