IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 886/2021P

In the matter between:

TOWER PROPERTY FUND LIMITED	**APPLICANT**
and	
FIT 24 GYMS (PROPRIETARY) LIMITED	**FIRST RESPONDENT**
MAREK STEFAN BURCZAK	**SECOND RESPONDENT**

ORDER

The following order is granted against the first and second respondents, jointly and severally, the one paying the other to be absolved for:

1. Payment to the applicant of the amount of R4 001 328.85 together with interest thereon at the prescribed rate of interest as calculated from due date to date of final payment; and
2. Costs of the application on the scale as between attorney and own client.

JUDGMENT

MOSSOP J:

[1] This is an application brought by the applicant for a judgment sounding in money against the first and second respondents. The amount in respect of which judgment was initially sought was the amount of R4 585 729.46.

[2] The first respondent runs a gymnasium (gym) and the second respondent is its guiding mind. He is also its guarantor. The applicant is the landlord of the building in which the first respondent previously had its gym,[1] where it offered its members the opportunity, through strenuous exercise, to convert fats, sugars and starches into aches, pains and cramps.

[3] The applicant was represented by Mr Schaup when the application was argued and the respondents were represented by Mr Reddy. Both counsel are thanked for their respective arguments.

[4] The applicant concluded a lease with the first respondent in September 2017, in terms of which it let its premises to the first respondent for the purpose of the latter running its gym (the lease agreement). For reasons that need not detain me, the first respondent fell into arrears with its monthly rental payments to the applicant. A previous application in which a money judgment was sought against the respondents by the applicant was the consequence (the first application). The respondents did not deliver an answering affidavit in the first application. They were thus vulnerable to having default judgment entered against them. Perhaps because of this, the parties decided to resolve the matter and recorded their settlement in a settlement agreement (the settlement agreement). This appears to have been signed on 1 June 2021. On the day that the default judgment was to be heard, 7 June 2021, an order was taken (the order) in the following terms:

'1. The Application for Judgment by Default is adjourned *sine die*, the matter having been settled between the parties in terms of the written Settlement Agreement dated 1 June 2021, a copy of which is attached marked "A".

2. In the event of the Defendants defaulting and not carrying out their obligations the Plaintiff may, after having given notice in terms of clause 9 of the Settlement

[1] The notice of motion also sought the eviction of the first respondent from the applicant's premises, but by the time that this application was argued, the first respondent had already vacated the premises.

Agreement, apply for Judgment for the amount due on five (5) days' notice to the Defendants in terms of Rule 41(4).'

[5] It is necessary to dwell a while on the terms of the settlement agreement. It was concluded in full and final settlement of all amounts due, owing and payable to the applicant. In arriving at the amount due by the first respondent, certain concessions were made by the applicant and a portion of the amount alleged to be owing by it was forgiven by the applicant. The first respondent was required to make a lump sum payment of R400 000 within 15 days of the date of signature of the settlement agreement, and in terms of clause 4.1.4, the first respondent was also required to pay an amount of approximately R1,6 million to the applicant for the period March 2020 to August 2020, in 18 equal monthly instalments.

[6] The settlement agreement further recorded that the second respondent stood as the guarantor of the obligations of the first respondent and that such obligation was a primary obligation. The signature of the settlement agreement did not constitute a novation of the original debt and the applicant was entitled, in the event of the respondents breaching any of the terms of the settlement agreement, to claim the full amount of the original obligation. In the event that the applicant was compelled to bring legal proceedings to enforce its rights, any costs awarded to it would be on the attorney and own client scale.

[7] Subsequent to the conclusion of the settlement agreement on 1 June 2021, an addendum thereto was agreed to by the parties (the addendum) on 26 November 2021. The reason for its conclusion is alluded to in that document when it states:
'After the Settlement Agreement, the Tenant failed to pay to the Landlord its rental and other financial obligations in terms of the Lease Agreement, but made payment of the Settlement Amount, thereby leading to a further dispute.'
In the settlement agreement, the term 'settlement amount' is defined to mean the amount of approximately R1,6 million.

[8] The addendum recorded that clause 4.1.4 of the settlement agreement was to be deleted in its entirety and replaced with the following clause:

‘Tenant agrees to pay and the Landlord agrees to receive an amount of R2 614 978,25 which amount includes the operational and rates costs for the period March 2020 up to and until August 2020 and the amount of R753 590 for the rental and other rates and utilities for the months June 2021 till October 2021 (**“Settlement Amount”**) in 18 (eighteen) equal monthly instalments of R150 915,88 per month, without interest thereon, from the Signature Date hereof.’

In addition, a further clause was to be inserted immediately after the new clause 4.1.4, as clause 4.1.5, to read as follows:

‘The monthly payment referred to in Clause 4.1.4 shall be paid such that the Tenant agrees to pay and the Landlord agrees to receive R92 934.97 of [sic] the 1st of each month, R188 397.45 on the 20th of each month and R57 980.91 on the 7th of each month.’

[9] The founding affidavit makes all of this reasonably clear. However, a significant measure of that clarity was lost when Mr Schaup commenced his argument. Firstly, he submitted that notwithstanding the explicit allegation in the founding affidavit that the settlement agreement had been made an order of court, this had not happened. A perusal of the order reveals that there is merit in this submission. The order did not specifically state that the settlement agreement had been made an order of court. If the settlement agreement had been made an order of court, the order would undoubtedly explicitly have said so. The settlement agreement was attached to the order simply for identification purposes, but none of its terms became orders of the court. Despite this point being raised at the last minute, it was not seriously challenged by Mr Reddy. I must thus conclude that the settlement agreement was not made an order of court.

[10] The second point advanced by Mr Schaup that obscured the clarity of the matter was his submission that the application had not been brought in terms of Uniform rule 41(4). The applicant’s notice of motion, which bears the heading ‘Amended Notice of Motion – Rule 41(4)’ and founding affidavit which contains the following statement at paragraph 5 that ‘[t]his is an application in terms of Rule 41(4)’, make it plain that the application was brought in terms of that rule. Rule 41(4) reads as follows:

‘Unless such proceedings have been withdrawn, any party to a settlement which has been reduced to writing and signed by the parties or their legal representatives but which has not been carried out, may apply for judgment in terms thereof on at least five days' notice to all interested parties.’

The wording of the rule may be detected in the wording of the order taken on 7 June 2021.

[11] However, Mr Schaup disavowed any reliance on that rule and attempted to advance the argument that the application had not been brought in accordance with that rule. He, however, later submitted that the application had either been brought in terms of that rule ‘or in terms of the lease agreement’. I am not sure why this aversion to reliance on the provisions of rule 41(4) arose: there was a written settlement agreement, modified by the addendum; the agreement had allegedly not been carried out; and the requisite notice in terms of the rule had been given to the respondents.[2] It was accordingly permissible to claim relief under rule 41(4), the original application having not been withdrawn.

[12] It was not disputed by the respondents that the first respondent had defaulted on its payment obligations to the applicant for the period January to April 2022. So much so was admitted by it in the answering affidavit. It was also admitted that the rental amount that the first respondent was required to pay was R190 000 per month. To establish the total indebtedness of the first respondent to it, the applicant relied upon a certificate of balance, permitted in terms of the lease agreement. The amount certified as being due by the first respondent to the applicant was the sum of approximately R4,17 million. This was not the amount claimed in the notice of motion.

[13] A statement of account was, however, attached to the founding affidavit. The respondents drew attention to the fact that included in the amount reflected in the certificate of balance, was a provision for legal costs in the amount of approximately R200 000, and the applicant’s entitlement to claim that amount was disputed. This

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[2] *Massey-Ferguson (South Africa) Ltd v Ermelo Motors (Pty) Ltd and others* 1973 (4) SA 206 (T) at 214H-215A.

was the full extent of the respondents' complaint regarding the accuracy of the amount claimed by the applicant. Mr Schaup, fairly, conceded this point. He accordingly proposed to rework the figures to exclude the amount claimed in respect of costs. After the matter stood down, Mr Schaup performed the mathematical exercise of recalculating the amount due and presented the court with an amount of R4 001 328.85 as allegedly being due to the applicant. Mr Reddy confirmed that he agreed with the correctness of the calculation performed by Mr Schaup but in so doing did not agree that the respondents were liable for that amount.

[14] Is the applicant entitled to judgment in the lesser amount calculated by Mr Schaup? As a general proposition, an applicant will not be precluded from claiming a *minus petitio*.[3] I am satisfied that the recalculation can be accepted.[4] The amount claimed has been reduced and there can be no prejudice to the respondents.[5]

[15] In resisting the applicant's claim to payment of any amount, whether the amount claimed in the notice of motion, the certificate of balance or the amount calculated by Mr Schaup, Mr Reddy initially identified five arguments in his heads of argument. Two of those arguments were abandoned by him without argument being adduced, leaving three that must be considered by the court.

[16] The first argument advanced was that the deponent to the founding affidavit is a male, being a Mr Rivaaj Singh, but the attestation clause on that document referred to the deponent as 'she', which appellation was not corrected by the deponent or the commissioner of oaths upon the signing and commissioning of the document. The attestation clause also indicated that it had been signed at 'Durban', whereas the commissioner of oaths' stamp indicated that he practices from an address located at 'Umhlanga New Town'.

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[3] In *Trust Bank of Africa Ltd v Hansa and another* supra at 104I-J, the court held that 'a plaintiff can always claim less than his allegations seem to justify'.

[4] *Scally v Feltra (Pty) Ltd* [2019] ZAKZPHC 36 para 9.

[5] In *Trust Bank of Africa Ltd v Hansa and another* 1988 (4) SA 102 (W) at 106I-J, the court held that 'it is possible to give judgment for the aforesaid . . . or to ignore all debits of interest and give judgment for the remaining amount . . .'.

[17] The point taken undoubtedly has its genesis in the judgment in *Absa Bank Ltd v Botha NO and others.*[6] In that matter, where a similar misdescription as to the gender of the deponent occurred (the deponent was a woman but the attestation clause recognised her as a male), the judge found that the court was unable to place reliance upon the certification of the commissioner of oaths because ex facie the affidavit, it was unclear whether the deponent was a male or a female. I am not persuaded by the reasoning followed in that matter and I am not obliged to follow it.[7] Such omissions are fairly commonplace and are undoubtedly innocuous and inadvertent. In any event, after the point was taken by the respondents in their answering affidavit, any uncertainty over the gender of the deponent was erased when the commissioner of oaths himself deposed to an affidavit confirming that the applicant's deponent, Mr Rivaaj Singh, had appeared before him and signed the founding affidavit.

[18] As regards the area where the commissioner of oaths practices, nothing further needs to be said about that as Umhlanga New Town is a suburb within the metropolis of Durban. Both descriptions were thus correct and either could have been employed. The fact that both were employed does not detract from their individual correctness.

[19] The first argument must therefore be dismissed.

[20] The second argument advanced by Mr Reddy is that the amount claimed by the applicant has not been correctly calculated. This argument has, by way of the concessions correctly made by Mr Schaup mentioned earlier in this judgment, already enjoyed some success as the amount initially claimed by the applicant has been reduced by the amount of approximately R585 000 after the recalculation of the amount claimed by Mr. Schaup. The principal complaint of the respondents was confined to the inclusion of the costs in the total amount claimed by the applicant. No other inconsistencies in the amount claimed by the applicant were identified.

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[6] *Absa Bank Ltd v Botha NO and others* 2013 (5) SA 563 (GNP).

[7] It appears that I am not alone in this regard: *Christodoulos v Jacobs* [2019] ZAGPJHC 178, paras 16-18 (especially the last part of para 18); *Capriati v Bonnox (Pty) Ltd and another* [2018] ZAGPPHC 345 paras 8-9; and *Waste Group Projects (Pty) Limited v Reshumile Environmental Co-operative Limited* [2020] ZAGPJHC 223 para 18.

[21] The argument of the respondents, however, was not confined simply to the inclusion of costs in the overall amount claimed. It went beyond that. The argument is that the settlement agreement recorded that it was concluded in 'full and final settlement' of the dispute between the parties. The amount recorded in the settlement agreement was thus the total amount that the applicant could demand of the respondents. While it may be so that the settlement agreement was to constitute a written memorial of the final settlement of the dispute as it was framed at that point in time, it must be borne in mind that it covered a discrete period in the life of the lease. The lease had not been cancelled, it remained in place and was to be ongoing after the conclusion of the settlement agreement. As the lease would continue running into the future, the parties could not have intended that the applicant, in concluding the settlement agreement disposing of the then extant dispute, could never look to the first respondent in the future if amounts due to it arising out of the ongoing lease were not paid by the first respondent. That could never be the case because at the time of the conclusion of the settlement agreement, the future amounts were neither due nor owing and that is all that the settlement agreement dealt with: amounts that were then due and owing to the applicant.

[22] Had this been the respondents' view on the settlement agreement, the first respondent could, and should, have declined to execute the addendum. It did not do so: it consented to the revised value of the amount due by it. It now cannot claim not to be bound by the terms of the settlement agreement as revised by the addendum.

[23] Other than the point taken regarding the legal costs, which was conceded by the applicant, the second argument lacks any further merit and cannot be upheld.

[24] The third and final argument pressed by Mr Reddy was that the addendum to the settlement agreement is unenforceable. This argument appears to be predicated upon the understanding that the settlement agreement was made an order of court. It could thus only be amended, so the argument went, by an application to court to vary the court order. Having already found that the settlement agreement was not made an order of court, this argument must wither and perish. Nor did the matter become *res judicata*, as suggested by Mr Reddy in his heads of argument. The

settlement agreement was the parties' document and they were capable of changing it as they deemed fit and necessary. This they then did in the form of the addendum and the respondents cannot now be heard to complain that they are not bound by its terms.

[25] The respondents have not suggested that the first respondent has paid all amounts due by it to the applicant. Their defences were based upon points of criticism concerning the presentation of the applicant's case, and did not comprise positive assertions regarding conduct on the part of the respondents that would permit them to escape liability for the amount ultimately claimed by the applicant. Those defences that were raised have failed and the inevitable result is that judgment in favour of the applicant must follow.

[26] One final aspect needs to be addressed. The lease agreement provided in clause 39.5 that the applicant was entitled to levy interest on any due but unpaid amounts owed by the first respondent to it:

'… at 2% (two percent) above the prime Rate, from due date of payment to the date of actual payment.'

The clause did not identify whose prime rate of interest is to be applied. It was within the applicant's power to do so as it was the author of the lease agreement. The interest rate that accordingly must be applied is that permitted in terms of the Prescribed Rate of Interest Act 55 of 1957 from time to time.

[27] I accordingly grant the following order against the first and second respondents, jointly and severally, the one paying the other to be absolved for:

1. Payment to the applicant of the amount of R4 001 328.85 together with interest thereon at the prescribed rate of interest as calculated from due date to date of final payment; and

2. Costs of the application on the scale as between attorney and own client.

MOSSOP J

APPEARANCES

Counsel for the applicant	:	Mr. D. Schaup
Instructed by:	:	Cliffe Dekker Hofmeyer Incorporated 8th Floor, Cliffe Dekker Place 11 Buitengracht Street Cape Town
Counsel for the first and second respondents	:	Mr. T. Reddy
Instructed by	:	Manley Incorporated 179 MacKenzie Street Brooklyn Pretoria
Date of Hearing	:	21 November 2022
Date of Judgment	:	28 November 2022