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

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

15/11/2024

Date

Signature

CASE NUMBER: 23863/2022

In the matter between:

GROWTHPOINT PROPERTIES LIMITED

PLAINTIFF

(Registration Number: 1987/004988/06)

and

MI FINANCIAL SOLUTIONS (PTY) LIMITED

FIRST DEFENDANT

(Registration Number: 2016/510973/07)

NAMAHADI MARTIN KGOALE

SECOND DEFENDANT

(Identity Number: 7[...])

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

[1] This matter concerns an application for summary judgment brought by the Plaintiff against the Defendants for the payment of outstanding rental arrears, which the Plaintiff claims are owed in terms of a settlement agreement. The Defendants, in opposition to the application, assert a defence of misrepresentation, contending that the settlement agreement was concluded under the mistaken belief that they were not entitled to a remission of rental payments due to the impact of the COVID-19 pandemic.

Background

[2] On 4 October 2019, the Plaintiff and the First Defendant (then named Nosa Ma Afrika (Pty) Ltd) entered into an Offer to Lease for a portion of the [...] Floor, Block [...], C[...] P[...], located at 4[...] 1[...] Road, Midrand (“the Premises”). Around November 2019, they finalized the lease agreement for the premises.

[3] The First Defendant fell into arrears on rental payments, thereby breaching the terms of the Lease Agreement. In June 2021, the First and Second Defendants entered into a written settlement agreement with the Plaintiff.

[4] Under the terms of the settlement agreement, the First Defendant acknowledged its breach of the lease agreement, and the Defendants jointly acknowledged their indebtedness to the Plaintiff in the sum of R849,956.79 (“the Capital Amount”). They agreed to repay this amount in 24 equal monthly instalments of R35,414.87, with the first payment due on 1 July 2021.

[5] Between 1 July 2021 and April 2022, the Defendants made various payments to the Plaintiff totalling R244,489.22. However, they materially breached the settlement agreement by failing to make full instalment payments as required under clause 8(a) of the settlement agreement. Subsequently, the remaining balance of the

capital amount, totalling R605,467.57 plus interest, became immediately due and payable. This amount was duly certified by the Plaintiff in line with clause 10 of the settlement agreement.

[6] Following the initiation of action proceedings, the Defendants made additional payments totalling R96,000, leaving an outstanding balance of R509 467.57.

Common Cause

[7] The following facts in this matter are not in dispute:

[1] On 4 October 2019, the Plaintiff and the First Defendant entered into a written offer to lease the premises, Annexure "P".

[2] On 23 October 2019, the Plaintiff and the First Defendant signed a written lease agreement for the premises, Annexure "SJ1".

[3] On 7 July 2021, the Plaintiff, First Defendant, and Second Defendant entered into a written settlement agreement relating to rental in arrears, Annexure "B".

[4] The Defendants partially fulfilled their obligations under the settlement agreement by making cumulative payments to the Plaintiff totalling R244,489.22 from 7 July 2021 to April 2022.

[5] The Defendants did not make any further payments to the Plaintiff as required by the settlement agreement before institution of the action proceedings.

[6] After the initiation of the action proceedings, the Defendants made additional payments to the Plaintiff totalling R96,000.

[7] The remaining balance of the capital amount owed under the settlement agreement stands at R509,467.57.

Issues for Determination

[8] The issues that arise for determination in this matter are the following:

[1] Whether the Defendants have raised a triable defence by claiming that the settlement agreement was rescinded due to an alleged misrepresentation by the Plaintiff, which allegedly induced the Defendants to enter into the agreement. Specifically, this relates to the Plaintiff's assertion that the First Defendant was not entitled to a rental remission under the lease due to *force majeure* or unforeseen circumstances (*vis major* or *casus fortuitus*) caused by COVID-19 restrictions.

[2] Whether the Defendants are allowed to rely on defences raised in their Affidavit Resisting summary judgment that were not included in their Plea.

Submissions by Plaintiff

[9] Counsel for the Plaintiff argued that the defences raised by the Defendants in resisting the summary judgment are without substance.

[10] The Plaintiff asserts that the Defendants have failed to disclose a *bona fide* and/or triable defence because the plea does not raise any defence or substantial matter apart from disingenuous bare denials and therefore the attack on the summary judgment application is misplaced.

[11] The Plaintiff stated that the defence of *force majeure*/supervening impossibility of performance raised by the Defendants is inapplicable in the matter because the lease agreement in the present application does not make provision for *force majeure*.

Submissions by Defendants

[12] Counsel for the Defendants argued that when there is no doubt that the Plaintiff has an unanswerable case, that summary judgment should be granted. The Defendants allege that, during settlement negotiations with the Plaintiff, they were led to believe that they were not entitled to any remission or reduction in rental payments for the period of the Covid 19 pandemic.

[13] The Defendants assert that, had they been correctly informed of their legal entitlement to remission due to the COVID-19 restrictions, they would not have entered into the settlement agreement on the terms that were ultimately agreed upon. The settlement agreement was concluded with the understanding that the full rental arrears would be paid, without consideration for potential remission.

[14] The Defendants argued that the balance of convenience necessitates the dismissal of the summary judgment and that the matter to be referred to trial.

The Law-Summary Judgment

[15] Rule 32 of the Uniform Rules of Court (“the Rules”) governs the procedure for summary judgment, a legal mechanism allowing a plaintiff to obtain swift judgment without a full trial when there is no genuine defence from the Defendant. The aim of Rule 32 is to avoid unnecessary delays and expenses in cases where the Defendant has no legitimate grounds to contest the claim. Summary judgment is typically sought in clear-cut cases involving debts, liquidated claims, and straightforward contractual disputes.

[16] To obtain a summary judgment, the Plaintiff must demonstrate:

[1] That their claim is clear and uncontroversial.

[2] That the Defendant lacks a “*bona fide*” (genuine) defence to the claim.

[17] Upon application, the Defendant can oppose the summary judgment by filing an affidavit that sets out a *bona fide* defence. This defence must contain enough detail to show it has substance; simply denying the claim is insufficient.

[18] A *bona fide* defence to summary judgment often involves presenting substantive, plausible arguments that could affect the outcome of the case if allowed to proceed to trial. One of the potential defences is alleging misrepresentation by the Plaintiff.

[19] A Defendant can claim that they were induced to enter into a contract or agreement (such as a lease or settlement agreement) due to the Plaintiff's misrepresentation. Misrepresentation, in this context, refers to a false statement or omission by the Plaintiff, which led the Defendant to enter into the agreement under incorrect assumptions.

[20] For a Defendant to raise misrepresentation as a *bona fide* defence, they must provide detailed allegations showing how the Plaintiff's misrepresentation led them into the agreement. They must demonstrate that:

[1] A specific misrepresentation was made by the Plaintiff,

[2] The misrepresentation was material to the Defendant's decision to contract, and

[3] They would not have entered into the agreement had they known the truth.

[21] The Court assesses whether the defence is genuine and plausible—not whether it will ultimately succeed at trial. A summary judgment is denied if the defence appears *bona fide* and could, in principle, succeed.

[22] COVID-19 significantly impacted the ability of tenants, particularly businesses, to meet rental obligations due to lockdowns, economic slowdown, and trading restrictions. During the pandemic, many tenants sought rental remission, arguing that they were unable to use the leased premises or generate income due to government-imposed restrictions.

[23] South African contract law includes the doctrine of *supervening impossibility*, which may apply if a tenant was prevented from utilizing the leased premises due to circumstances beyond their control, such as a government lockdown. This principle can justify partial or full rental remission in cases where the tenant's intended use of the premises was temporarily impossible.

Evaluation

[24] Having carefully considered the Defendants' defence of misrepresentation, I find that they have raised a genuine issue for determination. The Defendants have provided sufficient evidence to suggest that the Plaintiff may have misled them regarding their entitlement to rental remission due to the pandemic.

[25] The Plaintiff's assertion that the Defendants were fully aware of their obligations under the settlement agreement does not adequately address the possibility that the Defendants were induced to accept the agreement based on an incorrect understanding of their rights. In particular, the Defendants' claim that they were informed they were not entitled to remission, when in fact they may have been entitled to such a remission, raises a material issue of fact that requires a full examination at trial.

[26] In *Aludar 233 CC v Unlocked Properties 28 (Pty) Ltd*,¹ Wilson J recognized that there might be legitimate public policy concerns regarding enforcing a lease when the fundamental purpose like operating a nightclub, became legally impossible due to COVID-19 restrictions. The judgment suggests that holding a tenant liable in such circumstances could be against public policy, as it would enforce an obligation that both parties were legally barred from fulfilling. The Court emphasized that

¹ *Aludar 233 CC v Unlocked Properties 28 (Pty) Ltd* (A3148/2021) [2023] ZAGPJHC 1297 (14 November 2023) at para [11]:

"Even if I am wrong in this respect, I think that there are colourable public policy claims to be raised at trial by Aludar. In my view, evidence has to be led to explore whether, on the facts of this case, it can be consistent with public policy to allow a party to enforce the terms of a lease during a period in which everyone accepts that the underlying purpose of the contract has been rendered wholly unlawful."

factual evidence should be presented at trial to determine if enforcing the lease would be fair and consistent with public policy.

[27] A defence of misrepresentation, particularly where COVID-19 rental remission is concerned, can be a strong argument against summary judgment if the defendants demonstrate they were misled into waiving their potential remission rights. Courts remain cautious, ensuring that parties were accurately informed and fairly represented before entering a binding settlement agreement. This defence, if credible, serves as a significant check on summary judgment and protects defendants' rights to fair treatment and due consideration of extraordinary circumstances like the COVID-19 pandemic.

[28] At this stage, the Defendant is not required to convince the Court of the correctness of their stated facts or, in cases where facts are disputed, to establish a balance of probabilities in their favour. Likewise, the Court's role at this stage is not to weigh or resolve disputed factual issues or to determine the likelihood of success for either party.

[29] It is essential for Courts to refrain from deciding complex contractual matters during a summary judgment application. The Court's function in such applications is not to interpret intricate or disputed contractual terms but rather to determine if the Defendant has raised a genuine issue warranting further examination. If a credible issue is raised, the application is dismissed, allowing the matter to proceed to full adjudication at trial.

[30] In *Breitenbach v Fiat SA (Pty) Ltd*², the Court stressed that the Defendant need not fully prove their case at this stage but must show a bona fide defence, justifying a trial. Additionally, in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*³, the Supreme Court of Appeal held that summary judgment should not preclude a Defendant who presents a credible defence. Courts are thus advised to exercise caution, ensuring that summary judgment does not deny any party a fair opportunity to present a substantive defence.

² *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226(T) at 227G-228B.

³ *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA).

[31] In light of the foregoing, I am of the view that the defence of misrepresentation raised by the Defendants is credible/*bona fide*. The Defendants have sufficiently demonstrated that the issue of their entitlement to remission is central to the dispute and warrants further investigation. It would not be appropriate to grant summary judgment in this matter, as the Defendants have raised a *bona fide* defence that requires a full trial.

[32] Therefore, the application for summary judgment is dismissed, and the matter is allowed to proceed to trial, where the Defendants will have the opportunity to fully argue their defence of misrepresentation and their right to rental remission due to the COVID-19 pandemic.

Costs

[33] The last aspect to be addressed is the issue of costs. Awarding of costs is at the discretion of the Court which must be exercised judicially. The awarding of costs in summary judgment applications follows the general principle that the successful party should be compensated for their legal expenses. However, the Court retains discretion to vary this depending on factors such as the conduct of the parties, the nature of the defence raised, and whether the application was justified.

[34] In summary judgment applications, the Court may order those costs be “in the cause.” This cost order defers the decision on who will bear the costs of the summary judgment application until the final outcome of the full trial. Essentially, it means that the costs associated with the summary judgment application will be awarded to the party who ultimately succeeds in the main action, regardless of who initially prevailed in the summary judgment stage.

[35] I am of the view, that ordering costs in the cause is a way for the Court to avoid penalizing either party prematurely. For example, if a Defendant raises a seemingly credible but ultimately unsuccessful defence, it may seem unjust to award costs against them at the summary judgment stage. By deferring the cost decision,

the Court can ensure that only the party who wins at trial is ultimately responsible for costs.

[36] In summary judgment applications, ordering costs to be “in the cause” allows the Court to reserve its decision on costs until the trial is concluded. This approach is common when the Defendant’s defence merits further examination. Ultimately, it ensures that the party who prevails at trial bears no unfair cost burden from the summary judgment stage, aligning with the principle that costs generally follow the result.

Order

[37] In the circumstances the following order is made:

1. The application for summary judgement is dismissed.
2. The matter is referred to trial.
3. Costs in the cause.

**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

This judgment was handed down electronically by circulation to the parties’ representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 15 November 2024.

DATE OF HEARING: 7 November 2024
DATE JUDGMENT DELIVERED: 15 November 2024

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