

IN THE REPUBLIC OF SOUTH AFRICA



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

CASE NO:033924/2022

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED YES

DATE 23 July 2024

SIGNATURE

In the matter between:

CEZ INVESTMENTS (PTY) LTD

Plaintiff

And

CHICCO HAIR AND COSMETICS (PTY) LTD

t/a MOTOR LAB ELITE

First Defendant

YUSUF BHIGJEE

Second Defendant

J U D G M E N T

WANLESS J

Introduction

[1] This is an application for Summary Judgment by CEZ INVESTMENTS (PTY) LTD (*“the Plaintiff”*) against CHICCO HAIR AND COSMETICS (PTY) LTD (*“the First Defendant”*) and YUSUF BHIGJEE (*“the Second Defendant”*) following the First Defendant's breach of a written lease agreement (*“the agreement”*) for which the Second Defendant bound himself as surety and co-principal debtor. Summary Judgment has been previously granted in favour of the Plaintiff in respect of KUBENTHREN GOVENDER (*“the Third Defendant”*) and MOHAMMED FAZIL INCE (*“the Fourth Defendant”*). The First Defendant and the Second Defendant will be referred to herein as the Defendants unless it is necessary to refer to them in their individual capacities.

[2] It was always the intention of this Court to deliver a written judgment in this matter. In light of, *inter alia*, the onerous workload under which this Court has been placed, this has simply not been possible without incurring further delays in the handing down thereof. In the premises, this judgment is being delivered *ex tempore*. Once transcribed, it will be

“converted”, or more correctly “transformed”, into a written judgment and provided to the parties. In this manner neither the quality of the judgment nor the time in which the judgment is delivered, will be compromised. This Court is indebted to the transcription services of this Division who generally provide transcripts of judgments emanating from this Court within a short period of time following the delivery thereof on an *ex tempore* basis.

The issues

- [3] The Defendants filed a Plea in terms whereof they aver that the First Defendant was not a party to the agreement and that the agreement was entered into between the Plaintiff and a third party, namely MOTOR LAB ELITE (PTY) LTD. It is also pleaded that the suretyships were in respect of this entity (“Motor Lab Elite”).

Discussion

- [4] The defences raised by the Defendants to the Plaintiff's claim for Summary Judgment and as set out in the Defendants' Affidavit Resisting Summary

Judgment (*“the opposing affidavit”*) are as follows:

4.1 the application does not comply with the rules insofar as the deponent does not have personal knowledge; and

4.2 the agreement falls to be rectified (*for the reasons set out above*).

[5] In the premises, this Court, in deciding whether to exercise its discretion in favour of the Plaintiff and grant Summary Judgment against the Defendants, must examine the aforesaid defences, as set out in the opposing affidavit, to determine if the Defendants have a *bona fide* defence to the Plaintiff's claim. In this regard, it is trite that this affidavit must disclose fully the nature and grounds of the defence and the material facts relied upon therefor.¹

The defence that the application for Summary Judgment does not comply with subrule 32(2)(b)

[6] In order to comply with subrule 32(2)(b) the Affidavit in Support of Summary Judgment must contain:

¹ Subrule 32 (3) of the Uniform Rules of Court; *PCL Consulting (PTY) Ltd t/a Phillips Consulting SA v Tresoc Trading 119 (P) Ltd 2009 (4) SA 68 (SCA)*

6.1 a verification of the cause of action and the amount, if any, claimed;

6.2 an identification of any point of law relied upon;

6.3 an identification of the facts upon which the Plaintiff's claim is based; and

6.4 a brief explanation as to why the defences pleaded do not raise any issues for trial.

[7] The Defendants accept that the deponent to this affidavit does indeed verify the Plaintiff's cause of action; the amount claimed and that he also identifies the facts upon which the Plaintiff's claim is based.

[8] However, the Defendants submit that no points of law are identified by the deponent upon which the Plaintiff may seek to rely in that affidavit. Furthermore, it is submitted that the deponent also fails to provide any explanation in the affidavit as to why the defence pleaded by the First and Second Defendants does not raise any issue for trial.

[9] On behalf of the Plaintiff, it was submitted that the deponent to the Affidavit in Support of Summary Judgment indicates that:

9.1 he works for the agent of the Plaintiff;

9.2 he manages the day-to-day affairs of the Plaintiff's property portfolio;

9.3 the claims of the Plaintiff fall under his direct control.

[10] In light of, *inter alia*, the foregoing, Adv Dobie, on behalf of the Plaintiff, further submitted that it was clear from the Affidavit in Support of Summary Judgment that the deponent is intimately involved in the day-to-day management and affairs of the Plaintiff's business which would include:

10.1 negotiation of agreements;

10.2 providing all the documentation for the Plaintiff's directors' signature;

10.3 doing the necessary credit checks on behalf of the Plaintiff;

10.4 managing the properties;

10.5 collecting rentals.

[11] It is correct. as was further submitted by Adv Dobie, that the deponent can rely for his knowledge on documents in the corporation's possession. *Reece and Another v Investec Bank*².

[12] Further to the foregoing, even where an affidavit fails to measure up to the requirement of personal knowledge, defects may nevertheless be cured by a reference to other documents relating to the proceedings which are properly before court. The principle is that in deciding whether or not to grant Summary Judgment the court looks at the matter at the end of the day and all the documents properly before it.³

[13] In the present matter, it is common cause:

² 2014 (4) SA 220 (SCA) at paragraphs [8], [12], [14] and [16]

³ *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (AD) at 423 A-H

13.1 that the documents annexed to the Plaintiff's Particulars of Claim were signed by both the Plaintiff's representatives and the First Defendant's representative (*save to indicate that when so signing the representatives did so on behalf of another entity*);

13.2 that the Second, Third and Fourth Defendants signed the documents annexed to the Plaintiff's Particulars of Claim.

[14] From the foregoing and upon a proper reading of the Affidavit in Support of Summary Judgment, it is clear that the deponent thereto has identified the facts upon which the Plaintiff's claim is based and has provided a brief explanation as to why the defences, as pleaded, do not raise any issues for trial, within the meaning of subrule 32(2)(b).

[15] In the premises, the point taken by the Defendants that the deponent has no "*personal knowledge*" of the facts necessary to comply with the aforesaid subrule, must be dismissed.

Rectification of the agreement as a defence to the Plaintiff's claim for Summary Judgment

[16] When dealing with this defence, as set out in the opposing affidavit, it is imperative to note that at the hearing of this application, Counsel for the Defendants raised the point that the documents annexed to the Plaintiff's Affidavit in support of Summary Judgment (apart from the agreement) were inadmissible. These documents pertained to, *inter alia*, negotiations entered into prior to the agreement and were sought to be admitted as evidence by the Plaintiff to show that during the course of negotiations no reference was ever made to another entity but only to the First Defendant.

[17] In support of this submission the Defendants relied upon subrule 32(4) and the decision in the matter of *Rossouw and Another v First Rand Bank Ltd*⁴ where, *inter alia*, it was held that a Plaintiff in Summary Judgment proceedings cannot annex to the Affidavit in Support of Summary Judgment a document which is not annexed to the Summons. Same is simply inadmissible and must be ignored by the court.

⁴ 2010 (6) 439 (SCA)

[18] This point was conceded by Adv Dobie (*correctly in the opinion of this Court*) on behalf of the Plaintiff. In the premises, these documents are inadmissible and this Court must decide the issue whether the claim for rectification is a *bona fide* defence in the present matter on those documents which *are* admissible only.

[19] In that regard, those documents are the Plaintiff's Particulars of Claim; the Plea; the Affidavit in Support of Summary Judgment and the opposing affidavit. The Claim-in-Reconvention filed on behalf of the Defendants seeks rectification of the agreement as set out in the Plea.

[20] As is to be expected, no reference to rectification is to be found in the Plaintiff's Particulars of Claim. The Plaintiff's cause of action is squarely based on the agreement between the Plaintiff and the First Defendant, together with the Deed of Suretyship signed by the Second Defendant.

[21] Insofar as the Plea is concerned, all averments pertaining to the alleged defence of rectification

relate to the requirements therefor and which the Defendants would have to prove at trial to discharge the onus incumbent upon them. No facts are pleaded in support thereof and the relief sought that the claims of the Plaintiff be dismissed. The same applies in respect of the Defendants' Claim-in-Reconvention. In both cases the Defendants rely solely on the above and certain conclusions of law.

[22] The Defendants' opposing affidavit is nothing more than a repetition of the averments as set out in the Plea. Once again, the Defendants have failed to place any material facts before this Court upon which this Court could, in the exercise of its discretion, dismiss the application for Summary Judgment.

Conclusion

[23] From the foregoing, it is clear that the Defendants have failed to satisfy this Court that they have a *bona fide* defence to the Plaintiff's claim. It must follow that the Plaintiff is entitled to Summary Judgment, with costs.

[24] At the hearing of this application, this Court was

advised that the Plaintiff (*correctly*) did not seek its claim for damages at Summary Judgment stage. In the premises, the claim of the Plaintiff is restricted to arrear rentals; interest thereon; eviction and costs. There was no dispute between the parties as to the relief that should be granted in the event of this Court finding for the Plaintiff.

[25] As to costs, the agreement provides for costs on the scale of attorney and own client. This has also been pleaded in the Particulars of Claim. In the premises, the Plaintiff is entitled to costs on this scale.

Order

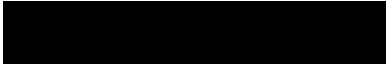
[26] This Court makes the following order:

Summary Judgment is granted against the First Defendant and the Second Defendant, jointly and severally the one paying the other to be absolved, for:

1. Payment of the sum of R153 012.44;
2. interest thereon at the rate of 14.75 percent

per annum, compounded monthly from
2 October 2022 to date of final payment;

3. costs of suit on the scale as between
attorney and own client;
4. the First Defendant and any persons claiming
occupation through the First Defendant is/are
hereby evicted from the premises known as
Unit 11, Fontainebleau Value City, 167
Republic Road, Fontainebleau, Randburg,
Gauteng, forthwith;
5. the order as set out in paragraphs 1, 2 and 3
hereof shall be joint and several with the
judgment already granted in respect of the
Third Defendant and the Fourth Defendant,
one paying the others to be absolved.


— **B. C. WANLESS**
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

Date of hearing: 19 February 2024
Date of *ex tempore* Judgment: 12 July 2024
Date of written Judgment: 23 July 2024

Appearances

For the Plaintiff: Adv. J. G. Dobie
Instructed by: Reaan Swanepoel Incorp.

For the First and Second Respondents: Adv. H. West
Instructed by: AR Mahommed Attorneys Inc.