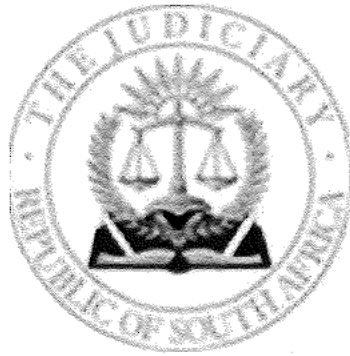




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO.: 2020 / 28981

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.


HARDY AJ

16 JANUARY 2023 07 FEBRUARY 2024

In the matter between:

PANEL TO PANEL AUTORBODY (PTY) LTD

Plaintiff

(Registration number: 2019/002341/07)

and

CAPITAL PROPFUND (PTY) LTD

Defendant

(Registration number: 2014/013211/07)

JUDGMENT

HARDY AJ:

1. The Defendant has taken exception to the Plaintiff's particulars of claim alleging that the particulars of claim do not contain all the averments necessary to sustain the cause of action pleaded by the Plaintiff. This exception is the issue being determined in this judgment.
2. The parties to this opposed action are the parties to a comprehensive lease agreement for commercial premises. The lease agreement was entered into on 10 October 2019. It commenced on 01 December 2019, although the Plaintiff was permitted to take occupation of the premises from 01 October 2019. The lease agreement was cancelled by the Defendant on 14 February 2020 due to non-payment of rent (and operating costs) by the Plaintiff.
3. The Plaintiff appears to accept that the lease agreement was cancelled¹, but on the reading of the whole particulars of claim, there are indications of some prevarication on the part of the Plaintiff. It sets out that it has "repudiated the cancellation of the agreement"²; has "... no remedy to its disposal in terms of the lease agreement ..." ³; and further it alleges that it is the Defendant that has breached the terms of the lease agreement by failing to comply with its obligations contained in annexure G to the lease agreement⁴.

¹ Paragraphs 13 and 17 of the particulars of claim both commence "Subsequent to the cancellation of the lease agreement ...".

² Paragraph 7 of the particulars of claim.

³ Paragraph 8 of the particulars of claim.

⁴ Paragraph 9 of the particulars of claim reads "... after failing to meet its obligations set out, *inter alia*, in annexure G of the lease agreement." and paragraph 19 of the particulars of claim reads "Despite the defendant not complying with the terms of the agreement in making changes as per annexure G of the lease agreement". I note that the allegations are never made in more specific terms than what is quoted, whilst annexure G (headed "TENANT INSTALLATION") covers a number of separate obligations (the defendant is to

4. The Plaintiff seeks to recover from the Defendant its deposit (R340 000,00 claimed); the tenant installation the parties contracted for (R245 000,00 claimed); and rental paid (R91 905,00 claimed) in a combined summons and particulars of claim served on the Defendant on 14 October 2020.
5. The Defendant expands on its allegation that the Plaintiff has not made the necessary averments to sustain its cause of action in its exception served on 26 November 2020.
6. In essence, the Defendant sets out that only the lease agreement has been pleaded by the Plaintiff; this agreement does not support the relief claimed by the Plaintiff; and the Plaintiff has not pleaded any other basis for the relief it seeks. The Defendant submits that the Plaintiff's claims indicate that the Plaintiff is relying on restitution (which is a contractual remedy), but has not pleaded the necessary averments for restitution – that is, the Plaintiff in seeking restitution for itself has not alleged that it has tendered restitution of the Defendant's performance (making the premises available for the Plaintiff's use – by tendering payment of rental and operating costs for the relevant period in full); or alleging that the Plaintiff is excused from tendering restitution of the Defendant's performance for some reason⁵.
7. The Plaintiff in response to the exception has submitted that all the necessary allegations are set out in its particulars of claim to support the relief claimed – and that any further detail required (especially for determining the quantum of its claim) is a matter for evidence at trial – and thus the exception should be

ensure that the premises are clean, that all the existing electrics and plumbing are in good working order, provide compliance certificates for the electrics and fire hoses; whilst the plaintiff requires installation work including tiling the reception, painting the offices and workshop, epoxy flooring for the workshop, signage and the re-doing of an office partition).

⁵ O-Line (Pty) Ltd v Datacentric (Pty) Ltd 2021 JDR 0161 (GP); [2021] SAGPPHC 16 at paragraphs 37 to 42.

dismissed. In argument, counsel for the Plaintiff did concede that the tenant installation claim may have been formulated badly and that the rental refund claim may need to be repleaded.

8. The general principles for determining an exception were set out by Makgoka J in Living Hands (Pty) Ltd v Ditz⁶. The principles applicable to the present matter require that I:
 - accept all the Plaintiff's allegations as true at the time of considering the exception;
 - consider whether there is no cause of action on any construction of the particulars of claim;
 - consider whether every necessary fact to be proven has been alleged in the particulars of claim – which must not be done by reading in what is not there or ignoring what is there; and
 - must look at the pleadings as a whole.
9. In respect of its claim for the refund of the deposit paid by it, the Plaintiff has alleged that it has paid a deposit as early as 01 November 2019; not been refunded its deposit after the cancellation of the lease agreement; and is accordingly entitled to a refund of its deposit paid.
10. Clause 12.2 of the lease agreement permits the Defendant to retain the deposit paid until the Plaintiff has vacated the premises and has satisfied all its obligations towards the Defendant⁷.
11. The Plaintiff would thus need to plead specifically that it has vacated the premises – which it has not done in its particulars of claim.

⁶ 2013 2 SA 368 GJ at 374G

⁷ Clause 12.2 reads " ... The deposit shall be retained by the LANDLORD ... until after the vacating of the LEASED PREMISES by the TENANT and the complete discharge of all the TENANT'S obligations to the LANDLORD arising from the LEASE."

12. The Plaintiff would also need to plead specifically that it has satisfied all its obligations towards the Defendant flowing from the lease agreement. Whilst the Plaintiff has pleaded broadly that it has complied with its obligations in terms of the lease agreement⁸, I do not think this is sufficient when the same particulars of claim set out that the reason for cancellation by the Defendant was a failure to pay rental on time. This indicates that there is an existing dispute around the extent to which the Plaintiff has met its obligations in terms of the lease agreement – being a necessary requisite for the refund of any deposit paid to the Defendant – and thus needs to be addressed specifically.
13. It appears to me that the Plaintiff has made insufficient factual averments at this time to support its claim for a refund of the deposit.
14. In respect of its claim for payment of the tenant installation, the Plaintiff has alleged that it made payment of R245 000,00 to a service provider as reflected in the invoice annexed to the particulars of claim as E1 and E2; not been refunded this payment after the cancellation of the lease agreement; and is accordingly entitled to a refund of the amount paid. Annexure E2 is an invoice from a service provider to the Plaintiff dated 17 February 2020; Annexure E1 is an invoice from the Plaintiff to the Defendant dated 28 February 2020.
15. Annexure G to the lease agreement provides that the tenant installation will only be refunded by the Defendant to the Plaintiff upon production of an original invoice for the work done and the inspection thereof by the Defendant on or before 28 February 2020 (being three months from the commencement date)⁹.

⁸ Paragraph 5 of the particulars of claim

⁹ Annexure G reads " ... This TENANT installation allowance will be payable upon inspection and against written proof (in the form of an original VAT invoice) being provided to the LANDLORD that such expenditure has been expended on the LEASED PREMISES, within three months from the COMMENCEMENT DATE."

16. Whilst the Plaintiff has annexed the invoice to the particulars of claim, it has not alleged that it has produced the original document to the Defendant nor that the Defendant has inspected the work done (and within three months of 01 December 2019).
17. I foresee a further difficulty for the Plaintiff that it may never be able to make these allegations as the invoice dated 17 February 2020 could not have been produced to the Defendant before it cancelled the lease agreement on 14 February 2020 – thus during the period of the lease agreement. It may be necessary for the Plaintiff to allege a basis for this claim outside of the terms of the lease agreement.
18. It appears to me that the Plaintiff has made insufficient factual averments at this time to support its claim for a refund of the tenant installation.
19. In respect of its claim for repayment of the rental paid by way of debit order, the Plaintiff has alleged that the debit orders were collected by the Defendant; not refunded after the cancellation of the lease agreement; and that it is accordingly entitled to a refund of the amount paid by way of debit order for rental.
20. The Plaintiff has pleaded that it enjoyed beneficial occupation of the premises¹⁰. The particulars of claim and lease read together set out that the Plaintiff would pay its proportionate share of the operating costs from 01 October 2019 and would pay its rental of R65 000,00 per month and its proportionate share of the operating costs from 01 December 2019.

¹⁰ Paragraph 9 of the particulars of claim.

21. The Plaintiff would need to plead specifically that it had overpaid its rental and share of the operating costs to receive a refund of the amount collected by way of debit order – this it has not done.
22. The Plaintiff may face a further difficulty in that the documents it attaches to its particulars of claim to prove payment of the debit orders (F1 and F2) seem to indicate that the debit orders were returned as unpaid within days of the debit being processed. It may be necessary for the Plaintiff to seek this relief on a different basis to that pleaded.
23. It appears to me that the Plaintiff has made insufficient factual averments at this time to support its claim for a refund of the rental paid by debit order.
24. Looking at the particulars of claim as a whole, it is evident that the Plaintiff is claiming relief not supported by the lease agreement it pleads and further that the Plaintiff has failed to plead any other basis for the relief it claims (restitution for both sides and/or enrichment and/or any other basis).

COSTS

25. The Defendant seeks the costs if the exception is upheld.
26. The Plaintiff in its heads of argument seeks that the exception be dismissed with costs on the attorney and client scale. At the hearing of the matter, the Plaintiff suggested that it be given an opportunity to improve its particulars of claim and that costs of the exception be costs in the cause.
27. Neither party advanced any specific reasons for the general rule for costs – that they follow the result – should not be applied.

CONCLUSION

28. For the reasons set out above, the Defendant's exception to the Plaintiff's particulars of claim as lacking averments necessary to sustain its cause of action must be upheld.
29. The Plaintiff should have the opportunity to plead the detailed allegations necessary to support the claims it makes for the refund of its deposit, payment of the tenant installation and rental refund to the extent that such allegations can be properly made.
30. The Plaintiff, as the unsuccessful party in the exception, is to pay the costs of the exception application on a party and party scale.

ORDER

31. I accordingly grant an order the following terms:

- 1) The Defendant's exception to the Plaintiff's particulars of claim is upheld.
- 2) The Plaintiff is afforded a period of 20 *dies* to amend its particulars of claim.
- 3) The Plaintiff is to pay the costs of this exception application.



G B HARDY
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Date of hearing 31 August 2021

Date of judgment ~~16 January 2023~~ 07 February 2024

Appearances:

Appearance for Plaintiff

Advocate M Kohn

Attorney for Plaintiff

A M Ellis Attorneys

tony@amellis.net

Appearance for Defendant

Advocate R Shepstone

Attorney for Defendant

Kokinis Incorporated

stevenpa@kokinisinc.co.za

CH