

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

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

Date: **2nd MARCH 2018** Signature: _____

CASE NO: 2017/47035

In the matter between:

CUMULATIVE PROPERTIES LIMITED

Plaintiff

and

NAME PLATE CENTRE SIGNS (PTY) LIMITED

Defendant

JUDGMENT

ADAMS J:

[1]. This is an application by the plaintiff for summary judgment against the defendant. The plaintiff's cause of action is based on a written commercial lease

agreement ('the lease agreement') concluded between the parties on the 7th October 2016 in terms of which lease agreement the defendant let from the plaintiff premises in Isando for a period of two years from the 1st of September 2016 to the 31st of August 2018. The monthly rental payable by the defendant to the plaintiff was agreed upon in the in the written lease agreement.

[2]. Pursuant to the lease agreement the defendant had occupied the premises from the 1st of September 2016 to the end of October 2017, and the 'absconded', according to the plaintiff, from the premises during or about October 2017. The plaintiff's claim is for an amount of R339 426.14, being in respect of arrear rentals and ancillary charges relating to the period of occupation up to and including October 2017, when the defendant vacated the premises. The plaintiff claims a further sum of R140 518.82, representing basic rental for a period of a further two months during which it had been unable to re – let the premises. Although couched as a claim for a loss due to the defendant's breach of the lease agreement, the claim is in fact also for rental payable by the defendant to the plaintiff in terms of the lease agreement, which was to endure until the 31st of August 2018.

[3]. The plaintiff's breakdown of the amount of R339 426.14 indicates that this amount in fact represents short payments on the rental and ancillary charges from about January 2017, and the balance due accumulated on a monthly basis to the total due of R339 426.14 at the end of October 2017. It is in fact the plaintiff's case that from about June 2017 the defendant, in breach of the lease agreement, failed to effect payment of the ancillary charges payable in terms of the lease agreement in addition to the basic rental.

[4]. In its affidavit resisting summary judgment the defendant raises a point *in limine* to the effect that the deponent to the affidavit in support of the application for summary judgment has not provided his Estate Agent's Certificate, and

therefore, so the defendant submits, had failed to prove his mandate. There is no merit in this legal point, and same stands to be rejected out of hand.

[5]. The defendant also opposes the application for summary judgment on the basis that it disputes the amounts charged by the plaintiff in respect of the ancillary charges. In that regard, the defendant's main contention relates to the charges for the consumption of water. It had on numerous occasions taken issue with these charges and pointed out to the plaintiff that same is excessive which may very well have resulted from a leak.

[6]. The defendant also denies that it absconded from the leased premises. The plaintiff in fact at some point during October 2017 had locked them out of the premises, thus breaching the contract, which caused the defendant to vacate the premises.

[7]. The defendant's defence to the plaintiff's claim is therefore twofold. It disputes that the amount claimed in respect of ancillary charges is the correct amount. It also denies that it is liable to plaintiff for further rental payable in terms of the lease agreement. It is in fact the plaintiff, so it is alleged by the defendant, who breached the lease agreement, by unlawfully and by self – help having them evicted from the premises. This defences, in my view, are not so far – fetched as to be rejected out of hand. If anything, it seems to be supported by the fact that the defendant maintained payment of the basic rental on a monthly basis up to shortly before they vacated the premises, which seems to confirm their version that they had a genuine dispute relative to the consumption of municipal services.

[8]. Uniform Rule of Court 32(3)(b) requires the defendant to satisfy the court by affidavit that he has a bona fide defence to the plaintiff's claim. 'Satisfy' does not mean 'prove'. What the rule requires is that the defendant sets out in his affidavit facts which, if proved at the trial, will constitute an answer to the

plaintiff's claim. If the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his 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.

[9]. If the affidavit lacks particularity regarding the material facts relied upon and falls short of the requirements of the subrule, the court may not be able to assess the defendant's *bona fides* but it may still, in an appropriate case, exercise its discretion in favour of the defendant if there is doubt whether the plaintiff's case is unanswerable.

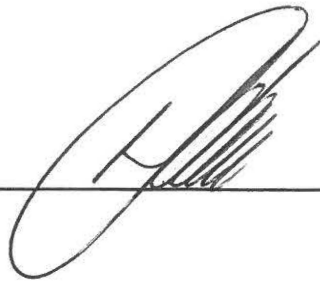
[10]. In terms of subrule (5): 'The court may enter summary judgment.' The word 'may' in this subrule confers a discretion on the court, so that even if the defendant's affidavit does not measure up fully to the requirements of subrule (3)(b), the court may nevertheless refuse to grant summary judgment if it thinks fit. The discretion, clearly, is not to be exercised capriciously, so as to deprive a plaintiff of summary judgment when he ought to have that relief.

[11]. Applying these principles *in casu*, I am satisfied that in its resisting affidavit the defendant has demonstrated a *bona fide* defence on the merits of the plaintiff's claim, and it is accordingly entitled to leave to defend.

Order

Accordingly, I make the following order:-

1. The defendant is granted leave to defend the action.
2. The cost of the application for summary judgment shall be in the cause of the main action.



L ADAMS*Judge of the High Court
Gauteng Local Division, Johannesburg*

HEARD ON:	27 th February 2018
JUDGMENT DATE:	2 nd March 2018
FOR THE PLAINTIFF:	Adv D Strydom
INSTRUCTED BY:	Harris Hadar Incorporated
FOR THE SECOND DEFENDANT:	Adv
INSTRUCTED BY:	De Vries Attorneys