

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 6828/2019

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>12/06/2019</u>	
DATE	SIGNATURE

In the matter between -

HYPROP INVESTMENTS LIMITED

Plaintiff

and

SUPERSTRIKE INVESTMENTS 56 (PTY) LTD
t/a BABY BOOM

Defendant

JUDGMENT

STRYDOM AJ

- [1] The plaintiff brought an application for summary judgment against the defendant. The plaintiff's predecessor in title leased premises to the defendant in terms of a written lease agreement ("the lease agreement").

- [2] In terms of the particulars of claim, issued on 1 February 2019 and served on the defendant on 8 February 2019, the defendant defaulted in its payments of rental and other charges, for the period December 2018 to January 2019. It is alleged that the defendant is indebted to the plaintiff to the extent of R210,490.70 as set out in a schedule attached to the particulars of claim marked as annexure "H8". This amount was due and payable on 1 January 2019.
- [3] In terms of clause 4.2 read with clauses 19.1 and 19.1.1 of the lease agreement, the defendant was obliged to pay rental and all other amounts payable monthly in advance on or before the first day of each calendar month of the lease period. Should the defendant fail to pay any rental and other amounts then and in such event, the plaintiff shall have the right, but not be obliged to, forthwith cancel the lease agreement. This is a so-called "forfeiture clause" allowing the plaintiff to cancel the lease agreement without placing the defendant in *mora*.
- [4] The undisputed breach took on 1 January 2019 when payment was not made on due date and the right to cancellation vested from this day. Considering that the plaintiff did not send a prior notice of cancellation, the effective date of cancellation, according to plaintiff, would have been on 8 February 2019, when the defendant was notified as per the particulars of claim that the plaintiff *"hereby elects to cancel the lease agreement"*.
- [5] Pursuant to the alleged cancellation, the plaintiff prayed for judgment against the defendant as follows:

- [5.1] Payment of an amount of R210 490.70;
 - [5.2] Interest on the said sum of R210 490.70 at the rate of 10.25% per annum *a tempore morae*;
 - [5.3] Confirmation of the cancellation of the lease;
 - [5.4] Eviction of the defendant and/or any other occupant from the leased premises;
 - [5.5] Plaintiff's damages to be postponed *sine die*;
 - [5.6] Costs of suit.
- [6] This matter was previously on the unopposed court roll of 13 May 2019 but was postponed to this court's roll for 5 June 2019. The reason for the postponement was the fact that the papers were not paginated and indexed and the parties failed to file heads of argument in respect of the now opposed application. It should be noted that the defendant filed its opposing affidavit during the course of the morning of 7 May 2019, within the time period set for the filing of an opposing affidavit but too late for pagination before this application, along with the other application files, would have been sent to the judge hearing the unopposed motion roll together with opposed summary judgment applications. I will deal with this issue later when I decide a reserved cost order.
- [7] The defendant filed its notice of intention to defend on 11 March 2019 and the plaintiff filed its summary judgment application on 26 March 2019. The

deponent to the founding affidavit, Wayne Abegglen, signed plaintiff's affidavit on 18 March 2019. These dates become important when the defendant's defences are considered.

- [8] In the opposing affidavit, various defences are raised. The first defence raised is one of payment of the amount claimed which goes hand in hand with the defence that the plaintiff had not exercised its rights to cancel the agreement within its terms, i.e. "*forthwith*".
- [9] It is alleged that the defendant made a payment on 31 January 2019 in an amount of R200 000, which substantially lowered the amount of R210 490.70 as per annexure "H8" attached to the particulars of claim. It is then alleged that when the summons was served the amount claimed, in relation to the January 2019 rental, was no longer due and payable. When the founding affidavit was deposed to on 18 March 2019, a further payment was made on 13 February 2019, and no outstanding debt existed. It was stated that the deponent to the founding affidavit could no longer verify the cause of action and amount contained in the particulars of claim (which was in any event wrong) as all outstanding amounts, including the February 2019 rental (which were not claimed in the particulars of claim), were paid.
- [10] It is common cause that when the 31 January 2019 payment was received, the lease agreement was still not cancelled.
- [11] It was argued that the fact that no debt existed when the founding affidavit was signed rendered this affidavit fatally defective as it verified a debt no longer in existence. The defendant has shown that on the date of receipt of the

summons, the amount claimed was substantially paid. The small differences between the amount paid and alleged to be outstanding was said to be related to inaccuracies pertaining to electricity charges.

- [12] When the plaintiff caused the summons to be served on the defendant, the amount claimed therein was incorrect and when the affidavit was deposed to, the confirmation of the amount was incorrect.
- [13] On behalf of the defendant it was argued that this conduct amounts to dishonesty and that the legal process has been abused.
- [14] That the particulars of claim, which refers to a December 2018 and January 2019 debt, and that the affidavit, are wrong cannot be disputed but whether it was dishonest to verify the incorrect debt under oath is another question. It was explained to defendant according to correspondence that at the time when the legal department of the plaintiff was instructed to sue the defendant, the position would have been as set out in the particulars of claim. The court will accept that it must have taken some time to prepare these documents and it is understandable that if payments were made subsequent to the instruction, this would not have been reflected in the particulars of claim. The affidavit confirmed what the situation was when the particulars of claim were drafted. It is unclear whether the deponent to the affidavit had knowledge that payments were made or was only verifying the particulars of claim as it stood.
- [15] The court, on the facts before court at this stage, cannot conclude that the deponent to the founding affidavit acted dishonestly. This court must consider whether the plaintiff's affidavit as it stands is in line with the prescripts of the

rule and whether the defendant has indicated under oath that it has a *bona fide* defence. In the defendant's answering affidavit, the defendant requested the court to find dishonesty and to dismiss the plaintiff's action on the basis that it is an abuse of process. As stated, this finding cannot be made on the facts before the court. Moreover, the rule does not provide the court with an option to dismiss the plaintiff's claim.

[16] What the court can accept at this stage is that the defendant has put up a *bona fide* defence insofar as the amount claimed in the particulars of claim is concerned. The defendant has shown that this amount has been paid. The plaintiff did not persist with its claim for outstanding rental, but persisted with its claim for confirmation of the cancellation of the lease agreement and the eviction of the defendant.

[17] The question whether the plaintiff validly cancelled the lease agreement remains contentious. It became common cause between the parties that the defendant had to pay the January 2019 rental on or before 1 January 2019. It was also not disputed that if this amount was not paid on due date and that the plaintiff acquired the right to "*forthwith cancel*" the lease agreement. This election to cancel was only exercised when the summons was served on 8 February 2019. That raised a question whether the plaintiff still had the contractual right to cancel the lease agreement 38 days after the right vested. On behalf of the defendant it was argued that the meaning of "*forthwith*" would be "*immediately*" or "*without delay or within a reasonable time*" in the circumstances of the case. Without evidence it will be difficult for this court to decide by when this right of cancellation should have been exercised. I agree

with the argument on behalf of the defendant that whether the plaintiff cancelled "*within a reasonable time under the circumstances*", is a question probably best suited to be determined at exception stage or during trial. In some cases "*forthwith*" would mean within a few days but in other cases, a period of 38 days may be reasonable. On behalf of the plaintiff it was argued that the decision to cancel the lease after late payment remains an option, even though the plaintiff accepted the rent, provided that plaintiff expressly reserve its rights to cancel the lease. This does not mean that the plaintiff should decide immediately after it became aware of the breach whether he would prefer for the lease to continue or to come to an end. It was argued that an unreasonable delay in the plaintiff's decision implicitly indicate his intention to waive his right to cancel, although it is unlikely that such a waiver would ever be assumed.

[18] On behalf of the defendant it was argued that waiver does not come into consideration. The contractual reference to "*forthwith*" provides for immediate cancellation. If this is not done, that right falls away.

[19] The defendant alleged that the cancellation of the plaintiff did not take place "*forthwith*" and alleged that the plaintiff's attempted cancellation, 38 days after the breach, amounted to a repudiation of the lease agreement which was accepted by the defendant on 1 April 2019. Clearly this has now become a disputed issue which should be decided on exception or at trial. Moreover, the date of cancellation and extent of holding over damages, if any, are inextricably linked. There is also no indication that plaintiff, after the defendant's breach, reserved itself the right to cancel the lease agreement at a later stage.

- [20] Summary judgment proceedings are inappropriate for dealing with clearly arguable questions of law which should properly be dealt with on exception. See: *Hollandia Reinsurance Company Ltd v Nedcor Bank Ltd* 1993 (3) SA 574 (W) at 576 G – 576 I.
- [21] A further defence was raised relating to a counterclaim. The defendant in its affidavit resisting summary judgment set out a counterclaim which amounts to a *bona fide* defence that exceeds the amount claimed by the plaintiff. This counterclaim is for the repayment of a deposit in terms of the lease and contractual damages associated with the retrenchment of employees on the leased premises. It is trite that if the counterclaim exceeds the amount claimed in a summary judgment it will be a basis to grant leave to defend. The veracity of the counterclaim is a matter to be determined at trial.
- [22] Accordingly, the court is of the view that as far as the cancellation alleged by the plaintiff is concerned, the defendant has put up a *bona fide* defence to avoid such an order on a summary judgment basis. The fact that the defendant, on its version, cancelled the lease agreement with effect from 1 April 2019, does not assist the plaintiff in its claim for eviction, also not what defendant later stated in correspondence. The plaintiff's claim for eviction is premised on its cancellation of the agreement on 8 February 2019 pursuant to the 1 January 2019 non-payment and cannot be premised on the defendant's subsequent cancellation. Accordingly, the court is of the view that the defendant must be granted leave to defend the matter.
- [23] This court must also consider the reserved costs of the opposed summary

judgment which was set down for 13 May 2019. The costs incurred on that day were reserved. To consider the appropriate costs order the court will have to consider why the matter was not heard by Nkosi AJ on this date and why he decided to postpone the matter. I am of the view that the previous court was best suited to have dealt with the cost order as that court formed a view why the matter had to be postponed. This was, however, not done and I will now have to rely on what I was told by counsel what the reasons were. I was informed that the reason for the postponement was that the papers were not indexed and paginated and that heads of argument on behalf of both parties were not submitted.

[24] In paragraph 13.23 of the consolidated practice directives manual dealing with summary judgments the onus is placed on the plaintiff to paginate and index the application before it is served and filed. If a defendant files an opposing affidavit, as it did, such affidavit and annexures must be paginated and updated and an updated index must be served and filed. This was not done and the reason advanced by the plaintiff for not doing so was that the files had already gone to the judge.

[25] Sub-paragraph 4 determines as follows:

"The parties will be entitled to file and a supervisor will be obliged to receive and put of the file, opposing affidavits, indices, practice notes and heads of argument in spite of a summary judgment application having been finally enrolled."

[26] This would entail that even if a file has been taken to a judge, the judge's registrar could be approached to obtain the file to further pagination and to file

an updated index and heads of argument. As the onus was on the plaintiff to do that, and it failed to do so, the plaintiff must be blamed for not having a fully paginated and indexed set of papers before the judge.

[27] It does not however end there. Both parties were obligated to file heads of argument. Should the defendant fail to file short heads of argument the application should not be postponed unless there are exceptional circumstances requiring a postponement. On the other hand, if the plaintiff failed to file heads of argument, this will lead to a postponement. From this it can be concluded, that if the papers were properly paginated and indexed and the plaintiff had filed heads of argument, this matter would in all likelihood have been heard by the court on 13 May 2019.

[28] The awarding of costs is a discretionary issue and considering the facts of this matter I am of the view that the plaintiff should be held responsible to pay the wasted costs incurred as a result of the postponement on 13 May 2019.

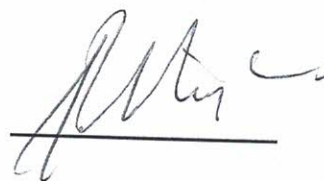
[29] The following order is made:

(1) The application for summary judgment is refused.

(2) The defendant is granted leave to defend.

(3) Costs of the application will be costs in the cause.

(4) The wasted costs incurred on 13 May 2019, which was reserved for decision by this court, is to be paid by the plaintiff.

A handwritten signature in black ink, appearing to read 'R. Strydom', is written over a horizontal line.

R. STRYDOM

ACTING JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Date of hearing: 5 May 2019

Date delivered: 13 June 2019 at 10h00