

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG



Case number: 2024-17136

Date of hearing: 26 February 2025

Date delivered: 18 March 2025

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO	
(2) OF INTEREST TO OTHERS JUDGES: YES /NO	
(3) REVISED	
18/3/25	[Redacted Signature]
DATE	SIGNATURE

In the application of:

LIZINEX (PTY) LTD

Plaintiff

and

FPC SOLUTIONS (PTY) LTD

First Defendant

FRANCOIS PACHANIK

Second Defendant

PHILLIPUS LODEWYK LE ROUX

Third Defendant

JUDGMENT

SWANEPOEL J:

[1] The plaintiff seeks summary judgment against the first defendant based on an alleged lease agreement in respect of a business premises situated in the Fin Forum Center. As against the second and third defendants, the plaintiff seeks summary judgments based on suretyships that allegedly guaranteed the first defendant's performance under the lease agreement.

[2] On 5 October 2021 the second defendant, representing the first defendant, signed a written offer to enter into a lease agreement with the plaintiff. The offer was accepted on behalf of the plaintiff on 11 October 2021. The material terms of the offer were the following:

[2.1] The commencement date was 15 October 2021;

[2.2] The agreement constituted a firm and irrevocable offer which remained open for acceptance within a reasonable period of time. Once accepted, a 'firm and binding' contract of lease came into existence;

[2.3] A more comprehensive standard lease agreement, that would be consistent with the terms of the offer, would be entered into;

[2.4] The parties undertook to sign the standard lease agreement within 3 months of the date of the offer;

[2.5] Should the standard lease agreement not be concluded within three months, or should the first defendant refuse to sign the standard lease agreement within 7 days of notice to do so, the plaintiff would be entitled to cancel the offer.

[3] The plaintiff pleaded, furthermore, that on 11 November 2021 at Pretoria, and on 7 February 2022 at Rosebank, the parties entered into the standard lease agreement. The plaintiff pleaded that the standard lease agreement remains binding on the parties. In its particulars of claim the plaintiff relied largely upon the standard lease as the basis for its claim.

[4] The plaintiff alleges that during January 2022 the first defendant vacated the premises, and that it breached the terms of the agreement by failing to pay the applicable monthly rental and charges. The plaintiff says that it elected to cancel the agreement as a result of the alleged breach. The plaintiff claims arrear rentals and charges, and, in claim 2, damages in the amount of R 339 196.04. Only claim 1 is before me for adjudication.

[5] In its plea the defendant raised various defences. The first *in limine* point, that the Court does not have jurisdiction in that the cause of action arose in Pretoria and the parties reside, and the first defendant does business there. That defence has no merit, and was abandoned by the defendants' counsel. The second point *in limine* point was that of non-joinder. The defendants alleged that the agent who negotiated the deal

should have been joined to the action. This point is equally meritless, and was also abandoned by the defendants' counsel.

[6] The third point *in limine* is that the standard lease agreement contains an arbitration clause. The defendants pleaded that if it is held that the standard lease agreement is of force and effect, that the plaintiff was obliged to give effect to the arbitration clause. For the reasons set out hereunder, I make no finding on this aspect.

[7] The fourth point *in limine* relates to the fact that the plaintiff alleged that the standard lease agreement had been entered into on two different days and at two different places. This point was also not persisted with.

[8] On the merits of the matter the defendants plead that the first defendant never entered into a formal lease agreement. They say that they never received a copy of the signed lease, and that they were brought under the impression that the offer was not a formal agreement. They pleaded that the offer could not be enforced against them because they never reached consensus with the plaintiff in respect of the terms and conditions of the agreement. I am skeptical of this argument, but due to my findings below, I also make no finding in this regard.

[9] The defendants plead that the premises were in such a state of disrepair that they were forced to vacate the premises on 25 January 2022. In a letter dated 26 January 2022 the defendants' attorney recorded that the first defendant had vacated the premises, and, furthermore, that at that stage no formal agreement had been entered into.

[10] The application for summary judgment was supported by an affidavit by one Byron Wilson, who was a manager of the plaintiff's managing agents. He was not involved in the negotiations that led up to the signing of the offer, nor was he party to the various discussions between the first defendant and Abacus, the agent who negotiated the lease.

[11] In the said affidavit Mr. Wilson alleged that the claim arose from the offer, and also from the standard rental agreement. He made the allegation that the plaintiff had complied with its contractual obligations, having given the first defendant occupation of the premises.

[12] Upon receiving the application for summary judgment the defendants' counsel received instructions that the plaintiff had ceded its right title and interest in and to the rentals and all amounts payable under the lease to Standard Bank Ltd. The defendants then raised the defence, and amended their plea to plead, that the plaintiff did not have locus standi to institute the claim. The plea was also amended to deny that the defendants had *commodus usus* of the premises.

[13] The plaintiff has admitted that when the summons was issued the claim vested in Standard Bank. However, in a supplementary affidavit the plaintiff says that the rights had been receded to the plaintiff in writing on 24 January 2024, which seems to be common cause.

[14] As a general rule a cause of action should exist at the date upon which the summons is issued. However, there has been movement away

from an absolute application of the rule. In *Marigold Ice Cream Co (Pty) Ltd v National Co-operative Diaries Ltd*¹ and *Bankorp Ltd v Anderson-Morshead*² the courts took a more indulgent approach to the issue. Eventually, in *Aussenkehr Farms (Pty) Ltd v Trio Transport CC*³, the Court, in a case that is on all fours with this case, held that where there is a cancellation of the cession (or as in this case, a recession), the fact that *locus standi* did not exist at the time of issuing of a summons is not dispositive of the matter. That approach was followed in *Zeta Property Holdings (Pty) Ltd v Lefatshe Technologies (Pty) Ltd*⁴.

[15] I therefore find that, given the fact that the rights to receive rentals were receded, the plaintiff was cloaked with *locus standi* upon recession, and this defence must fail.

[16] The defendants dispute that the plaintiff provided *commodus usus*. They deny that the deponent to the affidavit in support of summary judgment has personal knowledge of the circumstances under which they took occupation of the premises, and of the discussions and correspondence thereafter relating to the condition of the building.

[17] The offer specifically listed the plaintiff's obligations in respect of the property. The plaintiff had to clean and paint the unit, repair the laminated flooring, clean the carpets and fix all fixtures, electrical and plumbing. It must be borne in mind that when the defendants elected to vacate the premises, the standard lease agreement had not yet been concluded, and only the offer was of force and effect. Three months had

elapsed since the offer was entered into, and, on the papers as they stand, the plaintiff had not yet complied with its obligations arising from clause 9 of the offer.

[18] The laminated floors were in an unfit state, and there were constant water leaks. In addition, the building suffered from constant electrical interruptions. These interruptions rendered the premises unfit for use as administrative offices, the defendants say, and caused such an embarrassment that the first defendant was forced to host its clients elsewhere.

[19] The plaintiff argued that the letter dated 1 December 2021, in which the defendants demanded that the premises be repaired, did not refer to all the complaints now raised, and that the complaints should, therefore, be discounted. I do not think that that approach is correct. The question is whether, if the defendants establish at trial that the averments made in their affidavit are correct, they may be successful in establishing that the plaintiff had breached the agreement by failing to effect the agreed repairs. The defendants also say that they complained to the agent about the state of the premises on various occasions.

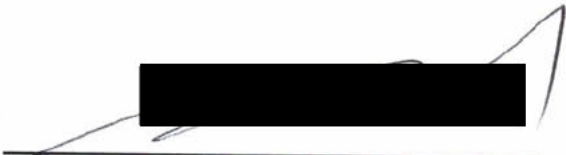
[20] In answer to the above, the plaintiff has simply made the bald allegation that it has complied with its obligations under the agreement. It has not dealt substantively with the allegation that it did not effect the repairs required by clause 9 of the offer, nor that it did not provide *commodus usus* of the premises.

[21] In these circumstances, there is a triable issue that should be determined at trial, namely, whether the defendants had *commodus usus* of the premises, and whether the plaintiff complied with its contractual obligations. Given my view on this issue, I will not deal with the other issues that have been raised by the defendants, most notably, that of the fact that the standard lease agreement contained an arbitration clause. That is a matter for the trial court.

[22] I make the following order:

[22.1] The defendants are granted leave to defend.

[22.2] Costs will be costs in the cause.



SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

Counsel for the plaintiff:	Adv. G Dobie
Instructed by:	Rooseboom Attorneys
Counsel for the defendants:	Adv. C van der Merwe
Instructed by:	AJ Scholtz Attorneys
Date heard:	26 February 2025
Date of judgment:	18 March 2025

¹ Marigold Ice Cream Co (Pty) Ltd v National Cooperative Dairies Ltd 1997 (1) SA 671 (W)

² Bankorp Ltd v Anderson-Morshead 1997 (1) SA 251 (W)

³ Aussenkehr Farms (Pty) Ltd v Trio Transport CC 2002 (4) SA 483 (SCA)

⁴ Zeta Property Holdings (Pty) Ltd v Lefatshe Technologies (Pty) Ltd 2013 (6) SA 630 (GSJ)