



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

**CASE NO: 2427/2023**

In the matter between:

**PROCON GT CAPITAL (PTY) LTD**

**Plaintiff/Applicant**

and

**BEREKET ISHETU WOLDEYESUS**

**First Defendant/Respondent**

**MESELE ERJABO SHAMO**

**Second Defendant/Respondent**

Coram: Joubert, AJ

Dates of Hearing: 31 January 2024 & 19 February 2024

Date of Judgment: 22 February 2024

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**JUDGMENT DELIVERED ELECTRONICALLY**

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**JOUBERT, AJ**

**INTRODUCTION**

1. In this summary judgment application, the plaintiff seeks judgment against the first and second defendants in the amount of R1 108 382.28 plus interest and costs being for arrear rental and other

agreed charges in respect of commercial property in Voortrekker Road, Bellville, which was rented from the plaintiff by the defendants in terms of a written Agreement of Lease ("the lease agreement"). The defendants conducted a restaurant business from the premises.

2. The defendants filed a Notice of Opposition and an opposing affidavit. The parties filed heads of argument and the matter was set down for hearing by me on 31 January 2024.
3. Five days before the hearing, the defendants delivered a Notice of Intention to Amend their Plea which would introduce into the Plea certain defences that were raised in the opposing affidavit but not in the existing Plea. Sensibly, the parties agreed to postpone the matter on the basis that the amendments to the Plea would be effected, and that the plaintiff would file a fresh summary judgment application to which the defendants would file a new opposing affidavit. The order that was granted by agreement between the parties provided for appropriate time frames, filing of heads of argument and postponement of the matter to 19 February 2024.
4. An Amended Plea was filed by the defendants and a new summary judgment application was duly filed by the plaintiff, but no new opposing affidavit was filed by the defendants. On Thursday 15 February 2024 a Notice of Withdrawal was filed by the defendants' erstwhile attorneys.

5. When the matter was called on Monday 19 February 2024, a different counsel (from counsel who appeared on 31 January 2024) appeared for the defendants. He handed up a Notice of Appearance by a new set of attorneys and informed me that he only received instructions in the matter on Saturday 17 February 2024, the instructions being to seek a postponement of the summary judgment application to enable the new legal representatives to properly litigate the defendants' case. For reasons not relevant to this judgment, the application for a postponement was refused, prompting counsel to withdraw, with leave of the Court, since he had not been briefed to argue the matter.
6. Counsel for the plaintiff then argued for the relief sought by the plaintiff on an unopposed basis, but on the understanding and acceptance that the Court would not disregard the defences that had been placed before the Court by the defendants in their Plea and affidavit opposing the first summary judgment application.

## **THE DEFENCES RAISED**

7. In their Amended Plea, the defendants raised the following distinct defences:
  - 7.1 First, that, at the time that the lease agreement was negotiated, there was another restaurant business operating from the same building. The plaintiff undertook that it would evict this tenant (referred to as "Yonas") as soon as the defendants had paid their rental deposit for their premises. This undertaking was the

basis on which the defendants signed the lease agreement, proceeded to pay the rental and also agreed to assume liability of an amount of R430 000 which was due to the plaintiff by Yonas. Moreover, the defendants allowed the plaintiff to off-set their cash deposit of R75 000 against the arrears still owing by Yonas.

- 7.2 It ultimately took approximately nine months to evict Yonas, who continued to trade unlawfully and in direct competition with the defendants from premises on the ground floor in the same building. As a result of this, the defendants were unable for a period of approximately nine months "to trade freely without interference from unlawful occupiers".
- 7.3 The defendants pleaded that these circumstances entitled them to a rental reduction as contemplated in section 54 of the Consumer Protection Act, 68 of 2008 ("the CPA").
- 7.4 Second, the defendants pleaded further that there was an agreement in writing that the defendants would be entitled to a reduction in rental.
- 7.5 Lastly, the defendants pleaded that they have a lien over the property, having invested an amount of approximately R1.2 million in the property in respect of renovations and improvements.

8. Given the view that I take of this matter, it is not necessary to deal with any of the defences other than the defence based on section 54 of the CPA.

### **THE DEFENCE BASED ON SECTION 54 OF THE CPA**

9. In their opposing affidavit, the defendants provided some facts relevant to this defence, including a series of WhatsApp messages between the first defendant and Mr Lardner of the plaintiff. The relevant aspects thereof will be dealt with in due course. The affidavit also contains evidence of discussions that took place between the parties, after the eventual vacation of the premises by Yonas relating to the defendants' future plans and certain financial consequences of what had transpired. This will also be dealt with in more detail below.

### **RELEVANT LEGAL PRINCIPLES**

#### **Section 54 of the CPA**

10. The defendants rely, in particular, on section 54(1)(b) read with section 54(2)(b) of the CPA, which provide, in relevant parts, as follows:

**"54 Consumer's right to demand quality service**

- (1) When a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has the right to –
- (a) ...
  - (b) the performance of the services in a manner and quality that persons are generally entitled to expect;
  - (c) ...
  - (d) ...

having regard to the circumstances of the supply, and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services.

(2) If a supplier fails to perform a service to the standards contemplated in subsection (1), the consumer may require the supplier to either –

- (a) remedy any defect... or
- (b) refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.”

11. The legal principles relating to the aforestated provisions that are relevant to this matter are the following:

11.1 The definition of “service” in the CPA includes (at (e)(v)) “*access to or use of any premises or other property in terms of a rental*”.

Section 54 accordingly applies to this matter.

11.2 The learned authors Naudé and Eiselen assert that Section 54 has the effect that

“If the consumer has already paid the price and seeks a refund as ‘plaintiff’, the onus will be on the consumer. If the service provider claims payment, whereas the consumer alleges that the services are defective and thus that the consumer is entitled to a price reduction or to withhold his performance under the *exceptio non adimpleti contractus*, the service provider would have to prove the amount payable as a reduced price”.<sup>1</sup>

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<sup>1</sup> Naudé and Eiselen: *Commentary on the Consumer Protection Act*, Juta, Revision 2023 p 54-22

- 11.3 For this assertion, reliance is placed on the case of **BK Tooling (Edms) Bpk v Scope Precision Engineering** 1979(1) SA 391(A) at 412, which is the *locus classicus* judgment on the topic of reciprocal contracts and the *exceptio*. Contracts<sup>2</sup> of lease are generally treated as reciprocal contracts and I see no reason why these principles should not find application in a case where section 54 of the CPA is raised against a claim for rental.
12. Should the circumstances that the defendants rely on indeed amount to performance by the plaintiff, in respect of the lease agreement, in a manner and quality that is less than persons are generally entitled to expect, having regard to the circumstances of the lease agreement and any specific criteria or conditions agreed between the parties before or during the performance of the service, the defendants can validly plead that they are entitled to a reduction as a defence to a claim for arrear rental. The plaintiff then bears the onus to prove the amount payable as a reduced price.

### **Summary judgment**

13. The legal principles relating to summary judgment applications are well-established.<sup>3</sup> For purposes of this judgment I need to refer only to the following three:

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<sup>2</sup> Van der Merwe et al: Contract General Principles, Juta 6<sup>th</sup> Ed at p335

<sup>3</sup> Van Loggerenberg: Erasmus Superior Court Practice, Vol 2, D1 -410A-410C

- 13.1 Uniform Rule 32(3)(b) requires that the defendant must set out in his affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim.
- 13.2 It is not incumbent upon a defendant to formulate his opposition to the summary judgment with the precision that would be required in a plea, but he must do so with a sufficient degree of clarity to enable the Court to ascertain whether he has deposed to a defence which, if proved at the trial, would constitute a good defence to the action.
- 13.3 Even if the affidavit lacks particularity to the extent that the Court is not able to assess the defendant's *bona fides*, the Court still has a discretion to refuse summary judgment if there is doubt whether the plaintiff's case is unanswerable.

## RELEVANT FACTS

14. The lease agreement was signed by the defendants on 9 June 2021. Before this, according to the defendants, Lardner undertook that the plaintiff would proceed to evict Yonas as soon as they paid their deposit.
15. The following WhatsApp messages passed between Lardner and the first defendant (emphasis added):
- 15.1 On 2 June 2021, Lardner wrote: "*Beki I sent you an email for info I need for the lease Please reply to same*".

- 15.2 On 4 June 2021, Lardner wrote: *"Please WhatsApp me the deposit slip tomorrow so I can arrange for a lock out of the Yonas premises after".*
- 15.3 On 5 June 2021, Lardner wrote: *"It's important you do it today to keep our agreement of locking out Yonas and going forward together".*
- 15.4 To this, the first defendant replied: *"Ok then I will do that" to which Lardner responded "Thank you let's keep our agreements".*
- 15.5 On 6 June 2021 Lardner asked for the defendants' names and residential addresses so that he could prepare the lease agreement and furthermore stated: *"I have just emailed Yonas notice of cancellation of lease and notice that he currently owes Procon K154. I have deducted your K75 cash deposit from his overall amount... In fact put someone at your door to prevent him from entering your premises and change the locks".*
16. According to the defendants, the undertakings contained in these messages persuaded them to sign the lease agreement, pay the rent and also agreed to assume liability for an amount of R430 000 which was due to the plaintiff by the same Yonas, as provided in clause 4.2 of the lease agreement. For the same reason they allowed the plaintiff to set-off their cash deposit of R75 000 against the arrears still owing by Yonas.

17. Ultimately it took approximately nine months to evict Yonas, who continued to do business in direct competition with the defendants from premises on the ground floor of the same building.
18. The defendants duly paid the monthly rentals until January 2022. Prior to that, the following WhatsApp messages passed between Lardner and the first defendant:
  - 18.1 On 4 November 2011, the first defendant wrote: *"If they keep doing the same business downstairs I don't think we can be able to pay rent and we don't want to have problems with you. So please do something as soon as possible."*
  - 18.2 On 13 November 2021 the first defendant wrote: *"Yonas is still getting money from downstairs and still threatening us by saying his (sic) gonna throw us out soon and we already lost plus minus 20% of our customers so if they continue you can imagine we can lose all 70% of our customers plus more ... So if those people continue to operate the restaurant this month I don't think we can be able to pay rent..."*.
  - 18.3 On 25 November 2021 the first defendant indicated that they have lost about 50% of their customer base and that they were now having to take money *"from our pockets to pay rent and what I've been hearing from you was it's just a matter of weeks or days but nothing happened still..."*.

- 18.4 On 25 November 2021 Lardner replied by acknowledging that Yonas' illegal occupation on the ground floor was putting the defendants under pressure and he agreed to them paying 50% of their rent but 100% of the utilities and that the balance could be carried forward until their business was running normally again, because he wanted a long lasting relationship with them.
- 18.5 On 29 November 2021 Lardner indicated that after a meeting with his partners they resolved that they were unable to write off the R430 000 debt incurred by Yonas, but that "*We did however all concur today that we must assist you wherever possible, and will stand by our prior offer to assist you with current cash-flow on the current upstairs rental*".
19. According to the first defendant, he had a meeting with Lardner on or around January 2022 during which meeting he indicated to Lardner that they could not continue paying the full rental when, nine months later, the unlawful tenant was still operating on the ground floor in direct competition with them. According to the first defendant, Lardner then agreed that, until such time as the restaurant on the ground floor was vacated, they would pay only the utilities and not the full rent.
20. After Yonas eventually vacated, nine months after the signing of the lease agreement, Lardner called the defendants to his office for another meeting and enquired what their future plans were in respect of the premises. They agreed to pay the R430 000 in respect of the

historic debt and full rental amount going forward, but indicated that they could not pay the rental amounts for the preceding months prior to the unlawful ground floor tenant vacating. Lardner undertook to consult with his partners and revert to them, but the next they heard from him was the letter of demand thus was served on them, as a precursor to the summons and this summary judgment application

21. In the affidavit in support of the summary judgment application, the plaintiff, in essence, simply raised legal arguments to the effect that the alleged defences were not sustainable in law. The grounds for the contention are that the lease agreement regulated the relationship between the parties, that the circumstances relied upon by defendants had no impact on the "service" rendered by the plaintiff and that the defendants had not even attempted to illustrate or quantify the extent of the reduction that they allege they are entitled to. It is also argued that the defendants have not instituted a counterclaim, which they could have done when the Plea was belatedly amended before the hearing of the initial summary judgment application.

## **DISCUSSION**

22. In my view, the defendants have done enough to raise a defence based on section 54(1)(b) read with 54(2)(b) of the CPA.
23. In this regard it must be borne in mind that the defendants need not locate their defence in the terms of the lease agreement and it does not assist the plaintiff to refer to the "no misrepresentation", "non-variation"

and other clauses, which would serve to deny the defendants a remedy in contract.

24. As stated by the learned author's Naude and Eiselen,<sup>4</sup> section 54 must be interpreted against the backdrop of section 3, which sets out the purposes of the CPA, namely the maintenance of a "consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally". Moreover, section 4(3) provides that where a provision of the Act is capable of more than one meaning, the meaning that "best promotes the spirit and purposes of the Act" must be favoured, which means that where a particular factual situation is unclear, it is likely that the interpretation which favours the consumer will be followed.
25. In this case, the plaintiff initially assured the defendants that Yonas would be "locked out" immediately. Indeed, Lardner went so far as to urge the defendants to provide proof of payment of the deposit slip on the same day *"to keep our agreement of locking out Yonas and going forward together"*. The defendants were so comforted by this that they agreed to take over an outstanding liability of R430 000 of Yonas and to have their R75 000 cash deposit applied for those purposes.
26. The plaintiff later indicated a willingness to relax the rental obligations but ultimately sued for the total amount of rental, including the R430 000 outstanding rental of Yonas which the defendants had

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<sup>4</sup> Supra at p 54-2

agreed to pay on the assurance that Yonas would be locked out immediately.

27. I could find no relevant reported judgments of the superior courts shedding light on the precise interpretation and application of section 54(1)(b) of the CPA, but some guidance can in my view be gained from judgments of the National Consumer Tribunal. In three such judgments, namely **Maree v Nissan SA (Pty) Ltd** [2019] JOL 43301 (NCT), **Van der Meyde v A to Z Motors CC** [2019] JOL 42507 (NCT) and **Masindi v RAMCO Motor Co CC** [2019] JOL 41625 (NCT), leave was given to refer matters directly to the Tribunal on the basis that, the consumer had been “treated poorly”, which amounted to a contravention of section 54 of the CPA. Those cases dealt with complaints about defects in motor vehicles recently purchased, and this judgment does not suggest, as a general principle, that “poor treatment” inevitably amounts to a contravention of section 54, but the approach of the National Consumer Tribunal at least supports the notion that regard can be had to conduct that does not amount to breach of contract.
28. In my view, in the words of section 54(1)(b) of the CPA, the plaintiff’s conduct fell short of performance of the rental service in a manner and quality that persons are generally entitled to expect, having regard to the circumstances and, particularly, conditions agreed upon between the parties before and after the signing of the lease agreement.
29. Given, further, that the plaintiff bears the onus to prove a reduced price, the fact that an opposing affidavit in summary judgment proceedings

will not be scrutinized for the same degree of clarity as a Plea, and the principle that a plaintiff must in effect be considered to have an unanswerable case, I cannot grant summary judgment.

30. The plaintiff's counsel has raised the issue of wasted costs relating to the previous hearing when the matter had to be postponed as a result of the late filing of a Notice of Intention to Amend the defendants' Plea, and I agree that the defendants must be held liable for those wasted costs.

31. I, accordingly, grant the following order:

31.1 The application for summary judgment is refused.

31.2 The defendants are given leave to defend the action.

31.3 The plaintiff shall pay the defendants' costs of the summary judgment application save for the wasted costs referred to in subparagraph 4 below.

31.4 The defendants shall pay the plaintiff's wasted costs of the first summary judgment proceedings including the hearing on 31 January 2024.

  
DC JOUBERT AJ

Date: 22/02/2024