

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

CASE NUMBER: 55408/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED:
DATE: 18 JULY 2024 _____	

In the matter between: -

ISIBONELO PROPERTY SERVICES (PTY) LTD

Plaintiff

and

UCHEMEK WORLD CARGO LINK FREIGHT CC

First defendant

t/a THE FISH & CHIPS COMPANY

(REGISTRATION NUMBER: 2010/167505/23)

PHINDILE BUSISIWE EMEKA

Second defendant

(IDENTITY NUMBER: 7[...])

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 18 July 2024.

F. BEZUIDENHOUT AJ:

INTRODUCTION

[1] This is an opposed application for summary judgment where the plaintiff seeks an order against the defendants, jointly and severally, the one paying the other to be absolved, for payment of the amount of R816 017.07, interest thereon, as well as an order for an ejectment of the first defendant and anyone claiming occupation through the first defendant from the commercial leased premises described as Shop G[...], T[...] R[...] M[...], corner W[...] and T[...] Avenue, M[...] W[...], Pretoria, Gauteng (*“the premises”*).

[2] The cause of action is the first defendant's breach of a written lease agreement (*“the lease”*) concluded between the plaintiff and the first defendant on the 8th of August 2019 at Pretoria and in respect of which the second defendant bound herself as surety and co-principal debtor.

[3] The monetary claim instituted by the plaintiff is for arrear rental and related charges up to and including November 2021.

[4] The defendants initially filed an exception to the particulars of claim which was dismissed with costs. Thereafter the defendants filed a plea and counterclaim on the 4th of April 2023 and filed an intention to amend on the 7th of June 2023 after the application for summary judgment had been enrolled for hearing on the 13th of June 2023. The plaintiff filed a notice of objection to the intended amendment in June 2023 and although the defendants brought an application for leave to amend on the 26th of June 2023, at the time of the hearing of the summary judgment application, the application for leave to amend had not been heard and the amendment not yet been effected.

[5] However, for the benefit of the defendants, the plaintiff took a pragmatic approach and took into consideration the new and additional defences raised in the

proposed amendment as if the amendment had been effected.

[6] The conclusion and terms of the lease and the entering into the suretyship are not disputed.

THE PLAINTIFF'S CASE

[7] In terms of the lease the first defendant agreed: -

[7.1] to pay total monthly rentals consisting of a basic monthly rental in the amount of R25 920.00 escalating at the rate of 7 % per annum compounded yearly on each anniversary of the commencement date, operating costs in the amount of R2 376.00 (excluding VAT) with the same 7 % escalation, pro rata municipal rates and taxes, sewer charges, refuse removal charges, as well as other associated charges consisting of *inter alia* a bank guarantee deposit in the amount of R134 741.76;

[7.2] that the lease period would commence on 20 August 2019 and terminate on 30 August 2024;

[7.3] that a failure by the first defendant to pay any amount due and payable on or before the due date for payment and failing to effect such payment after having been provided with five days' written notice to do so, would entitle the plaintiff to recover damages or to interdict or enforce specific performance against a tenant, or to cancel the lease forthwith by written notice.

[8] The second defendant bound herself as surety and co-principal debtor in terms of a written deed of suretyship in favour of the plaintiff.

[9] The first defendant was given and had taken occupation under and in terms of the lease agreement, but breached the terms of the lease as a consequence whereof the plaintiff exercised its election to cancel the lease agreement. Before cancellation demand for the payment of the arrear rentals was made on the 15th of November 2021 in accordance with the terms of the lease. Cancellation of the lease

agreement was exercised by way of the institution of the action in this court.

THE DEFENDANTS' CASE

[10] In their unamended plea the defendants aver that the lease period only started on the 13th of March 2020 after various delays caused by the plaintiff. Furthermore the defendants contend that the plaintiff failed to comply with its obligations in terms of the lease agreement, in that: -

[10.1] it failed to deliver the premises to the defendants in compliance with "*standard white box specifications*";

[10.2] it failed, notwithstanding an undertaking, to reimburse the defendants or credit their reconciliation statement for the costs the defendants incurred by bring the premises in line with "*standard white box specifications*";

[10.3] no certificate of occupancy was ever issued by the relevant municipality to the plaintiff valid for the period of the dispute between the parties;

[10.4] it failed to provide beneficial occupation in the condition for the purpose it was rented for or secure the tenant's promise to occupy the surrounding shops, thus guaranteeing customers for the first defendant, which conditions were the reason why the agreement of lease was concluded with the plaintiff in the first place;

[10.5] the landlord terminated the electricity supply to the premises on 19 April 2021, hence forcing the first defendant to stop trading and leave the premises on the 19th of April 2021 and tender the keys to the plaintiff.

[11] The defendants complained that various uncontrollable events took place, including but not limited to: -

[11.1] the delay of the occupation and/or trading date;

[11.2] the lockdown which started on the 31st of March 2020;

[11.3] the trading, as contemplated in the agreement could partially only resume in October 2020, at which stage there was no customer traffic

as there were not tenants trading in the nearby shops as promised by the plaintiff;

[11.4] the plaintiff brought another fish & chips shop into the mall;

[11.5] the plaintiff closed the mall at 18:00 every day, even though the agreement stated that the trading hours were until 21:00 on a weekday and until 22:00 on weekends.

[12] The defendants also pleaded that they were not furnished with regular invoices or properly reconciled monthly statements.

[13] Insofar as the second defendant is concerned, it was pleaded that the plaintiff failed to do an assessment of the second defendant's ability to stand surety for the first defendant's indebtedness as required by the National Credit Act, 34 of 2005 (*"the NCA"*).

[14] As a consequence, the defendants' case is that the plaintiff made the trading of the first defendant impossible through uncontrollable events and that it is the plaintiff who cancelled the agreement on the 22nd of November 2021 and that it therefore cannot claim specific performance in terms of the lease agreement.

[15] In their proposed amendment, the defendants raised the following defences:

[14.1] the suretyship is invalid due to non-compliance with the provisions of the Matrimonial Property Act, 88 of 1984;

[14.2] the arbitration clause should prevail and hence summons was instituted prematurely;

[14.3] the plaintiff contravened the provisions of the Consumer Protection Act, 68 of 2008.

THE LAW

[16] The object of rule 32 is to prevent a plaintiff's claim, based upon certain causes of action, from being delayed by what amounts to an abuse of the process of

the court. The procedure is not intended to shut out a defendant who can show that there is a triable issue applicable to the claim as a whole from laying his defence before the court.¹

[17] Despite the procedural changes effected to the provisions of Rule 32, the principles enunciated in *Breitenbach*² still equally apply.³

[18] A *bona fide* defence is one that (1) good in law and (2) pleaded with sufficient particularity.⁴

AN ANALYSIS OF THE EVIDENCE

White box specifications

[19] In terms of the building specifications attached to the particulars of claim, more particularly clauses 16.1 and 3.3, it is recorded that the plaintiff was obliged only to provide a white box shell and that it was incumbent upon the first defendant to install its own ceiling according to its own design, as was the case with all fast food and restaurant tenants. This provision is found in clause 3.3.17 of the design criteria.

[20] The electricity which the first defendant required was above the basic requirements in relation to a DB box which the plaintiff was obliged to provide. All requirements which exceeded the basic requirements were accordingly for the first defendant's account. The electrical distribution board provided for 6 kiloampere (see clause 3.3.6) whilst the defendants requested an upgrade.

[21] Lastly, it is apposite that the plaintiff did not guarantee that the premises were fit for the purpose for which they were let (clause 28.2.1). I am therefore not

¹ *Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 (SCA) at 232F

² *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228D-E

³ See also *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC).

⁴ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426C-D).

persuaded by the defendants' argument that the plaintiff did not comply with its obligations in terms of the lease.

[22] In terms of clause 27 of the lease agreement the first defendant was obliged in terms of the provisions of the lease to advise the plaintiff of any defects in the premises within 14 days, failing which the first defendant would have no claim whatsoever against the plaintiff for such defects. There are no allegations contained in the plea, the counterclaim or the affidavit resisting summary judgment that the first defendant in fact advised the plaintiff of any such defects.

[23] The opening and closing times of the mall are related to the rules of the mall, which were subject to amendment, and were amended having regard to the Covid-19 pandemic at the time and the regulations issued thereunder. The first defendant was however entitled to continue to trade after 18:00, subject to the Covid regulations. This is what the plaintiff stated at paragraph 6.10 of the affidavit in support of summary judgment.

Termination of electricity

[24] As far as the termination of electricity supply is concerned, it is not correct that the plaintiff cancelled the lease by virtue of the termination of the electricity on 19 April 2021. The plaintiff clearly recorded in correspondence to the defendants that in the event of failure to make payment for electricity usage, electricity would no longer be supplied. Moreover, a landlord is not obliged to provide electricity in circumstances where the defendants are not making payment.⁵

[25] It is apposite that the lease agreement between the parties provided for the payment to be made monthly in advance and as such, the plaintiff's obligation to provide electricity is reciprocal on the defendants' obligation to make payment first.⁶

⁵ *Scholtz v Thompson* 1996 (2) SA 409 (C); *RM van de Ghinste & Co (Pty) Ltd v Van de Ghinste* 1980 (1) 250 (C).

⁶ *Tudor Hotel Brasserie and Bar (Pty) Ltd v Hencetrade 15 (Pty) Ltd* [2017] JOL 38843 (SCA); *Baynes Fashion (Pty) Ltd t/a Gerani v Hyprop Investments (Pty) Ltd* 2005 JDR 1382 (SCA).

Misrepresentation

[26] It is apposite that clause 29.1 of the lease provides that the lease constitutes the entire agreement between the parties and no warranties or representations, whether express or implied, not recorded in the lease shall be binding on the parties.

[27] The first defendant instituted a counterclaim for damages in the amount of R2 550 928.57 suffered by the first defendant as a result of *inter alia* a misrepresentation by the plaintiff that the construction work to be completed at the shopping centre would be fully let by the time the first defendant took occupation. Such representation, the defendants allege, was false and material and influenced the defendants to contract with the plaintiff. Hence, so the defendants argue, the misrepresentation was intended to induce the defendants to enter into the agreement and were it not for such misrepresentation, the defendants would not have concluded the lease agreement. As a result, the defendants essentially claim restitution for the payments that were made during August 2019 and March 2020, spoiled perishable stock costs, gas and light installations.

Delayed occupation and the Consumer Protection Act

[28] I now turn to the issue of late occupation. Clause 4.2 of the lease agreement specifically provides as follows: -

“4.2 Should the LANDLORD be unable to give the TENANT occupation of the Leased Premises so as to comply with the anticipated commencement date stipulated in the schedule due to an uncontrollable event, the TENANT shall:

4.2.1 have no claim whatsoever against the LANDLORD for damages to whatsoever nature;

4.2.2 have no right to cancel the Lease; and

4.2.3 accept occupation on such later date on which the Leased Premises become available.”

[29] Clause 4.3 is similarly relevant: -

“4.3 In the event of a delay as envisaged in Clause 30, the Commencement Date shall be the date on which the Leased Premises shall become available for trading; provided that if the Leased Premises are not ready for occupation within 6 (six) months of the anticipated Commencement Date stipulated in Clause 1.5 then either Party shall be entitled to terminate the Lease by giving the other Party at least 1 (one) month’s written notice to that effect, and neither Party shall have any claim against the other arising from such termination.”

[30] Clause 30 provides for uncontrollable events and reads as follows: -

“In the event that the LANDLORD or TENANT shall be delayed, hindered in or prevented from doing or performing any act or thing required hereunder by reason of an Uncontrollable Event, then the LANDLORD or TENANT shall not be responsible for such delays and the doing or performing of such act or thing shall be excused for the period of delay, and the period for the performance of any such act or thing shall be extended for a period equivalent to the period of such delay.”

[31] On the defendants’ version the occupation date was 1 September 2019 and they only obtained occupation on the 1st of March 2020. This is more than six months after the anticipated commencement date and as such, the first defendant would have been entitled to cancel in terms of the quoted clause without any difficulties. Furthermore, the quoted clauses make it abundantly clear that the late occupation due to uncontrollable events does not give rise to any damages claim against the landlord.

[32] Moreover, at paragraph 6.3 of the affidavit filed in support of summary judgment, the plaintiff explained the reasons for the delay and asserted that it was unable to complete its tenant installation until March 2020 and only commenced trading in March 2020, from which date the plaintiff commenced charging rental and the plaintiff did not charge rental for the Covid 19 period.

[33] The defendants attempt to make out a case that the plaintiff was not entitled to cancel the agreement due to a delay in occupation. This defence is founded on the provisions of the Consumer Protection Act. However, similarly this does not assist the defendants. As already pointed out, the provisions of the lease agreement provide for a situation where the leased premises is not complete. This defence therefore has no merit either.

Suretyship and the NCA

[34] The provisions of the National Credit Act, 34 of 2005 do not apply to the lease agreement and similarly would not apply to the suretyship. Accordingly, the defence raised that an assessment needed to be done by the plaintiff holds no water. Even if the plaintiff was obliged to do so, save for a bald allegation to this effect, the defendants have not advanced one iota of evidence which would assist the court in arriving at a conclusion of recklessness on the part of the plaintiff.

Matrimonial Property Act

[35] In its intention to amend its plea and counterclaim, the defendants indicated that the second defendant is not bound by the deed of suretyship, having regard to the provisions of section 15(2)(h) of the Matrimonial Property Act, 88 of 1984. The aforesaid Act provides that the spouse shall not without the written consent of the other spouse bind himself as surety. However, a critical factor omitted by the second defendant is that where a spouse exercises this particular act within the ordinary course of their profession, trade or business, the application of section 15(2)(h) of the Act is excluded.

[36] Furthermore, it was incumbent upon the second defendant to advance reasons why it was contended that the suretyship was not signed in the ordinary course of business. Again the plea and the affidavit resisting summary judgment is absent of any factual allegations in this regard.

The arbitration clause

[37] The defendants contend that the plaintiff has failed to comply with the arbitration clause contained in the written lease agreement. Clause 38 reads as follows: -

“In the event of a dispute arising with regard to the terms and conditions of this agreement, the parties must first refer the dispute for resolution first by way of negotiation and in the event of that failing, by way of arbitration.”

[38] Accordingly the defendants argue that summons was instituted prematurely and that they ought to be granted leave to defend. This defence was introduced for the first time in the intention to amend.

[39] Clause 38.1 cannot be considered in isolation. Clause 38.4 provides that the demanding party may demand compliance with the specified provisions of the agreement and if the receiving party does not respond in writing within seven business days, the receiving party waived its right to arbitration of the issues referred to in the demand and the demanding party would have an option to elect whether to proceed with the arbitration or litigation via the court system. This provision, in my view, puts an end to the special plea of arbitration.

Counterclaim

[40] As already highlighted earlier in this judgment, the defendants have no claim for damages in the event of delayed occupation. The additional requirements of a suspended ceiling, suspended lights, the main breaker, fire-rated drywalls and a bulk head were requirements which exceeded the basic requirements provided for in the agreement.

[41] The defendants aver that they were necessitated to incur a loan and now wish to claim it from the plaintiff. As far as the loan is concerned, it was incurred substantially before the lease was concluded. The claim of R530 000.00 in respect of the plaintiff's failure to provide the defendants with beneficial occupation has

simply not been properly quantified as there is no indication as to how this amount is arrived at, nor is there any indication as to how the interest on the loan is arrived at.

[42] Whilst a counterclaim in an unliquidated amount may be a defence to a plaintiff's application for summary judgment, a defendant has to set out the grounds of the defence with sufficient particularity to satisfy the court that the defence is *bona fide*.⁷

[43] The existing authority allows a counterclaim to be considered in the same way as a plea, for the court to consider whether the counterclaim is frivolous, unsubstantial and intended only to delay.⁸

[44] However, on an analysis of the terms of the lease and the evidence before me, I am not persuaded that the counterclaim in this matter is sufficient to prevent the plaintiff from succeeding with summary judgment.

[45] In the circumstances I find that the defendants have failed to raise a triable *bona fide* defense.

ORDER

I accordingly grant an order in the following terms: -

Summary judgment is granted against the first and second defendants, jointly and severally, the one paying the other to be absolved, for: -

1. Payment of the amount of R816 017.07;
2. Interest thereon at the rate of 9 % per annum compounded monthly from 2 November 2021 to date of payment;
3. Ejectment forthwith of the first defendant and anyone claiming occupation through the first defendant from the commercial leased premises described as Shop G[...] (measuring approximately 88 m²), T[...] R[...] Mall,

⁷ *AE Motors (Pty) Ltd v Levitt* 1972 (3) SA 658 (T).

⁸ *Du Toit v De Beer* 1955 (1) SA 469 (T) at 473; *HI Lockhat (Pty) Ltd v Domingo* 1979 (3) SA 696 (T) at 698; *Muller and Others v Botswana Development Corporation Ltd* 2003 (1) SA 651 (SCA).

corner of W[...] and T[...] Avenue, M[...] W[...], Pretoria, Gauteng;

4. Costs of suit.

F BEZUIDENHOUT
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 7 February 2024

DATE OF JUDGMENT: 18 July 2024

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