



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

Of interest

CASE NO. 4233/2024

In the matter between:

TRANSARC INVESTMENTS (PTY) LTD

Applicant

and

DKM HEALTHCARE (PTY) LTD

Respondent

JUDGMENT

LAING J

[1] This is an application for summary judgment. It concerns a lease agreement concluded by the parties on 13 March 2023 at Mthatha in relation to erf 435 ('the premises').

Plaintiff's case

[2] In its particulars of claim, the plaintiff pleads that the agreement would endure for ten years. A monthly rental of R237,103 applied, subject to 7% annual escalation. If the defendant failed to pay any amount due and remained in default for three or more days after receiving notice, then the plaintiff was entitled to eject the defendant or to lodge any other claim as a result thereof.

[3] The plaintiff went on to plead that the defendant failed to make payment as agreed. It made sporadic payments and was always in arrears, despite numerous notices. Consequently, the plaintiff sought payment of the arrears in the amount of R968,449, as well as cancellation of the agreement and the eviction of the defendant from the premises.

[4] After receipt of the defendant's plea, the plaintiff launched the present application. It said that it was entitled to the relief sought because of the defendant's breach, which was not remedied by sporadic payments. The plea, so it contended, did not raise any issue for trial.

Defendant's case

[5] In its plea, the defendant admitted the terms of the agreement and its previous non-payment of rent but explained that it had subsequently paid the arrears. Furthermore, it had made improvements to the premises to ensure that it could operate a medical services facility. The defendant pleaded that it would not be in the interests of justice to cancel the agreement.

[6] The present application prompted the defendant to give notice of its intention to amend its plea. It also filed its opposing affidavit. To that effect, it argued that previous instances of non-payment had resulted in the plaintiff's election merely to issue notice and insist on payment. The plaintiff had waived its right to cancel the agreement and to eject the defendant. Furthermore, the parties had agreed that the premises would be used as a medical services facility. The plaintiff had, however, knowingly or wrongfully and

negligently, leased the premises to the defendant when the land was not zoned for the use agreed upon. This constituted a breach of contract, alternatively an act of delict, which resulted in the defendant's having been unable to operate a medical services facility. Consequently, it incurred a loss of R8,050,598 for the period of March to September 2024. The defendant alleged that the plaintiff was not entitled to rental because the envisaged use of the premises contravened section 26 of the Spatial Planning and Land Use Management Act 16 of 2013 ('SPLUMA'). In any event, no amount was owed to the plaintiff as the defendant was up to date with payments; any amount found to be owed had to be set off against the loss incurred by the defendant.

[7] The amended plea reflects the defences raised by the defendant in its opposing affidavit. It seeks dismissal of the plaintiff's claim, judgment in the amount of R8,050,598, and a declaratory order to the effect that no rent was payable for the period during which the premises were not zoned for the use agreed upon.

Issues to be decided

[8] As will be discussed in the paragraphs that follow, the primary issue for the court's determination is straightforward. It must decide whether the defendant has a *bona fide* defence to the plaintiff's action.

[9] The relevant principles are considered below.

Legal framework

[10] In terms of rule 32(1) of the Uniform Rules of Court ('URC'), a plaintiff can only rely on the summary judgment procedure in a limited set of circumstances. Under rule 32(2)(b), the plaintiff must explain briefly why the defence, as pleaded, does not raise any

issue for trial. The provisions of rule 32(3) make it clear that all that is required of a defendant to stave off such an application is either to give security or to satisfy the court by affidavit that it has a *bona fide* defence.¹

[11] Van Loggerenberg comments that the rule was designed to prevent a plaintiff's claim from being delayed by an abuse of process. It was not intended to shut out a defendant who can show that there is a triable issue.² After the recent amendment of rule 32, a full court in *Raumix Aggregates (Pty) Ltd v Richter Sand CC and Another*³ held that:

'The purpose of a summary judgment application is to allow the court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine triable issue, thereby conserving scarce judicial resources and improving access to justice. Once an application for summary judgment is brought, the applicant obtains a substantive right for that application to be heard, and, bearing in mind the purpose of summary judgment, that hearing should be as soon as possible. That right is protected under section 34 of the Constitution.'⁴

[12] The meaning of a *bona fide* defence was considered more closely in *Tumileng Trading CC v National Security and Fire (Pty) Ltd*.⁵ To that effect, Binns-Ward J found that the amended rule 32(2)(b) makes sense only if the word, 'genuinely' is read into it, so that the plaintiff must 'explain briefly why the defence as pleaded does not *genuinely* raise any issue for trial.' The learned judge went on to say that the plaintiff is not required to explain that the plea is excipiable. It must explain why it is contended that the pleaded defence is a sham.⁶

¹ The rule indicates that the affidavit must disclose, fully, the nature and grounds of the defence and the material facts relied upon.

² DE van Loggerenberg, *Erasmus: Superior Court Practice* (Jutastat e-publications, RS 25, 2024), at D1 Rule 32–3. See, too, *Meek v Kruger* 1958 (3) SA 154 (T), where Boshoff J explained that the summary judgment procedure was intended to prevent sham defences from defeating the rights of parties by delay, causing great loss to plaintiffs who were endeavouring to enforce their rights.

³ 2020 (1) SA 623 (GJ).

⁴ At paragraph [16].

⁵ 2020 (6) SA 624 (WCC).

⁶ At paragraph [21].

[13] More recently, in *Cohen NO and others v Deans*,⁷ the Supreme Court of Appeal, per Nicholls JA, confirmed the test for deciding whether to grant summary judgment:

‘...[it] was, and remains, whether the facts put up by the defendants raise a triable issue and a sustainable defence in the law, deserving of their day in court. The defendants must fully disclose the nature and grounds of their defence and the material facts on which it is founded. All a defendant has to do is set out facts which if proven at trial will constitute a good defence to the claim.’⁸

[14] The above principles constitute the legal framework within which the present matter must be discussed. This will be done in the paragraphs that follow.

Discussion

[15] The defendant, in terms of its original and amended plea, as well as its opposing affidavit, has never denied that it repeatedly breached the agreement. It failed to pay the rent, alternatively it made sporadic payments thereof. The defendant contended, nevertheless, that the plaintiff’s election merely to issue notice and insist on payment meant that it had waived its right to cancel the agreement and to eject the defendant. In this regard, however, clause 13.1 of the agreement entitles the plaintiff to cancel without further notice in the event of repeated breaches. Furthermore, clause 14.3 stipulates that no ‘act of relaxation’ on the plaintiff’s part in relation to any of the defendant’s obligations shall prejudice or be deemed to be a waiver of the plaintiff’s rights. The defendant sensibly declined to pursue the defence during argument.

[16] It is to the remaining defence that attention must be given. The defendant based its argument on clause 6 of the agreement, which provides as follows:

⁷ 2023 JDR 1216 (SCA).

⁸ At paragraph [31]. Footnotes omitted.

'USAGE

The Tenant shall use the Premises as a medical services facility and for no other purpose whatsoever without the Landlord's prior written consent, any act or omission in conflict with the provisions of this clause shall constitute a material breach of this Lease on behalf of the Tenant.'⁹

[17] It was contended, essentially, that the defendant could not use the premises because the land was not zoned for the operation of a medical services facility. The plaintiff's letting of the premises when this was the case amounted to a breach of contract or an act of delict. Consequently, argued the defendant, it incurred a financial loss; the plaintiff, moreover, was not entitled to rental because of the contravention of section 26 of SPLUMA.

[18] For purposes of the immediate application, it is important to note that the plaintiff does not seek payment of the arrear rental. It merely seeks cancellation of the agreement and eviction of the defendant from the premises. For this, it relies on the defendant's non- or sporadic payment of rent (which was never denied) and the corresponding contractual rights available to the plaintiff in the face of such breach. The court is merely required, at this stage, to decide whether the defendant has a *bona fide* defence to the relief that the plaintiff seeks. This will depend on whether the facts alleged give rise to a triable issue and a sustainable defence in law.

[19] The difficulty with the defence advanced by the defendant is that it never pleaded that the plaintiff's conduct in letting the premises without the requisite zoning, as alleged, rendered the agreement unenforceable. Instead, the defendant relies on the plaintiff's conduct as the basis for a counterclaim for the loss that it says was incurred while it was unable to operate a medical services facility. The counterclaim is founded on either a breach of contract or a delict. The plaintiff's conduct also serves as the basis for the defendant's seeking a declaratory order that the plaintiff was not entitled to rental while

⁹ Sic.

the necessary zoning was outstanding. It has presented no further details in this regard. Whether the defendant knew of the zoning status when it concluded the agreement, what steps it took to address the problem, when it was resolved, and why its losses were restricted to a period significantly later than the commencement date (1 November 2022)¹⁰ remain unknown. This indisputably detracts from the *bona fide* or genuine nature of its defence. To the extent that the defendant relies on misrepresentation to avoid the plaintiff's enforcement of its contractual rights, it has failed to plead the necessary elements.¹¹ For example, it is far from clear whether it relies on innocent, fraudulent, or negligent misrepresentation;¹² each cause of action in this regard is different, with different legal consequences if proved.

[20] If the defendant can indeed prove the allegation that the premises lacked the requisite zoning, then it is still not evident why this precluded the plaintiff from being entitled to rental. Courts will generally enforce properly concluded contracts, as expressed in the Latin maxim of *pacta sunt servanda*. The principle is, admittedly, subject to a limited set of well-established exceptions, founded on, *inter alia*, the principle of fairness.¹³ In the present matter, the terms of the agreement are clear: clause 10.10 obliges the defendant (not the plaintiff) to comply with the requirements of the municipality and any other authority for the conduct of its business; clause 10.21 stipulates that the defendant (not the plaintiff) was liable for obtaining, maintaining, and renewing all necessary licences and permits for the business; clause 11.4 indicates, moreover, that the plaintiff was not obliged to make any alterations or additions to the premises to comply with the requirements of the municipality or any other authority; and, crucially, clause 11.5 provides that:

¹⁰ The defendant pleaded that the period for which 'it could not trade as medical services [sic]' ran from March until September 2024.

¹¹ Counsel for the plaintiff seemed to approach the matter on the basis that the defendant relied on misrepresentation. This was not, however, the approach taken by counsel for the defendant during argument.

¹² See the discussion of the relevant causes of action in LTC Harms, *Amler's Precedents of Pleadings* (LexisNexis, 9ed, 2018), 205 and 262–5.

¹³ GB Bradfield, *Christie's Law of Contract in South Africa* (LexisNexis, 8ed, 2022), 12–3.

‘[the plaintiff] does not warrant or represent that the Premises are fit for any specific purpose or that any permit or licence in respect of the Premises or the conduct of the Tenant’s business therein will be granted or renewed...’¹⁴

[21] The defendant contended that the enforcement of clause 11.5 made no commercial sense and undermined clause 6 regarding the use of the premises. It referred to the decision in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹⁵ to argue that a sensible meaning had to be attributed to the provisions in question rather than one that led to insensible or unbusinesslike results or that undermined the purpose of the agreement.¹⁶ Why clause 11.5 should be ignored or neutralised, however, was not fully explained. The text thereof is readily capable of interpretation; the context is a commercial lease agreement between two private companies; the purpose is to place, entirely, the responsibility of ensuring that the premises were fit for use upon the shoulders of the defendant, nothing more, nothing less.

[22] The defendant contended further that the enforcement of clause 11.5 would offend public policy. It referred to *Barkhuizen v Napier*¹⁷ to support its contention that a no-warranty clause, such as clause 11.5, was unenforceable in relation to the performance of an obligation that went to the very subject matter of a contract.

[23] The facts in *Barkhuizen* concerned an insured party’s failure to institute action within the 90-day limit stipulated in the underlying insurance contract. It was argued, in that matter, that the relevant clause was unconstitutional and unenforceable because it violated the insured party’s right, under section 34 of the Constitution, to have the dispute determined by a court. The Constitutional Court, per Ngcobo J, held that:

‘In my view the proper approach to constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by

¹⁴ Sic.

¹⁵ 2012 (4) SA 593 (SCA).

¹⁶ The relevant principles emerge from paragraph [18] of the *Endumeni* judgment.

¹⁷ 2007 (5) SA 323 (CC).

constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with constitutional values even though the parties may have consented to them.’¹⁸

[24] The court went on to state that it was necessary to determine whether the time-limitation clause was inimical to constitutional values such as those expressed under section 34 and thus contrary to public policy. If so, then it could not be enforced.¹⁹

[25] Returning to the present matter, the defendant failed to demonstrate what constitutional value was infringed by clause 11.5. It failed to explain why the provisions thereof offended public policy. Whereas *Barkhuizen* indicates that constitutional values have a direct bearing on the determination of whether a contractual term is contrary to public policy, a court’s interference with the principle of *pacta sunt servanda* must be properly reasoned and must be based on the facts placed before it.²⁰

[26] In the more recent, but somewhat contentious, decision in *Beadica 231 CC and Others v Trustees, Oregon Trust and Others*,²¹ the Constitutional Court, per Theron J, observed as follows:

‘Indeed, this court has recognised the necessity of infusing our law of contract with constitutional values. This requires courts to exercise both resourcefulness and restraint. In line with this Court’s repeated warnings against overzealous judicial reform, the power held by the courts to develop the common law must be exercised in an incremental fashion as the facts of each case require. The development of new doctrines must also be capable of finding certain, generalised application beyond the particular factual matrix of the case in which a court is called upon to develop the common law. While abstract values provide

¹⁸ At paragraph [30].

¹⁹ At paragraphs [36], and [70] to [72].

²⁰ See the court’s treatment of the subject in *Goliath and Another v Chicory SA (Pty) Ltd* 2022 JDR 2874 (ECMA), at paragraphs [96] to [101].

²¹ 2020 (5) SA 247 (CC).

a normative basis for the development of new doctrines, prudent and disciplined reasoning is required to ensure certainty of the law.²²

[27] As already observed, the parties in the present matter are private companies. There is no evidence that the relative situation of the parties gave rise to unequal bargaining power, warranting a finding that clause 11.5 was contrary to public policy.²³ The facts, overall, do not require the court to interfere. If anything, then the lack of the requisite zoning invites the question whether the defendant properly investigated the feasibility of operating a medical services facility on the premises before concluding the agreement, especially considering the substantial contractual protection afforded to the plaintiff by the clauses previously discussed.

[28] Regarding the defendant's reliance on section 26 of SPLUMA, it is unclear how this advances its position. The provisions thereof state that land may be used only for the purposes permitted by a land use scheme. The defendant's case is based on the allegation that it could not use the premises for the operation of a medical services facility. Consequently, on the defendant's version, no contravention could have occurred. If the defendant had intended to invoke the principles associated with illegality of purpose or any similar doctrine located within the law of contract, then it was incumbent for it to have pleaded this properly— and unambiguously. The court cannot second-guess its intentions. There is, however, nothing on the facts put up by the defendant to demonstrate that the purpose of the agreement, viz. the lease of the premises, was *per se* illegal.

[29] The plaintiff referred to the decision of the Supreme Court of Appeal in *Tudor Hotel Brasserie & Bar (Pty) Ltd v Hencetrade 15 (Pty) Ltd*.²⁴ In that regard, the respondent successfully applied in the court *a quo* for the eviction of the appellant on the basis that the underlying lease agreement had been cancelled after the appellant had fallen into

²² At paragraph [76].

²³ The Constitutional Court, with reference to the decision of the Supreme Court of Appeal in *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA), endorsed the relevant principle in *Barkhuizen* (n 17), at paragraph [59].

²⁴ (793/2016) [2017] ZASCA 111 (20 September 2017).

arrears with rental. The appellant denied that it was due because the respondent had failed to grant vacant occupation or beneficial use of the entire property. It was common cause that the respondent had retained a portion of the property upon which to store certain items. On appeal, the court found that the appellant's contractual obligation to pay rent in advance did not give rise to a reciprocal obligation on the respondent's part to grant occupation or use of the entire property. Furthermore, the appellant was contractually precluded from withholding payment. The appeal was dismissed.

[30] In the present matter, the defendant was required under clause 5.3 to pay rental in advance. Furthermore, clause 10.13 stipulated that:

'[the defendant] shall not be entitled to withhold, delay or abate payment of any amounts due to the Landlord in terms of this Lease by reason of any breach or alleged breach of the Landlord's obligations hereunder...'

[31] On the facts of the present matter, *Tudor Hotel* is authority for the assertion that the lack of the requisite zoning did not allow the defendant to withhold payment of rent. The plaintiff was entitled to enforce its contractual rights when the defendant fell into arrears.

Relief and order

[32] The court is required to decide whether the defendant has a *bona fide* defence to the plaintiff's claim for cancellation and eviction. The details provided by the defendant are simply inadequate; they do not, in the language of *Tumileng*, genuinely raise any issue for trial. It is difficult to avoid the conclusion that the defence, as pleaded, is a sham. Consequently, based on the test enunciated in *Cohen*, it cannot be found that the facts put up by the defendant raise a triable issue and a sustainable defence in law, deserving of a day in court.

[33] Regarding the relief to be granted, the plaintiff suggested a period of 21 calendar days within which the defendant be ordered to vacate the premises. Considering the nature of the defendant's business and the potential prejudice that could result to health care users, a longer period would seem to be reasonable.

[34] The only remaining issue is that of costs. As the successful party, the plaintiff is entitled to the reimbursement of its expenses; clause 13.2 of the agreement envisages the implementation of an attorney-and-client scale. There is no reason why not to make an order to that effect, including the costs of the postponement of the matter on 14 January 2025.

[35] In the circumstances, the application is granted, and the following order is made:

(a) with effect from 1 July 2025:

(i) the lease agreement concluded by the parties on 13 March 2023 at Mthatha is hereby cancelled;

(ii) the defendant is evicted from the premises situated at erf 435 Mthatha;
and

(b) the defendant is ordered to pay the plaintiff's costs of suit, including those for 14 January 2025, on an attorney-and-client scale.

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JUDGE OF THE HIGH COURT

APPEARANCE

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Date heard: 4 March 2025.

Date delivered: 6 May 2025.