

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
2026/09/09	
DATE	SIGNATURE

Case No: 119527/2023

In the matter between:

HERIOT PROPERTIES (PTY) LTD
(Reg No: 1998/003195/07)

Plaintiff

and

DEVLAND CASH & CARRY (PTY) LTD
(Reg No: 1997/003371/07)

First Defendant

CHOPPIES SUPERMARKETS SOUTH AFRICA (PTY) LTD
(Reg No: 2008/001621/07)

Second Defendant

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically and by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of his matter on Caselines. The date for handing down is deemed to be... August 2026.

JUDGMENT

SHANGISA AJ,

Introduction

- [1] The plaintiff seeks summary judgment against the defendants based on three distinct claims:
- a. First, the plaintiff seeks payment of arrear rental and related charges in the sum of R2 755 567,31, together with interest;
 - b. Second, the plaintiff seeks payment of holding-over damages in the sum of R1 408 024,24 for the period from 1 November 2023 to 30 November 2023, together with interest and costs; and
 - c. Third, the plaintiff seeks payment of rental damages in the amount of R49 068,68 per day for the period from 1 December 2023 until the premises are relet, alternatively until 30 November 2024, whichever occurs first, together with interest and costs.
- [2] The defendants oppose summary judgment and raise three legal points:
- a. First, the defendants contend that, although the deponent to the plaintiff's affidavit purports to verify the facts, cause of action, and amounts due, there are three causes of action, and the plaintiff's deponent failed to identify which of those causes of action he was confirming. The defendants therefore argue that the plaintiff's affidavit in support of summary judgment is defective.
 - b. Second, the defendants contend that the second and third claims are illiquid and constitute claims for damages that do not comply with the requirements of Rule 32(1)(b). The defendants thus submit that, because damages cannot be claimed in summary judgment proceedings, the plaintiff's claims should fail.
 - c. Third, the defendants submit that the plaintiff is in breach of a previous judgment and order of the High Court and should therefore be precluded from obtaining relief from this Court until it has purged its contempt. The defendants assert that the previous court order on which they rely determined that the plaintiff was unlawfully withholding the defendants' goods, which the defendants had purchased for R3 882 488,41.
- [3] The defendants also bring a counterclaim based on unjustified enrichment. The counterclaim is two-pronged. First, the defendants contend that the plaintiff was not entitled to charge rental and that, as a result, they suffered a loss in the

amount of R14 400 000,00. The other leg of the counter-claim entails a counter-claim for the defendants' racking that they claim the plaintiff has stolen and comes to the amount of R7 918 839, 19.

- [4] The defendants argue that their defences and counterclaim are good in law and raise triable issues. They contend that their defences are bona fide and have not been raised merely for the purpose of delaying the plaintiff from obtaining relief against them.

The law

- [5] It is trite that in order for the plaintiff to succeed in its summary judgment application, its claim in the summons must be based on a liquid document or be for a liquidated amount of money.
- [6] The application must be brought within 15 days after the delivery of a plea, together with an affidavit made by the plaintiff personally or by any other person who can swear positively to the facts verifying the cause of action and the amounts claimed. The affidavit must demonstrate that the defendants do not have a bona fide defence and are defending the application merely to delay an inevitable losing case.

Parties' submissions

- [7] In the present matter, the plaintiff bases its claims on the provisions of an admitted and written lease agreement between the parties, and for liquidated amounts sounding in money.
- [8] It is important to look closely at the defendants' plea so as to ascertain their defence. First, the defendants raise a special plea. They submit that the validity of the cancellation of the lease agreement ought to be referred to arbitration. They therefore contend that the court does not have jurisdiction to determine issues arising from the cancellation of the lease agreement.
- [9] The plaintiff contends that the validity of the cancellation of the lease agreement is *res judicata*. It argues that on 31 October 2023 this court granted an eviction order on the strength of the cancellation of the lease agreement. It is common cause that the defendants consented to that order.

- [10] As a result, the defendants were evicted from the leased premises on 18 January 2024, and the plaintiff argues that they have thus acquiesced to the cancellation of the lease agreement. On this basis, the plaintiff contends that the arbitration clause did not survive cancellation of the lease agreement.
- [11] The plaintiff also rejects the defendants' defence of breach of agreement. That is the case, so the argument goes, because the lease agreement prevents the defendants from relying on this defence.
- [12] The plaintiff resists the defendants' counter-claim on two grounds. First, it contends that both counter-claims are excipiable in that they lack the necessary averments which are necessary to sustain a cause of action or defence. Secondly, the plaintiff argues that the defendants have failed to comply with the provisions of Rule 18(10) of the Uniform Rules of Court in that they failed to provide any basis the quantification of the counter-claims.
- [13] As regard the undue enrichment claim, the plaintiff contends that this too should fail because it does not meet the elements of a *conditio indebiti*. It is trite that the elements of a *condictio indebiti* are the following;
- a. The defendant must have been enriched;
 - b. The plaintiff must have been impoverished.
 - c. The enrichment must have been without legal obligation.
 - d. The defendant's enrichment must have been at the expense of the plaintiff.
 - e. The enrichment must have been because of a bona fide, but mistaken belief that the enrichment is due.
- [14] South African law does not recognise a general enrichment action. Although they raised the defence of unjustified enrichment, the defendants have failed to specify which of the elements of *condictio indebiti* they relied on.

Triable Defences

- [15] In my view, the third leg of the defendants' ground of objection disposes of this application. That is so because the plaintiff has been unable to answer the defendants' contention that it remains in contempt of the order of the high court. That order compelled the plaintiff to return the defendants' rack that was held in

plaintiff's premises. The court also made an order of costs against the plaintiff.

[16] The defendants rely on the following court order:

“[1] The [plaintiff] is ordered to;

1.2.1 allow the [second defendant] access to ... in order to remove the racking and shelving stored within the premises and to remove same within a period of 30 days from the date of this Order;

1.2.2 Directing the [plaintiff] to pay the costs of the application.”

[17] It is common cause that as at the time of the application for summary judgment, the plaintiff has not complied with the provisions of the Order and is currently in contempt of such Order.

[18] The Constitutional Court in *Secretary of the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State v Zuma and Others*¹ held as follows:

“Contempt of Court proceedings exist to protect the rule of law and the authority of the judiciary. As the applicant correctly avers ‘the authority of courts and disobedience of their orders – the very foundation of a constitutional order founded on the rule of law – depends on public trust and respect for the courts’. ... Any disregard for this court’s order and the judicial process requires this Court to intervene. As enunciated in *Victoria Park Ratepayers’ Association*, ‘contempt jurisdiction, whatever the situation may have been before 27 April 1994, now also involves the vindication of the Constitution’.

... .

A similar point was made in *Victoria Park Ratepayers’ Association* in which it was said that –

‘[c]ontempt of court has obvious implications for the effectiveness and legitimacy of the legal system and the judicial arm of government. There is thus a public interest element in each and every case in which it is alleged that a party has wilfully and in bad faith ignored or otherwise failed to comply with court order. This added element provides every case an element of urgency.’” (Footnotes Omitted)

¹ 2021 (9) BCLR 992 (CC) at paras 27 and 32

[19] It has been held in *Di Bona v Di Bona and Another*² (*Di Bona*) that:

“The consequences of the rule are that anyone who disobeys an order of Court is in contempt of Court and may be punished by arrest of his person and by committal to prison and, secondly, that no application to the Court by a person in contempt will be entertained until he or she has purged the contempt.”

[20] It is so, and having regard to the judgment in *Di Bona* that the plaintiff, pending its compliance with the order of contempt issued by the high court, should not have an audience before this Court and as against the defendants. This is particularly so when one has regard to the fact that the application in question is a summary judgment application, meaning that this court does not close the doors to the plaintiff, it simply stays over its determination for the trial.

[21] The same goes for the unpaid costs. Erasmus, Superior Court Practice, in the appendix D5 – Costs in general – and under the heading “Previous Costs Unpaid”, sets out that this Court should stay proceedings instituted by a plaintiff who has not paid previous costs.

[22] The plaintiff currently withholds the defendants’ goods, which withholding has been determined to be unlawful by the previous order of this court. It is obvious that the defendants will suffer damages and have a counterclaim for such damages. The invoice issued to the defendants for such goods is in the amount of R3 882 488,41. It is so, that such claim is as expressed in *Herb Dyers (Pty) Ltd v Mahomed and Another*³, that:

“I should add that where a defendant admits the plaintiff’s claim he will nevertheless be considered to have a *bona fide* defence if the Court is satisfied that he has a good and honest counter-claim in excess of the claim which is not capable of set-off because it is in respect of an unliquidated amount ...”

[23] In my view, the defendants have established that they have a genuine defence which constitutes a triable issue. That is so because the order of contempt granted against the plaintiff compelled the plaintiff to return the defendants’ and to pay the costs order of the application. The damages claim and the counter-

² 1993 (2) SA 682 (C) at 688F.

³ 1965 (1) SA 31 (T) at 32D-E.

claims that the defendants allege they have suffered as a result of the plaintiff's withholding of their goods are a matter that merits the attention of the trial court.

[24] What is more, the plaintiff cannot obtain summary judgment before it has purged its contempt of the court order granted against it. That includes the plaintiff's compliance with the order requiring it to pay the defendants' costs of the application for contempt.

[25] The defendants' counter-claims cannot be wished away as merely an attempt to delay the inevitable. As a result, I am satisfied that the defendants have established a bona fide defence and have shown that they have a good and honest counter-claim which may offset the plaintiff's claim.

[26] The above being the case, the application for summary judgment must be refused.

Order

[27] In the result, I make the following order:

1. The application for summary judgment is refused.
2. The defendants are given leave to defend the action.
3. The costs are reserved for the trial court.



**S.L SHANGISA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

HEARD ON: 05 May 2025

DATE OF JUDGMENT: 9 September 2026

APPEARANCES:

For Plaintiff: Adv. S Mathiba

Instructed by: GVS Law

For Respondent: Adv. M Desai

Instructed by: Somaar and Malik Attorneys