

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

CASE NO.: 2021 / 3377

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

HARDY AJ

~~28 FEBRUARY 2023~~ 08 FEBRUARY 2024

In the matter between:

LILFAM HOLDINGS (PTY) LTD

Plaintiff

(Registration number: 1993/000232/06)

and

MIKE AND IAN CONSULTING (PTY) LTD

First Defendant

(Registration number: 2017/019853/07)

KHUMALO, IAN THEMBA

Second Defendant

(Identity number 80[...])

JUDGMENT

HARDY AJ:

1. This is an application for summary judgment. At the hearing of the matter, the counsel for the Plaintiff indicated that it would only be seeking an order for the arrear rental claim against both Defendants and confirmation of the cancellation of the lease agreement concluded between the Plaintiff and First Defendant.
2. The Second Defendant is a director of the First Defendant – he appeared for himself and the First Defendant. He addressed the court after the Plaintiff had addressed me on the merits of the matter. At that point the Defendants raised the postponement of the application for the first time. The postponement was sought to obtain legal representation to address argument to the court on the summary judgment application. The Defendants indicated that it would take about two weeks to obtain the necessary representation.
3. The matter was fully pleaded at that time – combined summons, particulars of claim, plea, application for summary judgment supported by an affidavit, affidavit opposing summary judgment and a supplementary affidavit to that affidavit. There was no scope for the filing of further documents by either side.
4. Both sides had also filed comprehensive heads of argument referring to applicable case law. It appeared to me that the Defendants' heads of argument had been prepared with the assistance of a legal practitioner – which the Second Defendant informed me was indeed the case. In circumstances where the parties are generally required to confine their oral argument to the case already made out on the papers, it did not appear that a legal practitioner attending court on a later date to present oral argument would take the matter any further – but only serve to delay the hearing.

5. In the circumstances, I asked for the argument on behalf of the Defendants to be presented and confirmed with the Second Defendant that I correctly understood the submissions he had made on the merits of the summary judgment application – in essence, that Covid-19 disruptions should excuse the First Defendant from its obligations in terms of the lease agreement (or at least delay them) and that the First Defendant was quite willing to meet its obligations to the Plaintiff but required more time in order to do so.
6. I did indicate to the parties that I would not postpone the matter at that time for a legal representative to make oral arguments for the Defendants. I did indicate further that if while preparing this judgment I found some need to be addressed on any point that it appeared needed to have been raised by the Defendants and had not been so raised, I would advise the parties accordingly and arrange for additional argument to be heard. I have not found a need to be addressed on any further issues to prepare this judgment.
7. It is common cause between the parties that the Plaintiff and the First Defendant (duly represented by the Second Defendant) entered into a lease agreement on 17 July 2018 for the First Defendant to occupy commercial premises belonging to the Plaintiff during the period 01 November 2018 to 31 October 2021¹; that the Second Defendant bound himself as surety and co-principal debtor for the obligations of the First Defendant in terms of the lease agreement; and that the arrear rental amounted to R189 476,10 as at 02 January 2021.

¹ This lease agreement has thus come to an end by the effluxion of time two months after the hearing of the summary judgment application - prior to the handing down of this judgment – and it is thus not necessary to grant any order confirming the cancellation of the lease – to support an eviction application or otherwise.

8. In its particulars of claim, the Plaintiff sought the payment of these arrears, together with interest thereon; the eviction of the First Defendant; and the discounted future rentals from January 2021 to October 2021 as damages for the early termination of the lease; as well as costs.
9. In their plea, the Defendants set out the defence of impossibility of performance (without actually using those words) claiming that the Covid-19 hard lockdown and subsequent travel restrictions (many of the First Defendant's customers being from other African countries who were not permitted to travel into or out of South Africa for many months after the hard lockdown) meant that it could not trade sufficiently to generate enough income to fulfil its obligations in terms of the lease agreement. In their plea, the First Defendant also sought additional time to meet its obligations in terms of the lease agreement. The plea did not raise any defences unique to the Second Defendant as surety and co-principal debtor.
10. The application for summary judgment was made timeously. The Defendants took the point *in limine* that the application was out of time as it had not been brought after the filing of their Notice of Intention to Defend, but only after the filing of their plea. This would have been correct up until 19 May 2019 when the uniform rule of court dealing with summary judgments was changed – but no longer reflected the position in law at the time that this application for summary judgement was brought on 29 April 2021. Accordingly, this point *in limine* is dismissed.
11. The summary judgment application is supported by an affidavit deposed by the property manager in the employ of the managing agent for the Plaintiff tasked with oversight of the commercial premises leased by the Plaintiff to the

First Defendant. As such, she is a person who can swear positively to the facts of the matter.

12. Her affidavit confirms the facts, verifies the cause of action, and alleges that there are no triable issues raised in defence of the matter on three main grounds:

- a. the arrear rental is common cause; thus, the First Defendant's breach of the lease agreement was admitted, which permitted the Plaintiff to cancel the lease agreement;
- b. Covid-19 relief (although not compulsory) had already been given to the First Defendant by crediting its account with the Plaintiff with 75% of April's rental and 50% of May's rental²;
- c. the First Defendant was not entitled as of right to additional time in which to make payment of its obligations; especially in circumstances where it had failed to make any payment to the Plaintiff in the period 01 June 2020 to 31 March 2021³.

13. In their affidavit resisting the granting of summary judgment (and a supplementary affidavit repeating some of the same contents), the Defendants raise the point *in limine* dealt with above; mention "force majeure" – accepted by me to refer to some form of impossibility of performance; repeat their plea; and adding the fact that its business only started to pick up

² Annexure C to the particulars of claim is a copy of the First Defendant's tenant account during the period 01 June 2020 to 31 March 2021. It indicates that credits were passed on 01 June 2023 for April 2020 rental in the amount of R4304,89 and May 2020 rental in the amount of R2 889,93. These credits total R7 194,82. This exceeds the amount of basic rental payable in a month at that time.

³ I note from Annexure C that the First Defendant was in arrears in the amount of R102 115,92 as at 01 June 2020. Bearing in mind the amount of basic rental and operating costs being billed during the year 01 November 2019 to 31 October 2020 in terms of the lease agreement, it appears that the First Defendant had been in arrears for many months prior to Covid-19 restrictions being put in place.

slowly at the beginning of 2021 so it could now tender to pay off its debt at the rate of R4 000,00 per month⁴.

14. In its supplementary affidavit, a repayment period of 24 months is suggested on behalf of the First Defendant. In its heads of argument, a repayment period of 36 months is suggested on behalf of the First Defendant.

15. The payment terms for the common cause arrears are a matter for negotiation between the parties and cannot be imposed on the Plaintiff at the behest of the First and/or Second Defendants. This defence thus does not raise a triable issue to enable the action to proceed beyond summary judgment.

16. One further defence remains – the impossibility of performance created by the Covid-19 hard lockdown and subsequent restrictions, including travel restrictions. The question is whether this defence creates a triable issue that will enable this action to proceed beyond summary judgment.

17. The answer is to be found in Freestone Property Investments (Pty) Ltd v Remake Consultants CC and another⁵, a decision of this division of the High Court of South Africa dealing specifically with the impact of the Covid-19 hard lockdown and later restrictions on contractual obligations, which decision was reached on 25 August 2021 – only a few days before this summary judgment application was heard.

18. It sets out that:

- a. “11. The doctrine of supervening impossibility of performance is firmly entrenched in our law. If performance of a contract has become impossible through no fault of the party concerned, the obligations under the contract are generally extinguished.

⁴ At that payment rate, it would take approximately 4 years to settle the capital amount of the claimed arrears – a timeframe that exceeded the remaining extent of the lease period and does not take account of any current portion of the rental obligation.

⁵ 2021 (6) SA 470 (GJ)

But the doctrine is not absolute. For example, the doctrine may be overridden by the terms or the implications of the agreement in regard to which the defence is invoked.”;

- b. “15. The implementation of the ‘hard lockdown’ under the previous Regulations give rise to a more nuanced situation than where only one party is unable to perform.”;
- c. “20. There is no suggestion that either the plaintiff or the first defendant was entitled to trade during the ‘hard lockdown’ because either of them fell within any of the exceptions provided for in the previous Regulations that would have enable them to trade.”; and
- d. “25. ... the effect of the ‘hard lockdown’ on the lease agreements incapacitated both the plaintiff and first defendant from performing their respective obligations.”

19. The Covid-19 hard lockdown would thus be a circumstance where both parties to the lease agreement are absolved of their obligations for the month of April 2020, unless their lease agreement provides otherwise.

20. Clause 4.4.5 of their lease agreement provides that the First Defendant cannot hold the Plaintiff liable for any damage suffered as a result of the access to the rented premises being restricted or denied⁶. It thus appears that the lease agreement may have excluded the defence of supervening impossibility of performance.

21. In respect of the month of April 2020 (hard lockdown), this does not seem to have any impact on the arrear rental as the Plaintiff has given the First Defendant a credit exceeding the basic rental for that month when neither party was obliged to perform in terms of the lease agreement.

⁶ Clause 4.4.5 reads: “The Tenant hereby acknowledges that the Landlord is not liable for any inconvenience or damage suffered by the Tenant on account of the ... restriction or denial of access to the Property and/or Building.”

22. Even if the lease agreement did not exclude supervening impossibility of performance, the First Defendant would still not be relieved of his lease obligations during the remaining period of the Covid-19 restrictions after the hard lockdown.

23. For this period of time, Freestone Property Investments (Pty) Ltd v Remake Consultants CC and another sets out that:

- a. "27. ... the first defendant cannot legally justify its failure to make payment of rentals and other charges for the protracted period of March to October 2020. Whatever restrictions there may have been that prevented the plaintiff and first defendant from performing their respective obligations for the period of the 'hard lockdown' until 30 April 2020, those restrictions did not persist until October 2020. From 1 May 2020, the lockdown regulations were progressively eased. Any supervening impossibility of performance did not endure for the entire period corresponding to the first defendant's non-payment of rentals.";
- b. "29. ... the declaration of the state of disaster and the continued effect of the Covid-19 pandemic may have resulted in a dramatic decline of custom through the shopping centre in which the leased premises were situated, does not afford a defence to the first defendant as lessee.".

24. Accordingly, there is no triable issue (*bona fide* defence) raised in the Defendants' plea and summary judgment should be granted.

COSTS

25. Clause 5.5.3 of the lease agreement between the Plaintiff and First Defendant provides for the costs of any legal proceedings to be paid on the scale as between attorney and own client.

26. Clause 12 of the suretyship and co-principal debtor agreement between the Plaintiff and Second Defendant provides for costs to be paid on the same scale as provided for in the lease agreement.
27. Accordingly, the scale of costs in this matter is that between attorney and own client.
28. I am not aware of any reason why the costs should not follow the result in this matter and that the unsuccessful parties should pay the costs of the successful party.

CONCLUSION

29. The point *in limine* that the application for summary judgment has been brought out of time cannot succeed.
30. The defence of impossibility of performance of the lease agreement can only at best be successful for the month of April 2020 (the period of the hard lockdown).
31. As the Plaintiff has already given the First Defendant credit on its rental account sufficient to cover one month's rental, there is no further relief to be obtained in respect of the quantum of the arrear rental on the basis of impossibility of performance of the lease agreement.
32. The defences pleaded by the First Defendant thus contain no triable issue and the summary judgment application against it must succeed.
33. The Second Defendant has not raised any defences unique to his position as surety and co-principal debtor and thus must have joint and several liability in the same amount as the First Defendant.

ORDER

34. I accordingly grant an order the following terms:

The First and Second Defendants are jointly and severally liable (the one paying the other to be absolved) to make payment to the Plaintiff of:

- 1) the amount of R189 476,10;
- 2) interest on the amount in paragraph 1) at the rate of 9% *per annum* from 02 January 2021 to date of payment in full;
- 3) costs of the action on the scale as between attorney and own client.

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 ~~28 February 2023~~ 08 February 2024

Appearances:

Appearance for Plaintiff	Advocate J G Dobie
Attorney for Plaintiff	Reaan Swanepoel Attorneys reean@uitweb.co.za
Appearance for Defendants	Mr I T Khumalo Second Defendant Director of First Defendant iankhum@gmail.com