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**IN THE HIGH COURT OF SOUTH AFRICA,
(GAUTENG DIVISION, JOHANNESBURG)**

Case No.: 53599/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.NO

09/11/2022

In the matter between:

HPROP (PTY) LTD

Applicant/Plaintiff

and

VENN AND MULLER INCORPORATED

Respondent/Defendant

**JUDGMENT HANDED DOWN ELECTRONICALLY BY CIRCULATION
TO THE PARTIES AND/OR LEGAL REPRESENTATIVES BY EMAIL, AND
BY UPLOADING ONTO CASELINES**

Judgment is deemed to be handed down at 10h00 on 09 November 2022

JUDGMENT

CORAM: H CONSTANTINIDES AJ

1. This is an application for summary judgment wherein the Applicant/Plaintiff seeks an order against the Respondent on the following terms:

- (a) Payment of the amount R281 087,23;
- (b) Payment of interest on the aforesaid amount calculated at the rate of 7% per annum, from date of demand until date of payment;
- (c) Costs of suit on the attorney and client scale.
- (d) Further and/or alternative relief.

2. This application is opposed by the Respondent/Defendant.

3. In the Particulars of Claim the cause of action is ostensibly based on a tacit Agreement of Lease allegedly concluded between the Applicant and the Respondent on or about the 10th May 2019.

4. The Plaintiff is claiming payment of outstanding rental, ancillary charges due, owing and payable by the Defendant in respect of the premises.

5. The Plaintiff in its Particulars of Claim sets out that Voorslag Ontwikkelings Korporasie (Pty) Limited("VOK") on or about the 1st March 2018 and at Pretoria, duly represented by I.S. Badenhorst, and who was previously the owner of the premises, and the Defendant Venn and Muller Partnership ("the Partnership") duly represented by Gert Johannes Cloete and Joseph Murray Kotze, who are both "Directors" of the partnership, entered into a written Lease Agreement ("the Lease") in terms of which VOK let the premises to the partnership.

6. It is was a material express, alternatively tacit, further alternatively implied term of the lease that:

"10.1 In terms of clause 3 of the lease, the lease would commence on 1 March 2018 and would terminate on 28 February 2021 ('the initial period');"

10.2 In terms of clause 4 of the lease, the monthly rental payable by the partnership which would escalate at 6% per annum, would be the following:

10.2.1 *rental:* *R13 834,80;*

10.2.2 *operating costs:* *R5 920,20;*

10.2.3 *parking base:* *R1 103,85¹*

7. According to the Applicant, on the 1st August 2018 the partnership was terminated and ceased to exist. After the termination date of the partnership, VOK represented by I S Badenhorst and the Defendant represented by Gert Johannes Cloete and/or Joseph Murray Kotze entered into a Lease Agreement in respect of the premises ("the first tacit Agreement").

8. In terms of the alleged first tacit Agreement, after the termination date the partnership the Defendant continued to occupy and lease the premises from VOK on the same terms and conditions as reflected in the Lease. VOK continued to invoice and charge the Defendant for its occupation of the premises in accordance with the terms and conditions reflected in the lease.

9. The Defendant made various payments of the monthly rentals and ancillary charges to VOK as per the terms and conditions reflected in the Lease.

10. On the 10th May 2019 the Plaintiff took transfer of the premises and became the registered owner thereof and the Plaintiff alleges that the Plaintiff and the Defendant entered into a Tacit Lease Agreement in respect of the premises ("the second tacit agreement").

11. According to the Applicant, the circumstances in respect of the second Tacit Lease Agreement were as follows:

11.1. After the Plaintiff became the registered owner of the premises, the Defendant continued to occupy and lease the premises from the Plaintiff on the same terms and conditions as reflected in the Lease;

¹ 010 – 5 CaseLines
Para. 10 to 10.3 of the Application for Summary Judgment.

11.2. The Plaintiff continued to invoice and charge the Defendant for its occupation of the premises in accordance with the terms and conditions reflected in the Lease;

11.3. The Defendant made various payments of the monthly rentals and ancillary charges to the Plaintiff after the Plaintiff became the registered owner of the premises as per the Terms and Conditions reflected in the Lease.²

12. The Applicant states that subsequent to the initial period referred to in the Lease, the Defendant remained in occupation of the premises and continued to lease the premises **on a month to month basis on the same conditions and terms of the Second Tacit Agreement which terms and conditions are reflected in the Lease.** (Emphasis added)

13. The Plaintiff stated that the Defendant failed to pay rental, parking rent, electricity, water, effluent and operating costs due in terms of the Lease and as at the 1st November 2021 was indebted to the Plaintiff in the amount of R281 087.23 and attaches a statement marked “C” reflecting the Defendant’s alleged indebtedness to the Particulars of Claim.

14. The Plaintiff alleges that the Statement which is annexed to the Particulars of Claim is incorrect in the following respects:

14.1. The statement was addressed to the partnership and not the Defendant;

14.2. The Plaintiff charged the Defendant a letter of demand fee in the amount of R339.25 as well as storage rental charges which totals R6775.12.

15. The Plaintiff submits that the aforesaid incorrect amounts have already been deducted from the amount of R288 201.60 which is reflected in the statement.

THE DEFENDANT’S POINTS IN LIMINE

² Paragraphs 13.1 to 15.3 of the Affidavit for Summary Judgment – **010-7 CaseLines**

16. The Defendant has pleaded that this Court does not have jurisdiction to entertain this action for summary judgment proceedings due to the fact that the alleged oral agreement was entered into in Pretoria and the Defendant's place of business as well as his *domicile* is in Pretoria.

17. The aforesaid objection is unsustainable due to the fact that the Gauteng Division, Johannesburg has concurrent jurisdiction with the Gauteng Division, Pretoria. This has been confirmed in the Government Gazette Notice dated the 15th January 2016 published in GG39601. Therefore the aforesaid point *in limine* stands to fail

18. The second point *in limine* which the Defendant takes is the fact that the Deponent to the Affidavit for Summary Judgment is not able to swear positively to the facts alleged in the Founding Affidavit as there is no indication as to whether he was the authorised representative of the Plaintiff at the time that the alleged tacit Agreement was concluded.

19. Nicholas Obel ("Obel"), the Deponent to the Affidavit in support of the Summary Judgment³Application states the following:

"1. I am a major businessman and a Director of Big Bell Investments (Pty) Ltd t/a Citynet ("Citynet") a private company ... carrying on business and having its registered address.. ...

2. Citynet are the managing agents of the premises situated at Unit [...], [...] C [...] Avenue, W [...] H [...], Pretoria ('the premises'). I am authorised to institute proceedings on behalf of the plaintiff as appears from the resolution annexed hereto marked "SJ1"."

20. Obel has stated that he has in his possession and under his control all the Plaintiff's records and other documents relevant to the subject matter of the application and he has **access and insight into those records and documentation on a continuous basis.**" (emphasis added)

³ Affidavit in support of Summary Judgment, paragraphs 1 and 2, page 010-3 CaseLines.

21. The Defendant states that Obel cannot possibly swear positively to the facts alleged in the Founding Affidavit as the Applicant relies on a tacit agreement, and Obel does not allege that he represented the Applicant when this Agreement was concluded or negotiated. Furthermore, it is not clear whether Obel as Managing Agent managed the Applicant when the Agreement was concluded.

22. The Defendant's aforesaid point in limine raises a valid dispute due to the Defendant's plea that an oral agreement and not a tacit agreement was concluded between the parties. There is no indication where Obel obtained "personal knowledge" of the information relating to the three pleaded versions of the rental agreements. Therefore, it cannot be accurate that Obel has all the information pertaining to the cause of action available to him when he deposed to the Affidavit in support of the Application for Summary Judgment. Obel does not provide the court with material information and/or facts to enable the court to ascertain how he has personal knowledge to enable him to swear positively to the facts of this matter in order to enable the court to ascertain whether he indeed has such knowledge more particularly relating to the alleged tacit agreements and or leases which had been entered into previously and there is no date as to when Obel was appointed as managing agent for the Applicant..

23. The third objection which the Defendant has is that the nature of the Plaintiff's claim is not susceptible to summary judgment as it is not based on a liquid document or for a liquidated amount in money as annexure "C" is not accurate in many respects which is admitted by the Plaintiff.

24. The Defendant denies that a tacit agreement was concluded between the parties and submits that an oral Agreement was concluded in Pretoria for a fixed rental.

25. The Defendant denies the terms of the alleged tacit agreement. The Applicant has taken the point that the Respondent did not plead the terms of the oral agreement. The aforesaid argument is countered by the Respondent stating that the Applicant had its legal remedies in terms of Uniform Rule 23(1), and by serving a Notice of Exception if they deem this necessary.

26. The Respondent is denying that it is indebted to the Applicant.⁴

27. The fact that the Plaintiff on its own accord admits that the statement is incorrect and attempts to rectify it in the particulars of claim, application for summary judgment and the further heads of argument thereby renders the speedy ascertainment of a liquidated amount questionable.

28. The Defendant alerted the Court to the fact that there was a waiver clause in the written Lease Agreement between VOK and Venn and Muller Partnership dated the 1st March 2018. which stipulates as follows:

“20. Waiver or concession

*Any waiver or concession that may be made by the LESSOR to the LESSEE will not prejudice the rights of the LESSOR in terms of this lease agreement. Especially the acceptance of rental or a reduced amount thereof will not be regarded as a waiver of the LESSOR of his rights in terms of this lease agreement. This lease agreement represents the total agreement between the parties and no guarantees, promises, terms or amendments of any nature whatsoever will be binding upon the LESSOR, unless in writing and signed by both parties thereto”.*⁵

29. Clause 35(2) states:

*“No extensions of time, or waiver, or relaxation of any of the provisions or terms of this lease agreement shall operate as an estoppels against any party in respect of such party’s rights hereunder, nor shall it operate so as to preclude such a party from thereafter exercising its rights strictly in accordance with this lease agreement.”*⁶

30. The Applicant’s Counsel in argument referred the Court to Clause 22 of the Written Lease Agreement which related to the transfer of shares and change in

⁴ The Rules of Summary Judgment

⁵ 015-52 Caselines

⁶ 015-58

partnership wherein the Lessee required the Lessor's written permission to change to an incorporated company and in the event of change of partnerships, the partners remained jointly and severally liable in terms of the Agreement to the Lessor.

31. The Respondent's Counsel countered the aforesaid by stating that no formalities in clause 22 had been triggered, nor was the aforesaid pleaded by the Applicant.

32. The Applicant objected to the fact that the Respondent's Counsel pointed out the waiver clause and that the formalities of clause 22 of the Written Agreement relating to transfer of shares and change of partnership and the new entity had not been complied with. The Applicant argued that the aforesaid defence by the Respondent should have been raised in its Plea and in the Affidavit Opposing Summary Judgment to enable the Applicant to deal with same fully in the Summary Judgment application.

33. Due to the aforesaid, the Court afforded the parties on the request of the Applicant's Counsel, an opportunity to file Supplementary Heads of Argument.

34. The Applicant in the further heads of argument stated that, if the Court finds that the charges that were placed in issue by the Respondent relating to the further tacit terms of the Agreement do not include VAT, operating costs and parking bay rentals, and that if the Respondent is afforded the protection of clause 20 of the Lease which requires the aforesaid charges to be in writing and signed by the parties, then the Applicant once again alters the amount claimed and states that the Court can deduct the water and effluent charges if the Court finds that these are not due, which is a deduction of R14 032.62 from the R281 087.23 and grant judgment in the amount of R267 054.61.

35. In paragraph 4.3 of the Amended Particulars of Claim it is alleged that it was a tacit term of the Lease that the Partnership would be liable for VAT on rental, operating costs and rental for parking bay rental and effluent and water consumption charges in respect of the premises.

36. Clause 20 of the Lease states that the Lease Agreement represents the total agreement between the parties and no guarantees, promises, terms or amendments of any nature whatsoever will be binding upon the Lessor unless in writing and signed by both parties.

37. The Respondent's supplementary Heads of Argument states :

*"3.3 It is therefore clear that the alleged further tacit term of the agreement could not have been valid and binding, and Applicant's version of the terms of the written agreement is disputable. This is especially important as it is Applicant's case that exactly the same terms applied in the alleged second tacit agreement."*⁷

38. The Applicant's supplementary Heads of Argument counters the tacit relocation of the written Lease Agreement and states that:

"5. The parties tacitly renewed the lease agreement on a month- to month basis on the same terms as the written lease. This is by no means a new line of argument, which is supposedly doomed to fail, as suggested in the Respondent's supplementary Heads of Argument. The Respondent has not had proper regard to the Particulars of Claim, as amended in which the Applicant has specifically pleaded the renewal of the lease on a month to month basis at paragraph 10 and 11 of the Particulars of Claim which reads of follows:

'10. The circumstances in respect of which the second tacit lease agreement came into existence are as follows:

10.1 After the Plaintiff became the registered owner of the premises the Defendant continued to occupy and lease the premises from the Plaintiff on the same terms and conditions as reflected in the lease.

⁷ Respondent's Supplementary Heads of Argument.

10.2 *The Plaintiff continued to invoice and charge the Defendant for its occupation of the premises as per the terms and conditions of the lease.*

10.3 *The Defendant made various payments of the monthly rentals and ancillary charges to the Plaintiff after the Plaintiff became the registered owner of the premises as per the terms and conditions reflected in the lease.*

11. *Subsequent to the initial period referred to in the lease, the Defendant remained in occupation of the premises and continued to lease the premises on a month to month basis, and on the same terms and conditions as a second tacit agreement which terms and conditions are reflected in the lease.*"

39. The Applicant's Counsel submits in her supplementary Heads of Argument that after termination of the partnership, VOK and the Respondent entered into a tacit agreement to occupy the premises on the same terms and conditions as reflected in the written lease. This is allegedly supported by the conduct of the parties as pleaded in the Particulars of Claim and the alleged subsequent payments made by the Respondent in respect of the Lease in the Debtor/Tenant Transaction Statement.

THE LAW

40. Navsa JA in **Joob Joob Investments (Pty) Ltd v Stock Mavundla Zek Joint Venture**:⁸

"[32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or 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 the first

⁸ 2009 (5) SA 1 (SCA) at par [32] and [33].

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.

[33] Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett J in the Maharaj cast at 425G-426E.

The purpose of a summary judgment application is to allow the court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine triable issue, thereby conserving scarce judicial resources and improving access to justice. Once an application for summary judgment is brought, the applicant obtains a substantive right for that application to be heard, and, bearing in mind the purpose of summary judgment, that hearing should be as soon as possible. That right is protected under section 34 of the Constitution."

CONCLUSION:

41. The Court is satisfied that one cannot readily ascertain the amount that is allegedly due and owing by the Respondent to the Applicant. Due to the fact that there are conflicting versions relating to the rental amount and the fact that there are errors in the calculations of the amounts that the Applicant claims. Furthermore, the

Plaintiff was under a duty to prove unequivocal conduct that establishes on a balance of probabilities that the parties intended to, and did in fact contract on the terms alleged. It must be proved that there was agreement.⁹The Plaintiff has not made out a proper case for the relief it seeks in the summary judgment application.

42. The Respondent has placed both the form of the Lease Agreement and its terms into dispute and the Respondent claims that *an oral agreement* came into being **which is supported by a letter from the Applicant's Attorneys dated the 20th May 2021 which is annexure "D" to the Answering Affidavit which refers to an "oral agreement" and not a tacit agreement between the Lessor and the Defendant.** (Emphasis added)

43. The disputes relating to amounts allegedly due and owing by the Respondent and the form and terms of the alleged tacit and/or oral agreements that were subsequently concluded between the parties are triable issues that would require to be fully ventilated in a trial court between the parties.

The following order is made :

1. The application for summary judgment is refused;
2. Leave to defend is granted to the Defendant on the Plaintiff's claim for payment of the sum of R281 087,23; including the payment of interest thereon;
3. Costs are to be costs in the cause.

H CONSTANTINIDES A J

Acting Judge of High Court

Gauteng Division

JOHANNESBURG

⁹ Standard Bank of SA Ltd v ocean Commodities Inc 1983 (1) SA 276 (A) at 292
Amlers precedents of pleadings pp. 94-95[6th edition]

Matter heard on: 27 October 2022

Judgment handed down on: 9 November 2022

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