



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: 2017/0023133 ⁴⁵¹⁰²

In the matter between:

PETERSON, ISAK SMOLLY N O

First Plaintiff

GUMEDE, NYANGENI SAUL N O

Second Plaintiff

ASMAL, RIDWAAN N O

Third Plaintiff

AZIZOLLAHOFF, BRAIN HILTON N O

Fourth Plaintiff

In their capacities as Trustees of the

DIPULA PROPERTY INVESTMENT TRUST

and

UMKHOME TOURISM TRANSPORT CC

Defendant

JUDGMENT

ADAMS J:

[1]. This is an application for summary judgment against the defendant by the plaintiffs, in their representative capacities as Trustees for the time being of the Dipula Property Investment Trust ('the Trust').

[2]. The plaintiffs' cause of action is based on a written commercial lease agreement ('the lease agreement') concluded between the parties on the 16th May 2016 in terms of which lease agreement the defendant let from the plaintiffs premises in Florida for a period of three years from the 1st of March 2016 to the 28th of February 2019. The monthly rental payable by the defendant to the plaintiffs, as well as the ancillary charges, were agreed upon in the written lease agreement. On the 11th November 2016 an Addendum was concluded by the parties.

[3]. Pursuant to the lease agreement the defendant has occupied the premises from the 1st of March 2016 to date. The plaintiff's claim is for an amount of R268 630.85, being in respect of arrear rentals and ancillary charges relating to the period of occupation up to and including November 2017, as well as for an amount of R653 485.81, being damages arising from the defendant's alleged breach of contract. The plaintiffs also claim cancellation of the lease agreement and an ejectment of the defendant.

[4]. At the hearing of the application for summary judgment, I was advised by Mr Dobie, Counsel for the plaintiffs, that they were only proceeding with the application for summary judgment for the cancellation of the lease. The defendant, so I was advised, should be granted leave to defend the action relating to the claims for a monetary judgment.

[5]. The plaintiffs' claim for cancellation is based on their claim that as and at the end of November 2017 the defendant was in breach of the lease in that it was in arrears with the rental and ancillary charges in an amount of R268 630.85. The first issue which I am therefore required to adjudicate is whether the defendants were in fact in arrears with their monthly rental at the relevant time.

[6]. The plaintiffs' breakdown of the amount of R268 630.85 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 R268 630.85 at the end of November 2017. It is in fact the plaintiff's case that from about January 2017 the defendant, in breach of the lease agreement, failed to effect payment of the full amount due in respect of rental and ancillary charges payable in terms of the lease agreement.

[7]. The defendant opposes the application for summary judgment on the basis that it disputes the amounts charged by the plaintiffs in respect of the rental payable as well as the ancillary charges payable. In that regard, the defendant's main contention relates to the square meters leased. The defendant alleges that it is being charged rental and ancillary charges for 487.31 square meters, when in fact and in truth it only occupies 416.64 square meters. This was the case, so the defendant claims, from the inception of the lease, which means that it has been overcharged on a monthly basis, which means that if the recalculation is done, based on the correct square meters, it may well be that the defendant is not in arrears with the rental. The defendant alleges that it has on numerous occasions taken issue with these charges and pointed out to the plaintiffs that they base their rental on incorrect facts.

[8]. This defence, in my view, is 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 rental on a monthly basis, albeit that they paid less

than what the plaintiff invoiced them for, up to November 2017. The point is that these issues, in particular a calculation based on the correct square meters occupied, are issues which I cannot adjudicate on at this stage of the proceedings.

[9]. Uniform Rule of Court 32(3)(b) requires the defendant to satisfy the court by affidavit that they have a bona fide defence to the plaintiff's claim. 'Satisfy' does not mean 'prove'. What the rule requires is that the defendants set out in their 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.

[10]. While it is not incumbent upon the defendants to formulate their opposition to the summary judgment application with the precision that would be required in a plea, none the less when they advance their contentions in resistance to the plaintiff's claim they must do so with a sufficient degree of clarity to enable the court to ascertain whether they have deposed to a defence which, if proved at the trial, would constitute a good defence to the action. Affidavits in summary judgment proceedings are customarily treated with a certain degree of indulgence, and even a tersely stated defence may be a sufficient indication of a *bona fide* defence for the purpose of the rule. If, however, the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of *bona fides*.

[11]. 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.

[12]. All that the court enquires, in deciding whether the defendants have set out a *bona fide* defence, is: (a) whether the defendants have disclosed the nature and grounds of their defence; and (b) whether on the facts so disclosed the defendants appear to have, as to either the whole or part of the claim, a defence which is *bona fide* and good in law.

[13]. The defendant is not at this stage required to persuade the court of the correctness of the facts stated by them or, where the facts are disputed, that there is a preponderance of probabilities in their favour, nor does the court at this stage endeavour to weigh or decide disputed factual issues or to determine whether or not there is a balance of probabilities in favour of the one party or another. The court merely considers whether the facts alleged by the defendants constitute a good defence in law and whether that defence appears to be *bona fide*. In order to enable the court to do this, the court must be apprised of the facts upon which the defendants rely with sufficient particularity and completeness as to be able to hold that if these statements of fact are found at the trial to be correct, judgment should be given for the defendant.

[14]. 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.

[1]. 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 plaintiffs' 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 J G Dobie
INSTRUCTED BY:	Reaan Swanepoel Attorneys
FOR THE DEFENDANT:	Adv
INSTRUCTED BY:	B H Taula Attorneys