**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NO: 2024-085265**

(1) REPORTABLE: ***NO***

(2) OF INTEREST TO OTHER JUDGES: ***NO***

(3) REVISED.

(4) Date: 08 April 2026

Signature:

In the matter between:

**FREESTONE PROPERTY INVESTMENTS (PTY) LTD** Applicant/Plaintiff

And

**JUNXION TRAMSHED (PTY) LTD** First Respondent/Defendant

[registration No. 2019/369268/07]

**ALBERT MPHO NGOBENI** Second Respondent/Defendant

[ID No. 7[...]]

**NKATEKO PEARL NGOBENI** Third Respondent/Defendant

[ID No. 8[...]]

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**JUDGMENT**

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**NYATHI J**

## A. Introduction

[1] This is an application for summary judgment (limited to Claim 1) in which the Plaintiff seeks payment of R329 349.94, interest at prime plus 5% from date of

summons, and costs on an attorney-and-own-client scale, arising from arrear rentals and charges allegedly due after the First Defendant vacated the leased premises on 30 November 2023 and before the Plaintiff cancelled the lease on service of summons in August 2024.

[2] The Defendants entered an appearance to defend and delivered a plea (since amended) and an affidavit resisting summary judgment. They raise, in essence, three clusters of defences:

(a) public-policy challenges to the termination clause and the certificate-of-balance clause;

(b) non-liquidity of the claim; and

(c) a suite of factual/legal arguments (consensual cancellation by operation of law; supervening impossibility; mitigation; and issues around the deposit).

**B. Common-cause background**

[3] The parties concluded a written lease commencing 1 March 2020 (extended to 28 February 2031 via addendum). The lease fixed monthly rental and ancillary charges; provided for default interest at prime + 5% (compounded); recorded suretyships by the Second and Third Defendants; contained an acceleration/liquidated damages provision on cancellation by the landlord; an arbitration clause; and a certificate-of-balance clause (clause 40).

[4] On 30 November 2023 the First Defendant vacated the premises. The Plaintiff treated that as repudiation, did not accept it, and maintained the lease until it cancelled upon issuance/service of summons in August 2024. A statement (Annexure "F") and a certificate of balance (Annexure "G") underpin the claim for R329 349.94.

**C. Issues for determination**

[5] The crisp questions at summary-judgment stage are whether the Defendants have **disclosed fully the nature and grounds of a *bona fide* defence** that is **good in law** or have otherwise raised **a triable issue.** The following specific issues arise on the papers:

5.1 Whether the termination clause is contra bonos mores or its enforcement would be contrary to public policy in the circumstances;

5.2 Whether the certificate-of-balance clause (clause 40) is invalid as a “conclusive proof” device or otherwise offends public policy;

5.3 Whether Claim 1 is for a liquidated amount capable of speedy ascertainment;

5.4 Whether the lease terminated by operation of law / consensually when the keys were handed over;

5.5 Whether supervening impossibility or trading hardship (including alleged competition from “Clicks”) justifies non-performance; and whether a contractual no-remission / competition allowed framework precludes that defence;

5.6 Whether any of the above, individually or collectively, defeats summary judgment.

**D. Applicable legal principles**

[6] The purpose and standard for summary judgment are uncontentious on the authorities marshalled by Ms. Kotze on behalf of the Plaintiff:

i. The Plaintiff must establish the claim clearly;

ii. the Defendants must fully disclose a legally cognisable, *bona fide* defence with sufficient particularity;

iii. doubt favours the Defendant but mere conclusions are insufficient.

[7] On public-policy review of contractual terms, the Constitutional Court in Barkhuizen v Napier[1] and Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others[2] emphasises:

i. That *pacta sunt servanda* remains a central, constitutional value;

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[1] (CCT72/05) 904 April 2007) [2007] ZACC 5; 2007 (5) SA 323 (CC).

[2] (CCT109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (17 June 2020)

ii. even a harsh/unfair term is not for that reason alone contrary to public policy;

iii. a term or its enforcement may be refused only if it is so unfair, unreasonable, or unjust that it offends public policy; and

iv. the party impugning must establish the facts to justify non-enforcement.

[8] A certificate-of-balance that purports to be conclusive proof and authored by the creditor may be void; but where the clause stipulates **only prima facie proof**, different considerations apply, and courts (including SB Guarantee v Botes[3]) accept such certificates as procedural aids, not conclusive instruments.

[9] Liquidity turns on whether the amount is readily ascertainable from the contract and arithmetical workings; arrear rentals are typically liquidated; inclusion of utilities/interest does not necessarily de-liquidate if ascertainable from the account.

[10] A non-variation / consensual-cancellation-in-writing clause bars reliance on informal, tacit, or oral cancellation. Hand-back of keys without a written agreement is ordinarily not consensual cancellation under such a clause.

[11] Supervening impossibility does not avail where the contract allocates the risk or excludes remission/claims in broad terms; commercial hardship short of objective impossibility is insufficient. Competing tenants and fitness for purpose are often expressly disclaimed in retail leases.

## E. Analysis

### (1) The termination clause & public policy

[12] The Defendants contend that the lease **permits early termination by the landlord but not the tenant**, which—given long duration and retail volatility—"locks in" the tenant and is *contra bonos mores*; they invoke Ubuntu, Botha v Rich[4], and Beadica[5] to argue that enforcement here would be disproportionately harsh. They add that they warned the landlord of financial

[3] [2024] 2 All SA 529 (GP); [2024] ZAGPPHC 161.

[4] [2014] ZACC 11; 2014 (4) SA 124 (CC).

[5] *Supra* footnote 2.

distress, gave several months' notice, and secured a replacement tenant (Clicks).

[13] The Plaintiff counters that the Defendants freely contracted, even extended the lease post-COVID by addendum, and had contractual dispute resolution available (arbitration) yet uninvoked; that Beadica/Barkhuizen do not licence courts to re-write bargains save in exceptional cases; and that hardship coupled with a unilateral desire to exit do not found a right of cancellation at common law absent a material breach by the other party.

[14] On the papers, the termination architecture is plain: no tenant right to early cancellation, landlord remedies on breach/repudiation, and arbitration for disputes. The Defendants' public-policy case rests largely on general assertions of inequality of bargaining power and harsh effects, rather than specific primary facts (e.g., negotiation history, refusals, alternatives considered). While Ubuntu and substantive fairness inform public policy**,** **Beadica** cautions that they do not operate as free-floating fairness overrides. The Defendants have not shown that the clause is *per se* inimical to public policy, nor that its enforcement here is so unfair as to cross the **Beadica** threshold.

[15] I am mindful of the **Botha v Rich** "disproportionate penalty" language invoked in the supplementary heads. But that case addressed cancellation where the purchaser had paid most of the price; here, the Plaintiff claims accrued arrears between vacating and contractual cancellation, not acceleration of the full unexpired term; and the Defendants' thesis of "no prejudice because Clicks replaced us" is contested and, in any event, does not by itself negate claimability of arrears for the relevant period on an election to enforce. On the present facts, the Defendants' *contra bonos mores* attack does not raise a triable exception to enforcement at the summary-judgment stage.

**(2) The certificate-of-balance clause**

[16] The Defendants argue clause 40 is void because the creditor is the author and such clauses are contra bonos mores on the **Sasfin (Pty) Ltd v**

**Beukes**[6]**/Abstein**[7] approach. The Plaintiff answers that clause 40 creates only prima facie proof, not conclusive proof, and relies on **SB Guarantee v Botes** and **Rossouw v First Rand Bank Ltd**[8] for the procedural utility of such certificates even at the hearing.

[17] Clause 40 (as excerpted in the Plaintiff's heads) indeed stipulates *prima facie* proof and contemplates use for provisional sentence/summary judgment, without purporting to oust rebuttal. On authority, that is not the kind of conclusive-proof device invalidated in **Abstein.** The Defendants' challenge to clause 40 fails in law on the papers.

**(3) Liquidated amount?**

[18] The Defendants say the amount is not liquid because the reconciliation starts only February 2024 and includes utilities and interest, and because they dispute the termination date and quantum. The Plaintiff cites **Renico Construction**[9] and allied authority for the proposition that outstanding/arrear, agreed-upon rental is a "liquid" amount and that arithmetical working on agreed rates/charges does not de-liquidate.

[19] The claim is confined to the interim arrears (*post-vacatur* to cancellation). The lease fixes basic rental, provides formulas for ancillary charges and interest, and the account ("Annexure F") itemises postings through the relevant months; the certificate then states the running balance. On these papers, and applying the Renico line, the amount claimed is capable of prompt ascertainment. The complaint about missing Nov/Dec 2023 / Jan 2024 invoices could, if substantiated with concrete counter-calculations, raise a factual dispute; but the Defendants offer no alternate computation or documentary support—only a speculative possibility of earlier errors by analogy to February reversals. That is insufficient at this stage to de-liquidate the claim or demonstrate a triable quantum dispute.

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[6] 1989 (1) SA 1 (A)

[7] Ex Parte Minister of Justice: In re Nedbank v Abstein Distributors (Pty) Ltd and Others 1995 (3) SA 1 (A).

[8] 2010 (6) SA 439 (SCA).

[9] Standard Bank of South Africa v Renico Construction (Pty) Ltd 2015 (2) SA 89 (GJ).

**(4) Termination "by operation of law" / consensual cancellation**

[20] The Defendants contend that vacating and handing over keys, coupled with the Plaintiff's acceptance of possession, amounted to consensual cancellation, alternatively termination by operation of law. The lease, however, contains a non-variation / no consensual cancellation unless in writing and signed clause (clause 38). On orthodox authority adopted in the Plaintiff's heads, such clauses are enforceable, and informal conduct does not cancel. The Plaintiff's position—that it did not accept repudiation and later cancelled on summons—is consistent with clause 38. The defence therefore cannot stand.

**(5) Supervening impossibility / hardship & "Clicks next door"**

[21] The Defendants point to COVID-era hardship and say the Plaintiff placed a powerful competitor (Clicks) adjacent, sounding "the death knell", making performance impossible. The lease contains a broad "no claims/no remission" clause (clause 22.1) and a competition/fitness disclaimer (clause 9.2), allocating those risks to the tenant. Moreover, objective impossibility is the standard; here, the complaint is of **commercial impracticability** and competition—matters the lease anticipates and allocates. On these authorities and the contract, the defence fails.

**(6) Deposit / set-off / mitigation**

[22] The Defendants reserve rights to claim the deposit. The Plaintiff indicates the deposit was set off per clause 7.4, as reflected in Annexure F; the Defendants do not raise a pleaded set-off defence to Claim 1. That issue does not defeat summary judgment on the arrears. As to mitigation, the Defendants' complaint is misdirected in the face of the Plaintiff's election to hold them to the lease pending cancellation; mitigation does not erase accrued obligations for the period.

## F. Conclusion

[23] The Defendants have **not** disclosed a *bona fide*, legally sustainable defence to Claim 1. Their *contra bonos mores* attack does not, on the facts they advance, bring this case within the exceptional public-policy category contemplated by

**Beadica/Barkhuizen**; the certificate-of-balance clause is *prima facie* in nature and valid; the amount is liquid; and the remaining defences (consensual cancellation, impossibility, mitigation, deposit) do not avail them. Granting leave to defend would only delay the inevitable at unnecessary cost.

**G. Order**

It is ordered that:

1. Summary judgment is granted in favour of the Plaintiff against the First, Second and Third Defendants, jointly and severally, the one paying the others to be absolved, for:
    a. Payment of R329 349.94;
    b. Interest on the aforesaid amount at the publicly quoted prime rate of First National Bank plus 5% per annum, compounded as provided in the lease, from date of summons to date of final payment;
    c. Costs of suit on the scale as between attorney and own client, as provided for in the lease;
2. The Defendants' counter-contentions in relation to the deposit are **reserved to any separate action** the Defendants may elect to institute; nothing in this order determines that issue beyond recognising any set-off/appropriation already reflected in the Plaintiff's account.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of Judgment: 08 April 2026

On behalf of the Applicant: Adv. L. Kotze

Applicant's attorneys: GMI Attorneys, Pretoria

On behalf of the Respondent: Adv. Ndaba V.S. Kgaka

Respondent’s attorneys: Lebala Moloi Attorneys Inc, Pretoria

**Delivery**: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 08 April 2026.