IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

Not Reportable
CASE NO: 3431/2016

In the matter between:

CLEMEN INVESTMENTS NO. (PTY) LTD	**PLAINTIFF**
and	
SITHEMBISO SHARON NDZIMELA	**FIRST DEFENDANT**
HENTIE DE CONING	**SECOND DEFENDANT**

JUDGMENT

Noncembu J

[1] This is an action arising out of a lease agreement that was entered into between the plaintiff and the principal debtor, GHKS Investments (Pty) limited, a company duly registered according to the company laws of the Republic of South Africa (the company) on 19 May 2014.

[2] On the aforementioned date and in East London, the first and second defendants bound themselves in writing as sureties and co-principal debtors with the

company, in respect of all the company's obligations towards the plaintiff. The action has been withdrawn against the second defendant.

[3] The lease agreement was subject to, *inter alia,* the following conditions which are common cause:

(a) The lease was for a period of two months commencing 1 July 2014 to 31 August 2014, thereafter for a period of five years commencing 1 September 2014 terminating on 31 August 2019.

(b) The company undertook to pay rent in the amount of R38,000 rands per month plus Vat from 1 July 2014 to 31 August 2014, and then the amount of R75, 726.00 per month plus Vat from 1 September 2014 to 31 August 2015, thereafter the rental would escalate at 8% per annum, compounded on the annual anniversary date of the commencement of the lease agreement until the expiry of the lease agreement.

(c) In the event that:

(i) the rental or any other amount payable by the tenant to the landlord in terms of the lease agreement is not paid on the due date[1], or

(ii) the tenant commits or suffers to permit the commission of any breach of any of the other terms of the lease agreement, whether or not such breach goes to the root of the contract, and fails to pay such amount or remedy such breach within seven (7) days after being called upon by written notice to do so[2],

then in the event any one or more of the aforesaid breaches having occurred, the landlord shall be entitled but not obliged, notwithstanding any previous waiver or anything to the contrary contained in the lease agreement, to

[1] Clause 21.1.1 annexure "B" to plaintiff's further amended particulars of claim.
[2] Clause 21.1.2 annexure "B" to plaintiff's further amended particulars of claim.

forthwith cancel the lease and resume possession of the premisses and upon doing so, remove from the premisses any goods situated therein.

[4] In support of its claim, the plaintiff led the evidence of two witnesses in terms of which it alleged that the company was indebted to it in respect of arrear rental and other expenses. As a result of the alleged indebtedness, the plaintiff alleges that it elected to cancel the lease forthwith as provided for in terms of the lease agreement. At the close of the plaintiff's case, the first defendant applied for absolution from the instance, with costs.

[5] Two grounds were listed as a basis for the said application. The first one was that the plaintiff's claim failed to show a cause of action. This was premised on the submission that there was nothing in the pleadings to say that the company was liable to the plaintiff so as to invoke the first defendant's obligations as surety and a co-principal debtor, as there is no judgment against the company.

[6] In this regard the first defendant contended that his liability is based on a judgment of the magistrate's court, which is non-existent. This arises from the common cause evidence that the action pertaining to the current claim was initially instituted at the magistrate's court against both defendants as well as the company, and a default judgment was obtained against all three. The said judgment, however, was later rescinded against all three. The action in the magistrate's court was withdrawn against first and second defendants.

[7] Although the plaintiff in its further amended particulars of claim erroneously refers to the said judgment as having been rescinded against only the two defendants; it has since become common cause that the judgment was rescinded against all three. This is evident in that, whilst in argument counsel for the first defendant sought to take issue with the fact that the plaintiff's pleadings refer to a judgment and a judgment debt, in his amended plea the first defendant not only clarifies that the judgment was rescinded against the company as well, but also raises a special plea of *lis pendens*.

[8] Such a plea could not be raised if the first defendant believed that the case he is called to answer already has a judgment in place. Surely there cannot be a pending case and a judgment based on the same claim at the same time. The first defendant therefore cannot probate and approbate.

[9] What is clear however, from both the first defendant' s pleadings and the submissions made in terms of the application for absolution, is that the upshot of his contention on the first ground, is that in the absence of a judgment against the company, there can be no liability invoked against the first defendant, as his liability is premised on that of the company.

[10] The second ground for the application is that the plaintiff has failed to comply with the breach notice as provided for in terms of its contract. This is premised on the terms of clause 21.1.2 of the agreement, which require that in the event of a breach of the terms of the contract, the tenant be given seven days' notice within which to remedy such breach. The contention is that the company was not given the requisite notice in terms of the aforementioned provisions.

[11] As already mentioned above, with regards to the first ground the first defendant has noted a special plea of *lis pendens* against the plaintiff's action, stating that because the magistrate's court action was never withdrawn against the company, it is still pending and as such no claim can stand against the first defendant based on the same cause of action.

[12] This plea is ill-founded and the argument premised thereupon is misguided. The plaintiff's case, which is not disputed, is that the company has been de-registered. As such it has no legal personality, and therefore no action can be taken against it.

[13] The plaintiff contends that it relies on clause 2 of the Deed of Suretyship in terms of which the first defendant renounced the benefits of legal exceptions of excussion and division with the full meaning and effect of which he was fully acquainted. It follows thus, that although it can be accepted that given the deregistration of the company, the plaintiff had exhausted all the remedies it could

against it (the company), it was not necessary for it to establish such exhaustion given the aforementioned renunciation as the first defendant signed as a co-principal debtor.

[14] Therefore, the plaintiff did not need to obtain a judgment or exhaust its remedies against the company before it could institute action against the defendants. The case for the plaintiff is that it relies on the indebtedness of the company to institute a claim against the first defendant, which it can given the renunciation of legal exceptions as mentioned above. As to whether or not the indebtedness of the company has been established, is not a matter for determination at this stage of the proceedings.

[15] With regards to the second ground, the first defendant referred this court to various authorities pertaining to strict compliance with the terms of a breach clause in a contract for a cancellation to follow.[3] The essence of these authorities is that strict compliance with the peremptory provisions of a breach clause, where a contract provides certain procedures before cancellation of a contract can take place, must be adhered to. The contention by the first defendant therefore, is that the plaintiff failed to comply with the breach clause contained in clause 21of the lease agreement, in that it did not give the first defendant notice of the breach as well as the 7days within which to remedy such breach as provided for in terms of the lease. On this ground alone therefore, he contends that he should be granted absolution from the instance.

[16] The plaintiff on the other hand, argued that it relied on clause 21.1.1 of the lease agreement, and as such notice was not required in terms of the said provision as it was only required to communicate its election and intention to cancel, which it did with the service of the summons on the company on 3 September 2014. The plaintiff's argument is that clause 21.1.1 is not co-joined to clause 21.1.2, where 7 days is required to remedy a breach.

[3] See *Datacentrix (Pty) Ltd v O-Line (Pty) Ltd* (891/2021) [2022] ZASCA, 162 (25 November 2022); *Hano Trading CC v J R 209 Investments (Pty) Ltd and Another* 2013 (1) SA 161 (SCA) at paras [31] to [34]

[17] In my view, the issue in this regard is that of interpretation.

[18] It is therefore necessary to regurgitate clause 21.1 in its entirety in order to be able to analyse it in its proper context. It reads as follows:

> '21. Breach
>
> 21.1.1 Should the rental or any other amount payable by the Tenant to the Landlord in terms of this lease agreement not be paid on due date**, or (emphasis intended)**
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> 21.1.2 Should the Tenant commit or suffer to permit the commission of any breach of any of the other terms of the Lease, whether or not such breach goes to the root of this Contract, and fails to pay such amount or remedy such breach within SEVEN (7) DAYS after being called upon by written notice to do so**, or (emphasis intended)**
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> 2.1.1.3 Should the Tenant be placed in liquidation, whether provisional or final and whether voluntarily or compulsory**, or (emphasis intended)**
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> 2.1.1.4 Should the Tenant be placed under Judicial Management whether provisional or final**, or (emphasis intended)**
>
> 2.1.1.5 Should the Tenant effect or attempt to effect a general compromise with its creditors or any arrangement with its creditors**, or (emphasis intended)**
>
> 2.1.1.6 Should a Default Judgment be entered into against it or against the guarantor and fail within SEVEN (7) DAYS after such Judgment to satisfy or take steps to rescind same**, or (emphasis intended)**
>
> 2.1.1.7 Should the Tenant consistently breach is the Lease so as to show an unwillingness or inability to perform the obligations in terms of the Lease, then and in such event,

The Landlord shall be entitled but not obliged **in the event of anyone or more of the aforesaid breaches having occurred**, **notwithstanding any previous waiver or anything to the contrary herein contained, forthwith to cancel the Lease** and to resume possession of the premises and upon doing so to remove from the premises any goods situated therein.' (emphasis intended)

[19] The principles enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[4] with regards to interpretation have become trite. 'A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike result or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.'

[21] A closer look at clause 21.1 as a whole evinces that the sub-clauses contained therein are disjointed, and that each of the sub-clauses individually, or together with others, can result or entitle the landlord to a cancellation of the contract. If ever there was any confusion in this regard, the last sub-paragraph dispels any such confusion as it makes it very clear that **any one or more** of the aforementioned breaches could entitle the landlord to forthwith cancel the lease.

[22] This clearly demonstrates that each sub-clause pertains to a separate breach, and where a particular breach requires a particular notice, this is spelt out clear in the particular sub-clause (see for example sub-clauses 21.1.2- where a tenant is given 7 days within which to remedy a breach; and 21.1.7 -where a tenant is afforded 7 days within which to satisfy a judgment debt or take steps to rescind same).

[23] It is the plaintiff's contention that it placed reliance on clause 21.1.1 to forthwith cancel its lease agreement with the company (the tenant), and as such it was not necessary for it to give the company 7days as that is not a requirement in terms of the sub-clause in question. It accordingly served a notice of the cancellation

[4] 2012 (4) SA 593 (SCA) para 18.

when it served the company with summons on 3 September 2014. I accept this interpretation as being sensible and more business-like with regards to the contract in question.

[24] The test for absolution at the end of the plaintiff's case was formulated as follows in *Claude Neon Lights (SA) Ltd v Daniel*[5]*:*

> 'When absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.'

[25] In *Gordon Lloyd Page & Associates v Rivera and Another*[6] the Supreme Court of Appeal explained the application of the test as follows:

> 'This implies that a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff… As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one… The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff'… a test had its origin in jury trials when the reasonable man was a reasonable member of the jury… Having said this, absolution at the end of the plaintiff's case, in the ordinary course of events, will nevertheless be granted *sparingly*[7] but when the occasion arises, a court should order it in the interest of justice.'

[26] Given that, as demonstrated above, the grounds raised for the application for absolution relied upon by the first defendant cannot be sustained, I am of the view

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[5] *Gordon Lloyd Page & Associates v Rivera and Another* 1976 (4) SA 403 (A) at 409 G-H
[6] 2001 (1) SA 88 (SCA) para 2; *Osman Tyres and Spares CC and Another v ADT Security (Pty) Ltd* [2020] 3 All SA 73 (SCA)
[7] My emphasis.

that the plaintiff has made out a *prima facie* case in the sense that there is evidence relating to all the elements of the claim. Under those circumstances therefore, the application for absolution cannot succeed.

Order

[27] Consequently, the following order shall issue:

The application for absolution from the instance is dismissed with costs, as contemplated on scale B of the Uniform Rules of Court, as amended.

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JUDGE OF THE HIGH COURT

APPEARANCES

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Date of hearing: 17 April 2024 and 26 June 2014

Date judgment delivered: 18 December 2024