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

CASE NUMBER: 2025-012186

Reportable: **NO**

Circulate to Judges: **NO**

Circulate to Magistrates: **NO**

Circulate to Regional Magistrates **NO**

In the matter between:-

**GIFLO PROPERTIES (PTY) LTD
(REG NO: 2000/021693/07)**

1st Plaintiff

**ABLAND (PTY) LTD
(REG NO: 1990/005756/07)**

2nd Plaintiff

**SOM (PTY) LTD
(REG NO: 2001/022744/07)**

3rd Plaintiff

and

**SMARTOPS (PTY) LTD
(REG NO: 2015/374924/07)**

1st Defendant

**MAHENE PATRICE BENZANE
(IDENTITY NUMBER: 9[...])**

2nd Defendant

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JUDGMENT**FMM REID J****Introduction:**

[1] This is an application for summary judgment in which the plaintiffs claim the cancellation of a lease agreement, alleged arrear rental payments, and eviction. Summons was issued on 30 January 2025 in the amount of R420,093.29.

[2] The plaintiffs are the joint owners and landlords of the property known as Ground Floor, Irene Link Building E, [...] Avenue, Doringkloof, Gauteng (the property). The defendants are respectively the tenants and surety of the lease agreement. The defendants oppose the application, arguing that they have a *bona fide* defence against the claim.

Arguments of the parties

[3] The core factual dispute concerns whether the parties varied the lease agreement regarding payment dates before the plaintiff cancelled the lease and issued summons.

[4] The plaintiffs contend that the lease was validly cancelled on 24 January 2025 by the defendant's non payment of the rentals. The defendants contend that the lease was varied by mutual agreement between the parties during mid-January 2025. The defendants claim

that the terms of the amended agreement were that the defendant can pay the arrear amounts on 31 January 2025 and pay the rent of February on 14 February 2025. The plaintiffs deny this.

[5] The defendants claim that the plaintiffs drafted an "Acknowledgement of Debt" (AOD) reflecting this new payment schedule and sent the AOD to the defendants on 29 January 2025. As such, so the defendants argue, the summons was prematurely issued on 30 January 2025, before the first payment was due on 31 January 2025. The plaintiffs argue that the AOD was never signed by them, and that the AOD cannot novate the lease agreement.

[6] The plaintiffs argue that the summary judgment should be granted on the following grounds:

6.1. That the defendants raise no triable issues or valid defence. The defence of an alleged new agreement in the form of an AOD is invalid on the basis that there is a non-variation clause in the initial agreement in clause 29.3, and any amendment to the lease agreement must be in writing and signed by both parties. The AOD was not signed by the plaintiffs.

6.2. The cancellation of the rental agreement preceded the AOD and as such the AOD has no legal effect. The plaintiffs claim that the lease was already validly cancelled on 24 January 2025, before

the AOD was even sent to the defendants on 29 January 2025.

6.3. The AOD in itself is not a novation of the original cause of action, and this term is contained in the AOD itself.

6.4. The AOD does not constitute a new agreement, as it only came into force (if at all) on 31 January 2025 when it was communicated to the plaintiffs. At that stage, summons was already issued on 30 January 2025. Further, the plaintiffs' covering email to the AOD explicitly stated legal action would continue.

6.5. The plaintiff argues that they are entitled to cost on an attorney-and-client scale under clause 31 of the lease agreement.

[7] The defendants argue that summary judgment should be dismissed on the following bases:

7.1. That the defendants' opposing affidavit sets out a defence valid in law that is not inherently unconvincing. A defendant need not prove the defence on a balance of probabilities at this stage – only show a real possibility.

7.2. By entering into negotiations and agreeing to a new payment schedule (as evidenced by drafting the AOD), the

plaintiffs waived their right to rely on the original breach or to cancel the lease agreement. In support of this argument the defendant cited *Aucamp v Morton* 1949 (3) SA 611 (A). The granting of an indulgence is inconsistent with an intention to enforce strict compliance.

7.3. Summons was issued on 30 January 2025, but the first revised payment was only due on 31 January 2025. No breach had occurred when summons was issued. This conduct amounts to a repudiation of the varied agreement (the AOD), which the defendants have rejected, and the defendants claim specific performance in their counter-claim.

7.4. The court has a discretion to refuse summary judgment where there is any doubt about whether the plaintiff's case is unanswerable.

Legal position

[8] The principles governing summary judgment applications are well established. In *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A-C, the Appellate Division held that the defendant need not prove his defence on a balance of probabilities. It is sufficient if the defendant sets out facts which, if proved at trial, will constitute a defence to the plaintiff's claim.

- [9] The full court in *Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T)* at 228F-G further clarified that the defendant must swear to a defence "valid in law" which is "not inherently and seriously unconvincing". At page 277 B-E the following is said:

"The purpose of the procedure known as summary judgment is well recognised. It is, indeed, implicit in the portion of Rule 32 which prescribes the contents of the affidavit which must be filed on behalf of the plaintiff. It is a procedure aimed at the defendant, who, although he has no bona fide defence to the action brought against him, gives notice of intention to defend solely in order to delay the grant of judgment in favour of the plaintiff. In a case where that is what the defendant has done, the summary judgment procedure serves a socially and commercially useful purpose. The relevant Rule should, therefore, not be interpreted with such liberality to defendants that purpose is defeated.

It is, however, even more important to guard against injustice to the defendant, who is called upon, at short notice, and without the benefit of further particulars, discovery or cross-examination, to satisfy the Court in terms of sub-rule (3) (b). If the requirements of that sub-rule are too stringently applied, a defendant who has a defence to the action brought against him may be denied, unjustly, an opportunity of establishing that defence by the ordinary procedure of a civil suit."

- [10] The summary judgment procedure is a drastic remedy, intended to enable a plaintiff with an unassailable claim to obtain swift relief. It was never intended to shut out a defendant who raises a genuine dispute of fact or law. Where there is a reasonable possibility that the defence advanced may succeed at trial, the court should exercise its discretion in favour of granting leave to defend.

- [11] In *Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A)* the Court of Appeal (as it was then known) held as follows at 426A-C:

“Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has ‘fully’ disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law.”

- [12] The above principles were once again confirmed in the Supreme Court of Appeal in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) as follows:

“[31] So too in South Africa, the summary judgment procedure was not intended to ‘shut (a defendant) out from defending’, unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.

[32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case at 425G - 426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of

a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.”

[13] The court deciding on an application for summary judgment thus have a delicate balance to exercise: justice for an applicant (plaintiff) must be swift where the defendant enters a bogus defence to delay an inevitable judgment against it. At the same time justice for a respondent (defendant) must be upheld where there is a possible *bona fide* defence and such respondent has the right to have the defence tested at trial.

[14] On my understanding of the legal principles of summary judgment, it must be granted where the nature of the defence that is raised, is clearly doubtful. It is articulated in the Breytenbach matter that “*the summary judgment procedure serves a socially and commercially useful purpose.*” It calls for swift justice and a judicial discretion to be exercised balancing justice (for both plaintiff and defendant) with the reality of an ever increasing court roll of litigation.

Evaluation

[15] The critical question is whether the defendants have disclosed a *bona fide* defence that raises a triable issue.

[16] The defendants' version, set out in the affidavit of the second defendant, is that the parties mutually agreed to vary the payment

terms of the lease. The variation was subsequently recorded in a written document drafted by the plaintiffs' representatives.

[17] The existence of the AOD is not disputed; the plaintiffs contend that it was not signed by them. However, the fact that the AOD was sent by the plaintiffs' attorneys to the defendants on 29 January 2025, and that it expressly records payment dates of 31 January 2025 and 14 February 2025, is indicative of a meeting of the minds. Whether this constituted a binding variation of the lease or a waiver of the plaintiffs' rights to enforce strict compliance with the original payment terms is a dispute that cannot properly be resolved on paper in these summary judgment proceedings.

[18] The plaintiffs place reliance on clause 29.3 of the lease, which provides that no amendment shall be of any force or effect unless in writing and signed by both parties. While this non-variation clause is an obstacle for the defendants, it is not necessarily insurmountable. The doctrine of waiver operates independently of a non-variation clause. As was held in *Aucamp v Morton* 1949 (3) SA 611 (A), a party may, by conduct, waive its rights under a contract, including the right to enforce a non-variation clause.

[19] Whether the plaintiffs' conduct in negotiating new payment terms, drafting the AOD, and leading the defendants to believe that payment would be accepted by 31 January 2025 constituted a waiver of their

right to rely on the strict terms of clause 29.3 is a question that can only be answered in a trial where evidence is lead and tested under cross examination.

[20] Similarly, the issue of whether the cancellation was premature raises factual questions. The defendants contend that at the time of cancellation on 24 January 2025, the parties were already engaged in renegotiations and had reached an agreement in principle, thus negating the cancellation. The plaintiffs' email of 29 January 2025, annexed to the plea, expressly reserved their rights and stated that they were continuing with legal action. However, the existence of that reservation does not automatically negate the possibility that a separate agreement was concluded. This Court is not required to determine where the probabilities lie at this stage; it might be sufficient that the defendants have advanced a version that is not inherently and seriously unconvincing.

[21] The plaintiffs further argue that the defendants breached the AOD in any event by failing to pay on 31 January 2025. However, the AOD was signed on 30 January 2025 and only communicated to the plaintiffs' attorneys on 31 January 2025. Whether payment could reasonably have been expected to be made on that same day, and whether the plaintiffs were obliged to afford the defendants a reasonable opportunity to comply with the AOD, are additional factual disputes that require ventilation at trial.

[22] This is not a case where the defendants have merely advanced bald, vague, or sketchy allegations. The second defendant has provided a detailed account of the negotiations, the agreement reached, the drafting and signing of the AOD, and the timeline of events. The defence advanced is coherent and, if proven at trial, could constitute a complete defence to the plaintiffs' claim.

Conclusion

[23] Summary judgment is a drastic remedy that should be granted only in clearest of cases. This is not such a case.

[24] The defendants have raised genuine triable issues relating to the variation of the payment terms, waiver, the validity of the cancellation, and the prematurity of the summons. These issues can only be properly resolved after oral evidence and cross-examination at trial.

[25] For the reasons set out above, I am persuaded that the defendants have disclosed a *bona fide* defence that raises a triable issue.

Order

[26] In the premise, the following order is made:

- (i) The application for summary judgment is dismissed.

- (ii) The defendants / respondents are granted leave to defend the action.
- (iii) The costs of this application shall be costs in the cause.

FMM REID
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG
SEATED AT GAUTENG NORTH, PRETORIA

DATE OF HEARING: 09 FEBRUARY 2026

DATE OF JUDGMENT: 04 MAY 2026

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