IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Appeal case number: **AR423/2022**

Court a quo case number: **9201058/2021**

In the matter between:

BEYONCE HAIRPIECE SALON AND GENERAL MERCHANDISER (PTY) LTD **Registration number 2015/151193/07**	**FIRST APPELLANT**
MR SAMSON NNAMDI OKAFOR **(Passport number A[...])**	**SECOND APPELLANT**

and

SUSAN MARGARET WARD BESTER **(Identity number 6[...])**	**FIRST RESPONDENT**
BEVERLY LYNNE PICKFORD **(Identity number 5[...])**	**SECOND RESPONDENT**

Coram: Seegobin J and Mossop J

Heard: 8 September 2023

Delivered: 8 September 2023

ORDER

On appeal from: Pinetown Magistrates' Court (sitting as the court of first instance):

1. The appeal is dismissed with costs.

JUDGMENT

Mossop J (Seegobin J concurring):

[1] This is an appeal against an order by the Pinetown Magistrates' Court granting summary judgment in favour of the respondents against the first and second appellants for payment of the amount of R63 916.36, interest thereon at the rate of 7.7 percent per annum from date of service of the summons to date of payment and for ejectment from certain commercial premises.

[2] The respondents jointly own the commercial premises referred to above, which are situated in Pinetown, KwaZulu-Natal (the premises). The respondents concluded a written agreement of lease (the lease agreement) with the first appellant for the premises on 6 February 2018, which was to endure for a period of three years. The second appellant, who acted on behalf of the first appellant in concluding the lease agreement, also agreed to stand as surety for the obligations of the first appellant.

[3] The respondents subsequently alleged that the first appellant was in arrears with its monthly rental payment obligations and accordingly issued summons against both appellants, the latter on the strength of his suretyship. The appellants filed a plea, and having considered the plea, the respondents concluded that no triable defence had been raised by the appellants. The bringing of the summary judgment application was the inevitable consequence. The appellants delivered an affidavit resisting the granting of summary judgment but the magistrate, nonetheless, granted the summary judgment that is now being appealed against.

[4] Summary judgment is often characterised as being a drastic remedy because, if it is granted, it deprives a defendant of the opportunity to raise its defence in trial

proceedings. However, as was stated by Navsa JA in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture:*[1]

'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 learned judge of appeal went on to conclude that:

'Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are "drastic" for a defendant who has no defence.'[2]

[5] When the summary judgment application came before the magistrate, three points were initially raised by the appellants upon which their opposition to the granting of summary judgment was predicated. These points were formulated as points in limine and were contained in the appellants' affidavit resisting the granting of summary judgment. The three points were that:

(a) Mr Murray Guy Evennett (Mr Evennett), who concluded the lease agreement on behalf of the respondents and who deposed to the affidavit supporting the granting of summary judgment (the verifying affidavit), lacked:

'… the necessary *locus standi* to depose to the Founding Affidavit.'

In addition, it was alleged that Mr Evennett had no authority to depose to the verifying affidavit;

(b) Mr Evennett lacked personal knowledge of the facts to which he deposed to in the verifying affidavit; and

(c) There had been non-compliance with rule 14(2)[3] of the Magistrates' Court Rules in that the amount in respect of which summary judgment had been ordered was not a liquidated amount.

[6] Before the magistrate, the appellants abandoned the first point. Nothing more need be said about it other than that it was probably a good decision not to rely on it.

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[1] *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* [2009] ZASCA 23; 2009 (5) SA 1 (SCA) para 31.

[2] Ibid para 33.

[3] The appellants specifically reference Rule 14(2) of the Magistrate's Court Rules of Court in their affidavit opposing summary judgment. In fact, that is the title of a section of their affidavit. Rule 14(2) is not the correct rule as it deals with the procedural aspects of a summary judgment application. Rule 14(1) deals with competent claims for summary judgment.

[7] As regards the second point, the appellants submitted that Mr Evennett was not a person who could swear positively to the facts contained in the verifying affidavit. The high point of the appellants' submissions in this regard is to be found in the following paragraph in the affidavit resisting summary judgment:

'It is submitted that it is inconceivable that, the deponent, being the majority member of a substantial property management operation, would have personal knowledge of the transpiring of and matters pertaining to, and incidental to, the Applicants' cause of action.'

[8] Why it is 'inconceivable' that Mr Evennett has such personal knowledge is not mentioned. Mr Evennett stated under oath in the verifying affidavit that he had such personal knowledge. The appellants' rather cavalier submission that he did not, was a bald statement that was not fashioned upon any revealed facts.

[9] The appellants, however, appear to have forgotten that the respondents had pleaded in their particulars of claim that Mr Evennett had represented them in concluding the lease agreement with the appellants. The appellants, significantly, admitted this in their plea. That being so, it can be accepted that Mr Evennett was personally involved in negotiating and concluding the lease agreement with the appellants. He also alleged in the verifying affidavit that his business is the managing agent of the premises, which encompassed:

'the responsibility of entering into lease agreements with prospective tenants, the levying and collection of rental, and general management services in respect of the building ….'

The appellants did not deal with this allegation in their affidavit resisting summary judgment. It must therefore be accepted as being correct.

[10] Mr Evennett stated in the verifying affidavit that the first appellant had fallen into arrears with its rental and utility payments. This is not a fact that is at variance with the appellants' version. They pleaded in their plea that:

'The Defendant's (sic) do not owe the Plaintiffs' (sic) the sum as claimed. If any amount of money is due and owing to the Plaintiffs' (sic) it is far below the sum of R63 916.36.'

They went on also to plead, briefly, that:

'Any amount that may be due to the Plaintiffs' (sic) by the Defendants' (sic) is not immediately outstanding, owing or payable, in that the First Defendant had entered into an arrangement with the Plaintiffs' (sic) in respect of rental that fell overdue as a result of the Level 5 national lockdown'.

And they rounded off their plea with the following statement:

''… the Defendants' (sic) plead that they have not refused to bring any amount owing up to date and that the amount the Plaintiffs' (sic) are claiming is disputed.'

[11] Inherent in these extracts from the appellants' plea is a tacit admission of the appellants being in arrears with their obligations. Mr Evennett's knowledge therefore appears to have mirrored the knowledge of the appellants and cannot be criticised. Indeed, Mr Evennett went further than the appellants and quantified the amount of the arrears. Despite alluding to arrears or to an indebtedness due to the respondents, the appellants never attempted to suggest how much that indebtedness was.

[12] Dwelling for a minute on the reference to the level 5 national lockdown, Ms Holtzhausen submitted in her heads of argument that the allegation of an arrangement concluded as a consequence of the lockdown raised a bona fide defence. I cannot agree with that submission. How much rental was overdue was not disclosed by the appellants. What the terms of the arrangement were was not disclosed. Whether the arrangement was in writing or was oral was not disclosed. It was accordingly not a bona fide attempt to express a legitimate defence. Moreover, what the appellants appear to be alluding to in making a reference to this arrangement is some variation of the terms of the lease agreement. The lease agreement provided that any variation to it had to be recorded in writing and signed by the parties. The Appellate Division, as it then was called, held that where it is stipulated in an agreement that variations thereto may only be in writing, such agreement cannot be varied orally. This is the well-known *Shifren* principle.[4] The *Shifren* principle was considered in *Brisley v Drotsky*,[5] where the Supreme Court of Appeal held that a court has no discretion to decline to enforce a valid contractual term (of which a non-variation clause is part) and considerations of reasonableness and fairness do not come into play in the enforcement of such non-variation clauses. This was reaffirmed in *SH v GF and others*,[6] where the court stated that:

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[4] *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en andere* 1964 (4) SA 760 (A).
[5] *Brisley v Drotsky* 2002 (4) SA 1 (SCA); 2002 (12) BCLR 1229 (SCA).
[6] *SH v GF and others* [2013] ZASCA 144; 2013 (6) SA 621 (SCA) para 16.

'This court has for decades confirmed that the validity of a non-variation clause such as the one in question is itself based on considerations of public policy, and this is now rooted in the Constitution.'

No written variation of the lease agreement was referred to or put up by the appellants. An oral variation of the lease agreement had no starting price and could not constitute a bona fide defence. It goes without saying that this court should not have to engage in this essentially speculative exercise to deal with a vague allegation that is alleged to constitute a good defence. The onus is on the appellants to clearly set out the facts upon which they rely.[7]

[13] Given his admitted personal involvement in the conclusion of the lease agreement and the undisputed allegation that his business managed the premises, it seems to me to be very likely that Mr Evennett did have personal knowledge of the facts to which he deposed to in his affidavit. The appellants did not suggest that they did not know Mr Evennett or that they did not have dealings with him.

[14] Ironically, the appellants, of course, can have no personal knowledge themselves of whether Mr Evennett had personal knowledge, as they have no insight into the workings of Mr Evennett's business. In any event, even if I am incorrect in my conclusion as to Mr Evennett's personal knowledge, as the magistrate correctly pointed out in her judgment, it is not necessary that a deponent in summary judgment proceedings should have personal knowledge of every fact, and it is quite permissible to have reference to relevant documents to acquire knowledge.[8] The appellants' argument was advanced *in vacuo* as a purely theoretical construct devoid of any supporting facts. It was, in my view, 'deliberately vague'.[9] An attack on the personal knowledge of a deponent to a verifying affidavit in summary judgment proceedings is, unfortunately, a stratagem that is regularly employed these days when no other defence exists to avoid an inevitable judgment. There are undoubtedly cases where such an attack may be justified. This is not such a case. In my view, the magistrate rightly found against the appellants on this point.

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[7] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A-C.
[8] *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and another* 2010 (5) SA 112 (KZP) para 13.
[9] *Rees and another v Investec Bank Ltd* [2014] ZASCA 38; 2014 (4) SA 220 (SCA) para 22.

[15] The third point taken by the appellants was that the amount claimed from the appellants is not a liquidated amount in money. Colman J in *Oos-randse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk en andere (2)*[10] stated as follows on this issue:

'A money claim is liquidated if the amount thereof has been fixed by agreement or by the judgment of a Court. To those two cases one can perhaps add a third one (as suggested in *Botha v Swanson & Co. (Pty.) Ltd*., and in *Leymac Distributors Ltd*. v *Hoosen and Another*), namely, if the ascertainment of the amount is a mere matter of calculation. In the last-mentioned case, however, the *data* upon which the calculation is to be based would themselves have to be amounts about which there was no room for uncertainty, estimation or debate. When, in order to prove his claim, the plaintiff will have to show that it, or some element in it, or some *datum* involved in its computation, was fair or reasonable, the claim is not liquidated.' (Citations omitted.)

[16] The particulars of claim set out the rental amounts payable over the entire three-year period of the lease agreement. In the first year of the lease, the monthly rental would be R22 104.71. In the second year, it would be R24 094.13 per month and in the final year of the lease agreement, the monthly rental would be R26 262.60. These are agreed amounts and are therefore liquidated amounts.

[17] The amount claimed by the respondents in their particulars of claim is in respect of both rental and utilities. The appellants undertook to pay for all amounts due in respect of electricity, power and water consumed at the premises. The amounts due in respect of these utilities are swiftly ascertainable by reference to invoices rendered by the respective service providers. It follows that the amounts claimed by the respondents, both in respect of rental and utilities, are liquidated amounts.

[18] The appellants contended further that payments had been made that had not been taken into account by the respondents. Only a single payment was so identified. That payment had nothing to do with the amount claimed by the respondents in the summary judgment and everything to do with a payment arising out of a previous default by the appellants.

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[10] *Oos-randse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk en andere (2)* 1978 (1) SA 164 (W) at 168H-169A.

[19] The magistrate thus correctly found against the appellants on all the points taken by them. These points having been disposed of, what triable issues remained? The answer that the magistrate arrived at, was that there were none. I agree. Summary judgment was therefore correctly entered against the appellants. Ordinarily, costs follow the result. I see no reason to depart from that principle.

[20] In the circumstances, I would propose the following order:

1. The appeal is dismissed with costs.

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MOSSOP J

I agree and it is so ordered

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SEEGOBIN J

APPEARANCES

Counsel for the appellant	:	Ms T Holtzhausen
Instructed by:	:	Manoj Haripersad Attorneys Inc. Suite 4, Ground Floor 16 School Road Pinetown
Counsel for the respondent	:	Mr R M Van Rooyen
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Date of argument	:	8 September 2023
Date of Judgment	:	8 September 2023