

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: **A260/2020**

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

Date: 2 AUGUST 2023

In the matter between:

VINCENT NKUNA T/A NKUNA ATTORNEYS

Appellant

and

OCTODEC INVESTMENTS - OLIVETTI HOUSE

Respondent

JUDGMENT

DE VOS AJ

[1] The purpose of summary judgment is to ensure matters that do not justify a full ventilation of evidence are decided summarily.¹ The summary judgment procedure

¹ Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA) paras 31 - 32-

ensures a quick resolution of disputes, saves litigants costs and frees up court time. Court time is a scarce resource. If court time is wasted, it extends the waiting time for a trial date and affects litigants' access to justice. It is, therefore, in everyone's interests that matters where no triable issue is raised are dealt with summarily on motion rather than on evidence led during a trial. The test to determine if a matter can be dealt with summarily is crisp: does it raise a triable issue? If not, there is no need to refer the matter to the trial court. This appeal is such a matter.

- [2] Mr Nkuna leased his business premises from the respondent.² The respondent demanded Mr Nkuna pay his pro rate share of rates and taxes in terms of an addendum to the lease agreement.³ The amount claimed climbed to just over R 90 000. Mr Nkuna denied that he was liable for rates and taxes. The respondent issued a summons. Mr Nkuna filed a plea in which he raised the defences of jurisdiction and locus standi. Mr Nkuna also counter-claimed for an amount of just over R 20 000.

"It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights. The rationale for summary judgment proceedings is impeccable."

² The respondent acted as an agent for another company, but nothing turns on this.

³ The clause provides -

"5.3 Charges: The Tenant shall, for each month for the duration of this agreement, be liable for:
5.3.5 a Pro Rata Share of the Rates and Taxes which are payable by the Landlord from time to time, including all increases thereon, including its Pro Rata Share of any new property levies, charges or taxes which may be imposed by the local or any other responsible authority in respect of the Property and/or Building."

- [3] The respondent considered the plea and instituted summary judgment proceedings before the Magistrate's Court. The Magistrate granted summary judgment⁴ and dismissed the counter-claim.⁵
- [4] The appeal before us⁶ is slightly broader than that pleaded by Mr Nkuna. The grounds before us are, first, a defence of vis major. Mr Nkuna contends he must be released from his obligations under the agreement as a result of the covid-19 pandemic. Second, Mr Nkuna complains that the deponent of the respondent's affidavits lacked authority. Third, the Court lacked jurisdiction as a result of an arbitration clause in the agreement. The appeal requires us to consider whether these three points raise triable issues on which Mr Nkuna can successfully resist summary judgment. We conclude that they do not. In what follows, we set out our reasons.
- [5] First, the defence of vis major is considered. Mr Nkuna's case was that the entirety of the agreement was void for vis major as a result of the pandemic. Mr Nkuna refers to the recent Supreme Court of Appeal judgment in *Butcher Shop and Grill CC v Trustees for the time being of the Bymyam Trust*⁷ to support this argument.
- [6] Mr Nkuna's plea did not contain any reliance on vis major. It is not one of the defences raised in his plea. This distinguishes the case from *Butcher Shop*. On this basis alone,

⁴ The relevant part of the order provides -

1. Confirmation of cancellation of the Lease Agreement entered into between the Plaintiff and the Defendant dated 26 April 2018.
2. Confirmation of cancellation of the Parking Lease Agreement entered into between the Plaintiff and the Defendant dated 21 May 2018.
3. Confirmation of cancellation of the Addendum to Lease Agreement entered into between the Plaintiff and the Defendant dated 6 July 2020.
4. Payment of the sum of R 69 120.93.
5. Interest is calculated at 4% above the prime bank overdraft interest rate charged by Nedbank, which interest is compounded monthly from 1 February 2022, alternatively from the date of service of Summons to the date of final payment. (Prime interest rate 7.25% plus 4% = 11.25%)"

⁵ The relevant part of the order reads -

"IN RESPECT OF THE DEFENDANT'S APPLICATION FOR SUMMARY JUDGMENT ON THE COUNTER-CLAIM:

1. The Defendant's Application for Summary Judgment, based on the counter-claim, is dismissed with costs on an opposed attorney and client scale, which costs to include cost of counsel."

⁶ The notice of appeal is against the Court's whole judgement or order granting judgment in favour of the respondent and cost order in favour of the respondent.

⁷ [2023] 3 All SA 40 (SCA)

it ought not to be considered. However, for fullness of reasons, the Court weighs the possible impact of the Supreme Court of Appeal's judgment. In *Butcher Shop*, a remission of rent was sought as a result of the covid-19 pandemic. In this case, Mr Nkuna argues that his obligations to pay rates and taxes are destroyed as a result of vis major, not for a remission. Mr Nkuna's case and the case considered by the Supreme Court of Appeal in *Butcher Shop* are dissimilar. *Butcher Shop* is not the authority for the proposition Mr Nkuna wishes to make.

- [7] In addition, *Butcher Shop* makes it clear that it is based on the specific facts of the case. In this case, the facts preclude a finding of vis major. One of the requirements of vis major is that the events were not foreseeable. Mr Schoeman, for the respondent, makes the point that the addendum was signed in the period between June and July 2020. At this stage, the foreseeability of further lockdowns was on the cards for all South Africans as the President had publicly announced so on national television.
- [8] Mr Schoeman also contends that Mr Nkuna failed to make out a case that it was impossible to comply with his obligations. Mr Nkuna has not told this Court it was impossible to work. Mr Nkuna is an attorney and was permitted to work for most of the lockdown and limited only in terms of inter-provincial travel for urgent work for a short time. It is so that nowhere on the papers does Mr Nkuna say it was impossible to work, nor does he take the Court into his confidence by alleging or proving an inability to pay. In any event, Mr Schoeman points out that the respondent had been given a rent holiday of two months during the hard lockdown.
- [9] We conclude that the defence of vis major does not raise a triable issue.
- [10] Mr Nkuna's second point is that of locus standi. Mr Nkuna contends that the deponent of the respondent's affidavit does not have the authority to act on behalf of the respondent. The deponents to the respondent's affidavits indicate they work for an agent of the respondent⁸ and that they have personal knowledge of the relevant facts.

⁸ The deponent states -

"I verify and confirm that I have through my position as Legal Advisor of City Property Administration (Proprietary) Limited, the duly authorised agent of the Plaintiff, access to all the records and information in the possession of the Plaintiff pertaining to this matter before this Honourable Court and I am as such competent to depose to this affidavit."

This is sufficient.⁹ A deponent requires personal knowledge and can rely on knowledge of the documents in the context of a summary judgment application.¹⁰ This is clear from Rule 14(2)(a) of the Magistrate Court Rules dealing with summary judgment which indicates that an affidavit may be deposed to by "any person who can swear positively to the facts". The locus standi defence, also, does not raise a triable issue.

- [11] Lastly, the Court considers the arbitration clause. Mr Nkuna contends that this Court does not have jurisdiction to consider the matter as the lease agreement contains an arbitration clause that requires the matter to be referred to arbitration.¹¹ This is not what the lease provides. The lease clearly states under the heading "Choice of Process" that either party may elect to refer a dispute to Court or to alternative dispute resolution.¹² The clause permits either party to "elect" which process they wish to follow. The next clause sets out the process if a party elects to follow alternative dispute resolution. The clause provides for mediation and a referral to arbitration. This clause opens a route to the High Court - even during the arbitration process - to launch court proceedings for urgent or interlocutory relief. Mr Nkuna seizes on this to contend only urgent or interlocutory matters can be referred to Court. Mr Nkuna's argument

⁹ In *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) wherein the Court held the following:

"In determining the question whether a person has been authorised to institute and prosecute motion proceedings, it is irrelevant whether such person was authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof that must be authorised."

¹⁰ In *Rees and Another v Investec Bank Ltd* 2014 (4) SA 220 (SCA), the Court held the following:

"Where an applicant for summary judgment was a corporation, the deponent to its affidavit did not need to have first-hand knowledge of every fact comprising its cause of action: the deponent could rely for its knowledge on documents in the corporation's possession."

¹¹ The Appellant (Defendant) pleaded that the Court a quo did not have jurisdiction due to the provisions of clause 13.3.1 to 13.3.3 of the lease agreement, in that these clauses provide that any dispute of indebtedness arising from the lease agreement shall be referred to the Arbitration Foundation of Southern Africa (AFSA).

¹² The clause provides -

"Choice of Process

Without excluding any rights of the Tenant prescribed by the Consumer Protection Act, 2008 or any other legislation applicable, from time to time, either party may elect whether a dispute in terms of this agreement is to be brought in a court with competent jurisdiction or by way of dispute resolution as set out in clause 13.3 below."

ignores the preceding clause titled "Choice of Process" and the express provision permitting parties to elect which process to follow.

[12] The defence that the Court lacks jurisdiction does not raise a triable issue.

[13] Mr Nkuna raised a counter-claim for summary judgment. The counter-claim was out of time,¹³ did not comply with the rules of the Court and did not disclose a cause of action. The Magistrate was, in this regard also, sound in approach and conclusion in dismissing the counter-claim. Mr Schoeman pointed out that the counter-claim - dismissing summary judgment is not appealable. Generally, a refusal to grant summary judgment is not appealable.¹⁴ Our law has created some exceptions, and currently, even orders that are not final in effect can be appealed against if it is in the interest of justice to do so. In this case, the counter-claim has no merits, and it matters little whether this Court views it as non-appealable or not in the interest of justice to consider the appeal. Assuming in the appellant's favour that it is appealable, the Court dismisses the appeal against the counter-claim.

[14] The appellant has raised no triable issue, nor has he raised a bona fide defence. Mr Nkuna, to resist summary judgment, ought to have disclosed the grounds upon which he disputes the respondent's claim with reference to the material facts underlying the disputes raised. No such grounds have been disclosed, nor have any material facts

¹³ The relevant timeframes are as follows -

- a) Summons was issued against the appellant by the respondent for inter alia arrear rentals. The summons was served on the appellant on 1 February 2022.
- b) On 23 March 2022, the appellant served his plea together with a counter-claim.
- c) On 6 April 2022, the respondent's application for summary judgment was served on the appellant's attorneys. This was within the prescribed 15-day period wherein summary judgment can be brought. On the same day, the respondent's plea to the appellant's counter-claim was also served.
- d) On 18 May 2022, the appellant served his application for summary judgment, based on his counter-claim, on the respondent's attorney. This was out of time, and no condonation was sought for the non-compliance with the time frames.
- e) The application for summary judgment of the respondent was set down to be heard on 6 June 2022. This meant that the opposing affidavit had to be delivered on or before 30 May 2022. The opposing affidavit was only served on the respondent's attorney on Friday, 3 June 2022. This means that the opposing affidavit was out of time. There was further no condonation sought for the lateness of the opposing affidavit.

¹⁴ Kgatle V Metcash Trading Ltd 2004 (6) SA 410 (T) At 416 C- E "If the Court a quo had simply refused summary judgment, that would, of course, not have been appealable but the very effect of the appeal before us is due to the fact that the order went further and as a matter of fact provided the basis on which summary judgment was in fact entered."

which underpin such grounds been presented. To the contrary, Mr Nkuna concedes the conclusion of the agreement and the clause giving rise to his obligation to pay rates and taxes. Mr Nkuna accepts he did not comply with this obligation and does not dispute the amount that is being claimed. The contract, its clauses, Mr Nkuna's failure to comply and the quantum are all common cause. The defences raised by Mr Nkuna are purely legal in nature, not good in law¹⁵ and can be disposed of summarily without a referral to trial.

[15] The question at the summary judgment stage is not whether a pleaded defence stands good prospects of success. It is whether the defence is genuinely advanced.¹⁶ A defence that is obviously unsustainable on the facts that are alleged to underpin it, or that is bad in law, cannot be genuinely advanced.¹⁷ The defences raised by Mr Nkuna are unsustainable on the facts and demonstrably bad in law. For all these reasons, the Court concludes that the appeal must fail.

[16] Lastly, on the issue of costs: the appellant has been unsuccessful. No basis is presented to deviate from the rule that costs follow the result. The agreement between the parties provides for costs on an attorney and client scale. The Magistrate granted costs on this scale. This Court has not been presented with a ground to deviate from this scale. The Court therefore grants costs on an attorney and client scale in favour of the respondent.

Order

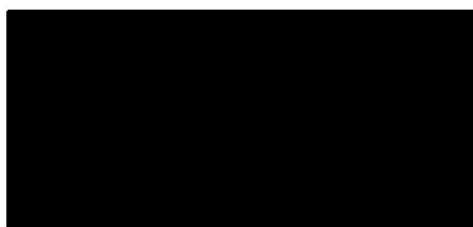
[17] As a result, the following order is granted:

- a) The appeal is dismissed.
- b) The appellant is to pay costs between the attorney and the client.

¹⁵ Maharaj v Barclays National Bank 1976 (1) SA 418 (A)

¹⁶ Tumileng Trading CC v National Security and Fire (Pty) Ltd 2020 (6) SA 624 (WCC) at para 23.

¹⁷ Guardrisk v Life Limited FML Life (Pty) Ltd and Another (9859/2020) [2023] ZAGPJHC 137 (15 February 2023) at para 12.



J de Vos

Acting Judge of the High Court



MPN Mbongwe

Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the appellant:

Mr Nkuna

Instructed by:

Nkuna and Associates

Counsel for the Respondent:

Z Schoeman

Instructed by:

Savage Jooste & Adams

Date of the hearing:

18 July 2023

Date of judgment:

2 August 2023