REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2024-038673

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

[redacted] ________ ______________________
DATE SIGNATURE

In the matter between:

EDMALUX (PTY) LTD Applicant

and

LUFI-D (PTY) LTD First Respondent

FORTUNATE NKATEKO KHOZA Second Respondent

JUDGMENT

This judgment is handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 24 February 2026.

DE OLIVEIRA, AJ

[1] The first respondent was a lessee of commercial premises in respect of which the applicant was the lessor. The applicant's case is that, despite vacating the leased premises in and during February 2024, the first respondent remains indebted to the applicant for arrear rental and unpaid utilities in the sum of approximately R180 000.00, together with interest and costs.

[2] Whilst judgment was initially sought against the second respondent as a surety for, and co-principal debtor with, the first respondent for any debts owed to the applicant; at the commencement of the hearing I was informed by Ms Beukes, who appeared before me on behalf of the applicant, that the applicant no longer persisted with its claim against the second respondent.

[3] The crisp issue for determination is whether there are material disputes of fact in regard to either or both (i) the first respondent's indebtedness to the applicant or (ii) the calculation thereof, and if so whether such disputes are genuine and *bona fide*.[1]

[4] If I find that there are genuine and *bona fide* disputes of fact in regard to either or both the existence of the first respondent's alleged liability or the calculation thereof, the law effectively disentitles me from granting final relief unless the first respondent's allegations or denials are so far-fetched or clearly untenable that I am justified in rejecting them on the papers.[2] Mr Nhutsve, who appeared before me on behalf of the respondents, submitted that if I were to find that there are genuine and *bona fide* disputes of fact, I should dismiss the application because the answering affidavit pertinently disputed the first respondent's liability to the applicant.

[5] In any event, an applicant who presses for a decision on the papers in the face of a factual dispute by necessary implication consents to the matter being decided on the basis of the rule in *Plascon-Evans*. The reason for this is not because the onus is on the applicant but because the applicant is *dominus litis* and must be

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1 A further issue raised by the respondent is whether this Court has the requisite jurisdiction to hear the matter by virtue of the fact that the amounts claimed by the applicant fall within the jurisdiction of the Magistrate's Court. There is plainly no merit in this point if regard is had to *South African Human Rights Commission v Standard Bank of South Africa Ltd and Others* 2023 (3) SA 36 (CC)).

2 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

taken to know that a court cannot decide factual disputes on probabilities or on onus in opposed motion proceedings.[3]

[6] It is settled law that, if a party has knowledge of a material and *bona fide* dispute of fact, or should reasonably foresee its occurrence, and nevertheless proceeds on motion, that party will usually find the application dismissed.[4]

[7] An application for the hearing of oral evidence must, as a rule, be made in *limine* and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail.[5] The applicant did not apply in *limine* for the mater to be referred for the hearing of oral evidence.

[8] The starting point in the present matter is the conclusion, on 17 October 2019, of a lease agreement in respect of certain premises wherein the applicant was the lessor and the first respondent was the lessee. The terms of the lease agreement are common cause between the parties. For present purposes it suffices to state the following:

(a) The first respondent would lease the premises for an initial period of three years.

(b) In the event of the first respondent remaining in occupation of the premises after the expiry of the initial period, without the parties formalising a new or extended lease, the first respondent would be deemed to lease the same premises on a monthly basis on the same terms as those set out in the "expired" lease agreement. Important for present purposes is clause 61.1.2 of the lease agreement, which provides as follows:

> *"…the Tenant further agrees that, in such circumstances, the Basic Monthly rental, operating costs (if applicable) and any other charges payable by the Tenant as contemplated in the Schedule hereto in respect of the first twelve month monthly*

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3 See for example *Absa Bank Ltd v Collier* 2015 (4) SA 364 (WCC) and the authority referred to in footnote 42 therein.

4 See for example *Lombaard v Droprop CC And Others* 2010 (5) SA 1 (SCA) at [31].

5 *Law Society, Northern Provinces v Mogami and Others* 2010 (1) SA 186 (SCA) at [23].

period after the expiration of the Lease Agreement shall not be less than the Basic Monthly Rental, operating costs (if applicable) and any other charges payable by the Tenant as contemplated in the Schedule hereto in the last month of the period of this Lease, escalating by 15% (fifteen percent). In addition to the aforegoing, the Landlord shall be entitled to escalate the Tenant's rental by a further 15% (fifteen percent) on the conclusion of each subsequent 12 (twelve month) period where the Tenant continues to remain in the Leased Premises on the aforesaid monthly tenancy basis."

[9] The import of clause 61.1.2, according to the applicant, is that if the first respondent remained in occupation after expiry of the initial lease, the applicant would be within its right to escalate the monthly rental by 15%.

[10] It is not in dispute that the first respondent remained in occupation of the leased premises after expiry of the initial lease. The applicant did not, however (at least initially), escalate the rental owing by the first respondent in terms of the "monthly tenancy" in accordance with clause 61.1.2 of the lease agreement, that is at the rate of 15% after the expiry of the initial lease period.

[11] In its founding affidavit, the applicant states that:

(a) On 2 February 2024, it made demand for payment of the sum of R167 358.27 "…*in respect of arrear rentals and utilities*." I pause to mention that, in terms of the relevant correspondence itself, demand is simply made for payment of "…*an arrears balance*…" in respect of the first respondent's account.

(b) On 9 February 2024, having not received payment, it terminated the lease.

(c) It "appropriated" the deposit of the first respondent in the sum of R34 436.83.

[12] It is common cause that, on 29 February 2024, the first respondent vacated the premises.

[13] For its part, the first respondent disputes that it is indebted to the applicant and contends that, in any event, there are material and *bona fide* disputes of fact in

regard to the quantification of the applicant's claim. In this latter regard, the first respondent raises the following three-pronged attack:

(a) Firstly, the first respondent points out that, in terms of the initial lease, it paid a "holding deposit" of R31 040.00 and a further "top up deposit" of R34 436.83. Only the latter deposit is reflected in the applicant's statement of account and not the former. It is not stated by the applicant what was done with the "holding deposit", if anything. The deposit that it "appropriated" is self-evidently the "top up deposit".

(b) Secondly, the first respondent points out that, in terms of clause 7.5 of the lease agreement, the deposit/s is/are meant to be refunded to the lessee once it vacates the premises (assuming that the lessee has discharged all of its obligations under the lease agreement), and that in the meantime interest is to accrue on the deposit from the date thereof. The first respondent submits that, in light of the applicant's failure to disclose what it did with the interest accrued on the deposit/s, if anything, the amounts claimed from the first respondent are not liquidated.

(c) Thirdly, the first respondent highlighted that, once it queried the applicant's below-mentioned decision to retrospectively raise a 15% escalation on a year's worth of rentals already paid, amounts charged for utilities and other imposts increased significantly without any explanation. By way of only one example, whereas charges for "effluent" were typically between R1 000.00 – R2 000.00 per month, once the first respondent began querying the aforementioned escalation, charges for "effluent" increased dramatically to between approximately R5 000.00 to R10 000.00 per month.

[14] In my view, each of the aforesaid issues called for a detailed response by the applicant. In reply, however, the applicant did little more than to disclose, for the first time (in the proceedings at least), that due to an "administrative error" the 15% escalation in terms of clause 61.1.2 of the lease agreement was never applied to the period following the expiry of the initial lease up until December 2023. It states that the first respondent was pertinently advised of this error in correspondence dated 5 December 2023. Indeed, it turns out that approximately

half of the amount claimed by the applicant is the retrospective 15% escalation applied to the period following the expiry of the initial lease up until December 2023.[6]

[15] As far as the deposit/s, interest thereon and utilities are concerned, save for reiterating that, in terms of clause 7.4 of the lease agreement, the applicant is entitled to appropriate the deposit towards payment of, *inter alia*, the monthly rental, the applicant did not respond to the first respondent's allegations in any meaningful manner. I confess that I was somewhat surprised that the applicant chose not to do so and in particular that it did not provide a detailed response to, or explanation of the aforementioned issues.

[16] In my view, the allegations and denials of the first respondent are not so far-fetched, palpably untrue or implausible that they can be rejected on the papers. Nor am I persuaded that such allegations or denials are not genuinely and *bona fide* raised. Mr Nhutsve pointed out, for example, that not only did the first respondent *not* breach the terms of the lease agreement during the initial period, even after the disputes between the parties arose the first respondent continued paying significant sums to the applicant.

[17] To the extent that the applicant relied on a certificate of balance affording *prima facie* proof of the first respondent's indebtedness, it is trite that same creates a rebuttable presumption of such indebtedness only, and I find that for purposes of these motion proceedings, the first respondent rebutted the presumption created by the certificate.

[18] Whilst the respondents sought costs on an attorney and client scale in the event of the application being dismissed, there is nothing so sinister that merits such an award being made, nor in my view is the application vexatious in effect.

Order

[19] In the circumstances, I make the following order:

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6 I digress to mention that the conclusion to which I come in this judgment must not to be construed as a finding that, in principle, the applicant was not entitled to retrospectively claim a 15% escalation in terms of the lease agreement

(a) The application is dismissed with costs including the costs of counsel on scale A.

DE OLIVEIRA AJ

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

Counsel for the Applicant:	C Beukes
Intstructed by:	Shaie Zindel Attorneys
Counsel for the Respondents:	E Nhutsve
Instructed by:	Mahlobogoane M Attorneys Inc.