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

Case no: 2023-009622

REPORTABLE

(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: No

DATE

SIGNATURE

In the matter between:

SA RETAIL PROPERTIES (PTY) LTD

Applicant

and

PAULSHOF LIQUORS CC

First respondent

CARINA MOODLEY

Second respondent

This judgment was delivered by uploading it to the court online digital database of the Gauteng Division of the High Court of South Africa, Johannesburg, and by email to the attorneys of record of the parties on 5 July 2024.

JUDGMENT

VAN DER WALT AJ

[1] This is an application for summary judgment on claims for, and related to, arrears rental and ejectment. The claims arise from an agreement of lease in respect of commercial premises used for those purposes. Interest is claimed on the claims sounding in money, and costs on the attorney and client scale are sought in respect of all claims.

[2] The applicant, SA Retail, and the first respondent, Paulshof Liquors, entered into the lease agreement in August of 2019. SA Retail would be the lessor and Paulshof Liquors the lessee. The term of the lease was to be five years, commencing on 1 April 2019 and terminating on 31 March 2024. Paulshof Liquors took occupation of the premises on or about 1 April 2019 and, as counsel confirmed during the hearing, remains in occupation. Ms Moodley, the second respondent, bound herself as surety to SA Retail for the obligations owed by Paulshof Liquors to SA Retail. She has made no attempt to absolve herself from liability should Paulshof Liquors be found liable, notwithstanding the fact that SA Retail asks for relief directly against both respondents. Instead, she made common cause with Paulshof Liquors and deposed to the affidavit opposing summary judgment on both respondents' behalf, denying any liability whatsoever.

[3] The lease agreement's clauses 26 and 28 deal with breach, cancellation and holding over, and their consequences. Clause 26 provides that once a breach occurs and continues for 7 days after the letter of demand is received by Paulshof Liquors, SA Retail has the rights to cancel the lease agreement and resume "possession". The latter presupposes a right to Paulshof Liquors' ejectment. The agreement also exhaustively affords SA Retail rights to claim upon cancellation, or an attempt at cancellation, three sums of money. The first claim is for rental and associated charges that accrued up to the date of cancellation. I'll call this the claim for accrued rental. The second is a claim for "pre-estimated liquidated damages". It is a claim for the rental and associated charges that would have been paid by the Paulshof Liquors had the agreement run its course. The claim is, therefore, calculated by using the "unexpired portion of the Lease", a term referring to the agreed term of the lease, immediately prior to the breach and cancellation. It is a claim that could be made whether or not Paulshof Liquors holds over and could be viewed as a penalty

for a breach that leads to early cancellation. I'll call this the claim for pre-estimated liquidated damages. The third claim is found in clause 28. It is a claim of compensation for holding over. It is for "all payments due in terms of [the lease agreement]" and "compensation for [Paulshof Liquors'] use and occupation of the Leased Premises". i.e., it is a claim for moneys due consequent upon Paulshof Liquors' actual occupation of the property. I'll call this claim the claim for rental upon holding over.

[4] SA Retail sought to cancel the lease agreement by way of its particulars of claim dated 23 January 2023. In these proceedings, it asks for summary judgment in respect of its claims for ejectment, accrued rental and damages for holding over. A cancellation in accordance with the lease agreement is required for these claims to be successful. I am therefore to consider whether, on the papers before me and in terms of the rule regulating summary judgment procedure, I should make findings that a cancellation in terms of the lease agreement had indeed occurred, and whether the claims for ejectment, accrued rental and damages for holding over should be successful.

[5] The gist of the rule allowing for summary judgment, notwithstanding the recent amendments to it, remains that plaintiffs are allowed to ask for summary judgment in respect of claims suitable to the procedure. Defendants must set out a bona fide defence to avoid summary judgment against them. Of relevance to the claims before me is the rule that the claims must be based on a liquid document, for a liquidated amount in money, or for ejectment. The claim which is the subject of the summary judgment application must, in addition, be good in law. Of particular relevance to the defence raised in this matter is the rule that the affidavit filed to set out a bona fide defence must disclose fully the nature and the grounds of the defence, and the material facts relied upon for it. The word "fully" requires sufficient detail of the nature and grounds of the defence to enable the Court to decide the issue: whether the defence could be good and whether the disclosure is honestly made.¹ Colman J, writing for a Full Bench of this court, dealt with why the word "fully", as found in Rule 32, is so important in the context of the summary judgment

¹ *Herb Dyers (Pty) Ltd v Mahomed* 1965 (1) SA 31 (T) 31H.

procedure. The procedure requires the filing of an affidavit in circumstances where a subsequent trial and cross examination looms large over a deponent. The penalty for making a false statement on oath is imposed after a trial for perjury. If the deponent to the affidavit opposing summary judgment is to be called to testify, he or she will find it easier to escape conviction if they said as little as possible in the affidavit. Respondents that do not have a bona fide defence will try to find any reason to do so.²

[6] The first claim I will deal with is for damages for holding over. SA Retail claims “damages by the first defendant for holding over at the rate of R1361.31 (being the current monthly rental of R42 200.61 excluding VAT divided 31 per day) with effect from 1 February 2023 to “date of ejectment”. As I have said, the agreement provides for the claim for accrued rental, the claim for pre-estimated liquidated damages and the claim for rental upon holding over. SA Retail, however, claims damages for holding over. It conflates the damages claim and the claim for rental upon holding over. Why this has been done is open to conjecture, but it seems to me that the phrase “pre-estimated liquidated damages” attached to the damages claim could, rightly or wrongly, be seen to be useful when one is of the intention to bring a claim for rental for an undetermined period (running to the date of actual ejectment) in summary judgment proceedings. Whether a claim that is “pre-estimated”, whatever that might mean, can be agreed to be “liquidated” so that it is capable of determination in summary judgment proceedings, is not a question I have to determine. From the papers before me it is apparent that SA Retail had no legal basis upon which to bring this claim. The lease agreement does not provide for it.

[7] The claim for accrued rental on the date when the summonses issued is of a different nature. The respondents received letter of demand in mid-January 2023. They were advised that Paulshof Liquors had fallen behind in respect of payments of rental and associated charges up to and including January 2023 (rental and associated charges having been payable in advance). They were also required to pay the outstanding amounts within seven days of the letters and were warned that steps would be taken to enforce SA Retail’s rights, should payment not occur. In

² *Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T) 228B – 229B.*

February of 2023, the relevant summonses issued out of this court, including SA Retail's cancellation of the lease agreement.

[8] Attached to its particulars of claim is a tenant account. It shows Paulshof Liquors' indebtedness as it accrued from February 2020 up to January 2023. By way of dates and detailed line items, it describes which amounts are owed by Paulshof Liquors to SA Retail, when these amounts accrued and what each amount represents. The total amount owed by 31 January 2023, according to this document, came to R1 233 483.90 (one million two hundred and thirty-three thousand, four hundred and eighty-three rand and ninety cents). SA Retail adjusted the amount for interest and legal fees for purposes of its claim before this court.

[9] The correctness of the tenant account and the facts contained in the letters of demand, all attached to the particulars of claim, is confirmed in the affidavit in support of summary judgment. These documents make clear that Paulshof Liquors had been in breach at the time the letters of demand were sent, the summonses issued, and the purported cancellation was made. The breach, the cancellation and Paulshof Liquors' indebtedness to SA Retail have, therefore, been confirmed in the affidavit in support of the summary judgment application.

[10] For this claim to be adjudicated upon in these proceedings, it must of course be based on a liquid document or for a liquidated amount in money. As to the former, clause 40 of the lease agreement provides that a "certificate" issued by SA Retail shall determine and prove Paulshof Liquors' indebtedness to SA Retail at any time. The clause provides further that the certificate shall be binding on Paulshof Liquors and that it shall serve as a liquid document in any competent court for the purposes of obtaining summary judgment. The clause, however, requires the certificate to be signed. Neither the tenant account attached to SA Retail's particulars of claim, or any other document relevant to these purposes, is signed. This claim cannot, therefore, be found to be a claim based on a liquid document.

[11] Is it a claim for a liquidated amount in money? Our courts have held that, should an amount not be agreed upon, as in the instant case, it may still be one for a liquidated amount in money if it is capable of speedy and prompt ascertainment.

Malan JA, writing for the Supreme Court of Appeal, relatively recently affirmed that where a claim is based on a contract, the probabilities are that its existence and character can be provided to the satisfaction of the Court speedily and promptly.³ Corbett J put the test as follows: A liquidated claim is one so expressed that the ascertainment of the amount is a mere matter of calculation.⁴ The ultimate decision as to whether or not a debt is capable of speedy ascertainment is a matter left to the discretion of the court.⁵ The claim for arrear rental and associated charges, especially when viewed in light of the terms of the lease agreement and the tenant account, which in detailed fashion sets out how the claim is made up in accordance with the lease agreement, is a liquidated amount in money. For by a simple matter of calculation, a calculation found in the lease agreement, and in fact done in the tenant account attached to the particulars of claim, the amount owed is capable of speedy ascertainment.

[12] Did the respondents put before this court a bona fide defence to this claim? It is only after the respondents were served with a notice of bar, that they pleaded. In this plea, they denied they were in breach of the lease agreement while, irreconcilably with that denial, not disputing that they had indeed been in arrears. They took issue with the amount by which they were in arrears, pleading that “various amounts paid by the first defendant have not been credited to the first defendant”. It was further pleaded that SA Retail had afforded them rental relief because of the COVID-19 pandemic during which time they said, they had been exempted from paying rental “for a period of about 6 months”.

[13] The summary judgment application was filed at the end of June 2023. Shortly thereafter, on 25 July 2023, Paulshof Liquors and Ms Moodley gave notice of their intention to amend their plea. At the hearing of the summary judgment application, this amendment had not been effected. The notice foreshadowed what can be described, at best, as a remarkable change of tack. Firstly, the pleaded “COVID relief”, not a trivial matter about which a miscommunication easily could have occurred during the drafting of the plea, no longer formed part of the defence.

³ *Blakes Maphanga Inc v Outsurance Insurance Co Ltd* 2010 (4) SA 232 (SCA) 240D–241C.

⁴ In *Botha v W Swanson & Company (Pty) Ltd* 1968 (2) PH F85 (CPD) 251.

⁵ *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T) 738F – H.

Secondly, the amended plea would now focus on a date found in paragraph 9 of the particulars of claim: “21 April 2021”. The date, in fact, became the foundation not only of the approach foreshadowed in the notice of amendment, but also the defence put up in the affidavit opposing the application for summary judgment.

[14] The date is, however, entirely inconsistent with the context in which it is found. It and the amounts it would have rendered relevant, are also immaterial to the claim against Paulshof Liquors. Paragraph 9 in the relevant paragraph of the particulars of claim reads as follows:

“In breach of the terms of the agreement as aforesaid, and despite demand, copies of which are annexed hereto marked ‘POC3’ and ‘POC4’, the First, and Second Defendants have failed, alternatively refused, further alternatively neglected to pay the amount of R1 029 494.44 to the Plaintiff, which amount is now due, owing and payable. This amount is in respect of arrear rental and associated charges due in terms of the agreement up to and including April 2021, as set out in the reconciliation annexed hereto and marked ‘POC5’, totalling R1 233 483.90.”

Paragraph 9 proceeds to set out the arrear interest and legal fees relevant to the calculation that accrued between February 2020 and January 2023. The letters of demand the paragraph refers to speak of the arrears of R1 233 483.90 in respect of arrear rental and associated charges arising up to and including January 2023, a date also confirmed by implication by the relevant prayer to the particulars of claim. In the affidavit in support of the summary judgment application the January 2023 date is again confirmed. Importantly the tenant account (POC5), referenced as the source for the 21 April 2021 date in the particulars of claim, sets out the arrears, as I have said, over the period February 2020 to January 2023. Moreover, this is also how the respondents seemingly understood the case they were to meet when filing their plea. For the plea makes no mention of 21 April 2021 and instead pleads to the whole period addressed in the tenant account, albeit in very broad terms.

[15] Yet, in the affidavit filed in opposition to the summary judgment, the respondents address the contents of POC5 only up to April 2021, admitting that even on that date, they were in arrears. They also submit that the affidavit filed in support of summary judgment, as opposed to the particulars of claim, makes reference to a

new period, “up to and including January 2023”. For this reason, they say, the summary judgment application is materially defective. As it is readily apparent from the papers before me, however, as it seemingly was to the respondents when they filed their plea, the date is immaterial to the relief sought in these proceedings. It could also perhaps fairly be described as a slip of the pen.

[16] I am therefore left to consider why a party, who placed no reliance on it prior to the filing of the summary judgment application, would set upon this new course, more or less just as the application for summary judgment was made. I find Paulshof Liquors’ approach particularly striking because it would not have been onerous at all simply to meet the tenant schedule, line item for line item, showing that all amounts due to SA Retail, over the course of the period covered by the tenant schedule, were either in fact paid or were not due. The risks consequent upon not doing so were great: they would not address the greater part of SA Retail’s case.

[17] It seems to me that they would not have taken this risk if they had a bona fide defence to SA Retail’s claim. There would simply not have been anything to gain by taking it. Once an application for summary judgment was made, the respondents had to find a way to avoid the perils inherent in setting out a bona fide defence against the claims against them; perils that only threaten parties who in fact have no bona fide defence. It is in this light that I view the defendants’ approach and find that they have made out no bona fide defence to this claim. The risk they ran when taking this approach has also come to fruition: for they have set out no facts relevant to the allegations of their arrears around the time of the breach, the receipt of the letters of demand and the cancellation. It follows that this claim must succeed. As the cancellation was warranted in terms of the lease agreement, clause 26 of the lease agreement affords SA Retail the right to an order ejecting Paulshof Liquors from the premises. That order will also follow.

[18] Clause 6.1 of the lease agreement provides that SA Retail may charge interest on overdue sums at the rate of the publicly quoted basic prime interest rate, at which First National Bank will lend funds on overdraft, plus 5%. According to the lease agreement, a certificate under the hand of a general manager of the bank constitutes prima facie proof of the prime rate. No such certificate has been attached

to papers before me. An order that interest be paid at a lower rate according to the alternative prayer in that regard will therefore follow.

[19] Clause 34 of the lease agreement provides that should SA Retail have to institute action against Paulshof Liquors pursuant to a breach of the lease agreement, Paulshof Liquors are to pay, among other things, attorney and client costs. Nothing in the papers moves me not to give effect to this provision.

[20] I make the following order:

In respect of claim A:

(1) The respondents are hereby ordered to pay the sum of R1 029 494.94 (One million and twenty-nine thousand, four hundred and ninety-four rand and ninety four cents.) and interest to the applicant.

Interest is to be paid on the aforesaid sum, calculated at 7% per annum accruing up to date of final payment.

(3) The respondents are to pay the applicant's costs on the attorney and client scale.

In respect of claim B: ejectment.

(1) The first respondent, and all persons claiming occupation through or under it, is hereby ordered to vacate the leased premises, being shop no. L19 and shop no. L[...].A, C[...].C[...]. Shopping Centre, Corner W[...] Road and S[...] H[...] Street, P[...], Sandton.

(2) The respondents are to pay the applicant's costs on the attorney and client scale.

Nico van der Walt.

Acting Judge, Gauteng Division, Johannesburg.

Heard: 22 April 2024

Judgment: 5 July 2024

Appearances:

For the applicant

Adv CJ Bekker

Instructed by Hadar Inc.

For the respondents:

Adv M.M. Muchopa

Instructed by SP Attorneys