



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

CASE NO: 115186/23

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

06/11/2025

DATE


SIGNATURE

In the matter between:

ITALITE INVESTMENTS (PTY) LIMITED

Applicant

and

ZIZ WELL TRADE (PTY) LTD t/a VOICE AFRICA

Respondent

JUDGMENT

MBONGWE J:

INTRODUCTION

[1] This is an application for summary judgment in terms of Rule 32 of the Uniform Rules of Court. The plaintiff seeks payment of R390 261.74 from the defendants, jointly and severally, arising from unpaid rental obligations.

- [2] The plaintiff and the first defendant entered into a written agreement of lease of commercial premises commencing on 1 April 2018 and terminating on 31 March 2021 by effluxion of time.
- [3] The second defendant executed a deed of suretyship in favour of the plaintiff, binding himself as surety and co-principal debtor for the due performance of the first defendant's obligations to the plaintiff under the lease.
- [4] Despite the termination of the lease, the first defendant remained in occupation and continued to trade on the premises, resulting, by law, in a relocation occurring. The first defendant's occupation of the premises from 1 April 2021 was on a month-to-month basis and terminated when the first defendant vacated the premises on 31 August 2023. The first defendant was liable to pay the monthly rental, which it did until October 2021, on the terms and conditions of the initial agreement.
- [5] The first defendant failed to pay the monthly rental from November 2021 to August 2023. The plaintiff issued a summons against both the first and the second defendants claiming the outstanding accumulated rental amount of R390 261.74, for that period.
- [6] The defendants delivered a notice of intention to defend and filed a special plea, a plea raising two defences as well as three counterclaims, which they contended constitute triable issues.
- [7] The defendants have further filed an affidavit resisting summary judgment setting out their two defences and the three counterclaims.

- [8] The plaintiff now seeks summary judgment, contending that the defendants have no bona fide defence and that the appearance to defend was entered solely for the purpose of delay. Concerning the counterclaims, the plaintiff has responded thereto contending that the same lack of merit in law and on the facts and constitute no barriers to the granting of summary judgment.

Legal Framework and Purpose of Summary Judgment

- [9] The purpose of summary judgment is to allow a plaintiff with a clear, unanswerable case to obtain a speedy judgment without the need for a full trial, where the defendant has failed to demonstrate a bona fide, triable defence. Compliance with the prescripts of the amended Rule 32 of the Uniform Rules of Court is mandatory. The defendant is required to fully disclose the nature and grounds of any defence it raises, and the material facts relied upon, explaining briefly why the pleaded defence constitutes a triable issue.
- [10] The summary judgment procedure is designed to prevent abuse of the judicial process by defendants who raise sham defences merely seeking to delay the inevitable.¹
- [11] The test is whether the defendant has disclosed facts which, if proved at trial, would constitute a defence to the claim. In *the Joob Joob matter, supra*, the court emphasised that the defendant must set out facts in sufficient detail to

¹ See *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* [2009] ZASCA 23; 2009 (5) SA 1 (SCA); [2009] 3 All 407 (SCA) and *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423A–E.

persuade the court that there is a triable issue. Mere conclusions or vague allegations do not suffice.

- [12] In *McCarthy Retail Ltd v Short Distance Carriers CC*², the Supreme Court of Appeal reiterated that summary judgment is appropriate where the defendant's opposition is contrived or lacking in substance.

The defendants' special plea (points in limine)

- [13] The defendants have challenged the eligibility of the deponent to the Founding Affidavit to attest thereto on the ground that she had received invoices from Broll and the absence of a supporting affidavit from Broll confirming the correctness of the reconciliation of the amount claimed.
- [14] Broll is a property management company employed to manage the property concerned, including the issuing of monthly rental invoices and the service thereof to the tenants, such as the first defendant. There is, in my view, nothing disqualifying a person involved with the accounts of the company, attesting to the invoices of the rental due by the tenants.
- [15] The defendants dispute that the claim is a liquid claim entitling it to summary judgment, contending that the claim arose from the unlawful occupation of the plaintiff's store by the first defendant, and that, therefore, the plaintiff's claim ought to be for damages requiring the plaintiff to prove the market value of the property on which the amount claimed was calculated. This contention by the defendants is misplaced for two reasons; firstly, the plaintiff has not alleged

² 2001 (3) SA 482 (SCA) at 487E–F.

that the first defendant had been in unlawful occupation of the premises, nor sought its eviction, and, secondly, the plaintiff has alleged the occurrence of a relocation when the first defendant remained in occupation of the premises, thirdly, the first defendant had accepted or acquiesced in that it continued to pay the monthly rental from 1 April 2021 until October 2021 and began defaulting from November 2021 to August 2023. In my view, there had been at least, an agreement on the further occupation of the premises by the first defendant and the corresponding payment of the agreed rental amount, which the first defendant paid in full until October 2021. The defendants' point in limine is, consequently, dismissed.

Defences Raised

[16] The defendant has raised the following defences:

16.1 *Lis alibi pendens*.

The defendant alleges that the plaintiff's claim for the rental is still pending in an action that the plaintiff instituted in the Magistrates' Court, Vhembe, in Limpopo.

[17] In reply, the plaintiff contends that it had instituted an action as alleged by the defendant in Vhembe under case number 427/2021, which it withdrew after the defendants had raised a special plea that the court had no jurisdiction to entertain the matter. The defendants, later in their papers, admit that the action was withdrawn by the plaintiff, but without tendering costs. This defence, consequently, stands to be rejected.

[18] The defendants' second defence is that they had paid the plaintiff in full and are not liable to the plaintiff for anything. The defendants further aver, in substantiation of this defence, that the plaintiff had granted the first defendant a 30% rebate on the monthly rental for the period September 2019 to November 2019, and that the plaintiff was paid the monthly rental amount less the rebate. They aver that the plaintiff failed to consider this fact in calculating its claim.

[19] In reply, the plaintiff admits that it had granted the defendant the 30% rebate, but states that the reduction was for the period September 2019 to November 2019 and was limited to that period only. The plaintiff contends further that the reason for the reduction in monthly rental was to provide temporary COVID-19 relief to the first defendant. In particular, the plaintiff avers that the period of the rebate occurred while the initial written lease agreement was still extant, while the amount currently claimed is in respect of the period August 2021 to November 2023. It is my view on these facts that the second defence raised by the defendants ought to be rejected.

Defendants' Counterclaims

[20] The defendants have raised three counterclaims:

20.1 Counterclaim A: The defendants allege that the plaintiff is indebted to them in the amount of R33 099,00 for restoration / improvement of the plaintiff's building. To this end, the defendants have attached Annexure ZIZ 7 as proof of the expense they allegedly incurred. On perusal by the plaintiff, this Annexure relates to damages to the first

defendant's stock caused by the rain and has nothing to do with the alleged restoration/ improvement to the plaintiff's building. The plaintiff further alleges that, in any event, the first defendant was, in terms of the lease agreement, to maintain and repair any damage to the interior of the building and to have insurance for its stock. The agreement further exonerates the plaintiff from liability for any damage that may occur. In my view, this counterclaim by the defendants ought to be dismissed.

20.2 Counterclaim B: The defendants seek a refund from the plaintiff of the amount of R54 820,08, being the amount the first defendant was obliged to pay, and had paid as a deposit for rent, and was retained by the plaintiff as security. The plaintiff averred that it had appropriated this deposit in reduction of the amount owed by the first defendant and that its claim was, accordingly, reduced to the value of that deposit. The plaintiff has further alleged that the defendants have failed, despite requests, to furnish proof of payments of monthly rent for the period September 2021 to August 2023. I find that the defendants' failure negates their assertion that they paid the plaintiff in full and are entitled to the refund of the deposit. The defendants' second counterclaim stands to be dismissed.

20.3 Counterclaim C: The defendant alleged to have incurred expenses to the tune of R120 000 in fitting shelves and other necessary equipment in the plaintiff's store. The defendants averred that the plaintiff has not compensated them for the expense incurred and, relying on the

condictio indebiti principle, the defendants seek payment of the amount spent on the ground that the plaintiff was unjustly enriched, and the defendants impoverished to that amount of R120 000,00.

[21] The plaintiff argued, in essence, that the defendants have not made out a case for the alleged unjust enrichment. I am inclined to agree with the plaintiff's contention as the defendants' claim falls short of meeting the requirements for entitlement to a *condictio indebiti* claim as laid down by the Supreme Court of Appeal in the matter of *McCarthy Retail Limited v Short Distance Carriers CC*³.

[22] For a claimant to succeed in an undue enrichment claim, it must demonstrate the existence of the undermentioned requirements aptly laid down by the Supreme Court of Appeal in *McCarthy Retail Limited v Short Distance Carriers CC*⁴:

- 22.1 The payment to the debtor must have been made erroneously, and
- 22.2 was without legal cause.
- 22.3 the defendant was unduly enriched thereby, and
- 22.4 the plaintiff is impoverished.

By their failure to meet these requirements in full, the defendants are therefore, not entitled to restitution against the plaintiff.

³ 2001 SA 482 (SCA) 8489F – G.

⁴ 2001 SA 482 (SCA) 8489F – G.

CONCLUSION

[23] I conclude that the plaintiff has successfully established:

- The existence of a lease agreement and its termination by the effluxion of time on 31 March 2021.
- The occurrence of a relocation of the lease agreement following the continued occupation of the leased premises by the first defendant post-termination.
- The second defendant's suretyship.
- The quantum of the arrears.
- The absence of any triable issue raised by the defendants to the plaintiff's claim.
- The defendants have failed to meet the threshold set out in the amended Rule 32. The plaintiff's application for summary judgment must consequently be granted.

ORDER

[24] Resulting from the findings and conclusions above, I make the order:

1. The defendants are ordered to pay the plaintiff the amount of R390 261,74 jointly and severally, the one paying the other to be absolved.
2. The defendants are to pay interest on the amount in 1 at the rate of 10.25% per annum, calculated from the date of summons to the date of payment.

3. The defendants are ordered to pay the costs on Scale C.



MPN MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the applicant:	Adv WJ Scholtz
Instructed by:	Fourie van Pletzen Inc
For the respondent:	Adv RA Britz
Instructed by:	Muthray and Associates Inc.
Date of hearing:	24 April 2025
Date of judgment:	06 November 2025