

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2021/38261

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

B.C. WANLESS

22 MAY 2023

In the matter between:

FRENCH CLUB (PTY) LTD

Plaintiff

and

CAROLINE MASHEGO T/A PARK STATION HOTEL

Defendant

Neutral Citation: *French Club (Pty) Ltd v Caroline Mashego t/a Park Station Hotel* (Case No: 2021/38261) [2023] ZAGPJHC 532 (09 May 2023).

JUDGMENT

WANLESS AJ

Introduction

- [1] This is an application for Summary Judgment by FRENCH CLUB (PTY) LIMITED ("the Plaintiff") against one CAROLINE MASHEGO trading as PARK STATION HOTEL ("the Defendant"). The Plaintiff seeks the following relief:

- 1.1 Payment in the sum of R2 452 516.94;
 - 1.2 Interest on the aforesaid amount at the rate of 7% per annum from service of the summons to date of final payment; and
 - 1.3 Costs on the attorney and client scale.
- [2] More particularly the Plaintiff seeks Summary Judgment in terms of subrule 32(1)(b) for a liquidated amount in money arising from the breach of a rental agreement ("*the agreement*") entered into between the Plaintiff and the Defendant in terms of which the Plaintiff claims rental and other ancillary charges.

The Plaintiff's cause of action as set out in the Plaintiff's Particulars of Claim read with the Plaintiff's Affidavit in Support of Summary Judgment in terms of subrule 32(2)(a)

- [3] On or about the 9th of November 2018 and at or near Pretoria the Plaintiff and the Defendant entered into the agreement in terms of which the Plaintiff leased Constantia Court Commercial and Groote Schuur ("*the property*") to the Defendant.
- [4] The express, *alternatively* implied, *alternatively* tacit, material terms of the agreement were, *inter alia*, the following:
- 4.1 In terms of clause 1.2 of the agreement the property leased by the Plaintiff to the Defendant was situated in buildings known as Constantia Court Commercial and Groote Schuur.
 - 4.2 In terms of clause of 3.1 of the agreement the lease would commence on 1 November 2018 and terminate on 31 October 2023.
 - 4.3 In terms of clause 4 of the agreement the rent payable by the Defendant would, subject to the provisions of Annexure "A",
 - 4.3.1 For the period 1 November 2018 to 31 October 2019 be R100 323.09 including VAT;
 - 4.3.2 For the period 1 November 2019 to 31 October 2020 be R108 348.93 including VAT;
 - 4.3.3 For the period 1 November 2020 to 31 October 2021 be R117 016.83 including VAT;
 - 4.3.4 For the period 1 November 2021 to 31 October 2022 be R126 378.18 including VAT; and

4.3.5 For the period 1 November 2022 to 31 October 2023 be R136 488.43 including VAT.

- [5] In terms of clause 3.1 of Annexure "A" to the agreement the monthly rental would be payable monthly in advance without deduction on the first day of each calendar month.
- [6] In terms of clause 4 of Annexure "A" to the agreement the Defendant would be liable for and would pay on demand for, any charges arising directly or indirectly out of its use of electricity, gas and water in respect of the property. The Defendant's liability for these charges would be in accordance with separate sub-meters which the Plaintiff would be entitled to install.
- [7] In terms of clause 9 of the agreement the refuse and sewerage payable by the Defendant would be based on the Defendant's pro-rata share of the actual charges being levied by the local authority related to the above services and would further be subject to adjustment from time to time as per clause 13 of Annexure "A" to the agreement.
- [8] In terms of clause 12 of the agreement the property was leased to the Defendant for the purpose of being used for a hotel.
- [9] In terms of clause 18 of the agreement, it was a suspensive condition of the agreement that the Plaintiff agreed to the waiver of R691 690.00 in respect of payment for work done in respect of maintenance in the past, subject to a self-maintaining lease for the Defendant to such an extent that all maintenance and upgrades were to be done by the Defendant for the cost of the Defendant, subject to the written approval of the Plaintiff.
- [10] In terms of clause 2 of Annexure "A" to the agreement, should the Defendant, upon taking possession of the property, discover that the property or any of any appurtenances or contents were in a defective state of repair, would within seven days from the date of such possession notify the Plaintiff's agents of the details of any such defects and the failure on the part of the Defendant to do so would be deemed to be an acknowledgement on the part of the Defendant that the property was in a good and proper state of repair and condition.
- [11] In terms of clauses 7.1 to 7.1.2 of Annexure "A" to the agreement the Defendant would not under any circumstances have any claim or right of action whatsoever against the Plaintiff for damages, loss, or otherwise, nor would the Defendant be entitled to withhold or defer payment of rent, by reason of:

- 11.1 The property being in a defective condition or falling in disrepair or any particular repairs not being affected by the Plaintiff (clause 7.1.1); or
- 11.2 Any failure or interruption in the lift service; the supply of water, gas, electricity, heating, telephone, Post Office, air conditioning; the cleaning services (if any), or any other amenities, in or to the property, whether such failure or interruption arose from the negligence of the Plaintiff, its servants, *vis major causes fortuitus* or any other cause whatsoever (clause 7.1.2).
- [12] In terms of clause 11.1 of Annexure "A" to the agreement the Defendant acknowledged that the property, including all sewerage and drainage systems, were in a thoroughly good state of repair and would be the responsibility of the Defendant at her own cost and expense to maintain the interior of the property in good order and condition.
- [13] In terms of clause 12 of schedule "A" to the agreement the Plaintiff would not be responsible for any damage to the property of the Defendant by reason of any defects in the property or any force whatsoever.
- [14] In terms of clause 23.1 of schedule "A" to the agreement, should the defendant fail to pay any amounts due in terms of the lease on its due date or commit any other breach of any condition of the agreement and fail to remedy the breach within a period of seven days after the giving of written notice to that effect to it by the Plaintiff, then the Plaintiff would be entitled to cancel the lease.
- [15] In terms of clause 23.4 of schedule "A" to the agreement, in the event of the Plaintiff instructing its attorneys to take measures for the enforcement of any of its rights under the agreement the Defendant would pay to the Plaintiff legal costs on the attorney and own basis as shall be lawfully charged by such attorneys to the Plaintiff on demand made therefore by the Plaintiff.
- [16] On or about the 9th of November 2018 and at Pretoria the Plaintiff and the Defendant entered into a written addendum to the agreement ("*the addendum*").
- [17] The material term of the addendum was that the monthly rental for the period 1 November 2018 to 31 October 2020 would be amended to R60 100.00 excluding VAT.
- [18] The agreement did not correctly reflect the agreement between the Plaintiff and the Defendant insofar as it stipulates that the property is situated at 31 Wanderers Street, Johannesburg, whereas the property is situated at 2 Koch Street, Corner Wanderer Street, Joubert Park, Johannesburg.
- [19] The addendum is also incorrect and does not reflect the agreement in respect of the addendum between the parties insofar as it relates to an agreement concluded on 8

November 2018 whereas the correct agreement to be referred to in the addendum is dated 9 November 2018.

- [20] The incorrect recordals of the agreement and the addendum thereto was occasioned by the common error of the parties and the parties signed the lease and the addendum thereto in the *bona fide* but mistaken belief that it recorded the true intention of the parties. The Plaintiff has claimed rectification of the agreement and the addendum in respect of the foregoing in both its Particulars of Claim and Summary Judgment application.

Common cause facts

- [21] Arising from the Plaintiff's Particulars of Claim; the Defendant's Plea; the Plaintiff's Affidavit in Support of Summary Judgment and the Defendant's Affidavit Resisting Summary Judgment in terms of subrule 32(3)(b) the facts which are either common cause or cannot seriously be disputed in this matter are the following:

- 21.1 The agreement was entered into between the parties on 9 November 2018.
- 21.2 The period of the agreement was from 1 November 2018 to 23 October 2023. Further, the terms thereof and the monthly amounts payable, without deduction, to the Plaintiff in terms of the agreement are not in dispute.
- 21.3 The incorrect recordals as alluded to by the Plaintiff in its claim do not reflect the common intention of the parties. Moreover, at the hearing of the application this Court was advised that the claim for rectification was no longer opposed by the Defendant.
- 21.4 The amount of R691 690.00 would be waived by the Plaintiff subject to the lease being a self-maintaining lease and subject to the Defendant having affected internal repairs to the property, at her own cost.
- 21.5 The addendum to the lease in respect of the amendment to the monthly rental, being the period 1 November 2018 to 31 October 2020.
- 21.6 The Defendant's refusal to pay rentals and ancillary charges allegedly due to the plaintiff.

The grounds of opposition to the Plaintiff's claim as raised by the Defendant in her Plea and in her Affidavit Resisting Summary Judgment in terms of subrule 32(3)(b)

- [22] The Defendant raised a plethora of defences resisting the Plaintiff's claim for Summary Judgment (to the best of this Court's ability, approximately 12). These were in the form

of Special Pleas; points *in limine* and defences. Of these, two (2) were abandoned during the course of argument by the Defendant's attorney, namely the point taken in respect of the rectification sought by the Plaintiff (dealt with above) and the point raised by the Defendant *in limine* that the Summary Judgment application should be dismissed since the joinder application instituted by the Plaintiff in this court (but under a different case number) has not been finalised.

[23] This Court has carefully considered each of the remaining grounds of opposition raised by the Defendant to the Plaintiff's application for Summary Judgment in light of the applicable principles of law in respect of Summary Judgment (which are fairly trite and which will be dealt with, where applicable, later in this judgment). Having done so, it is not the intention of this Court to burden this judgment unnecessarily by dealing with each and every ground of opposition raised by the Defendant in the Defendant's Plea and/or Affidavit Resisting Summary Judgment. In this regard, it may be accepted that it is abundantly clear that the majority of defences or grounds of opposition raised, do not raise a triable issue or *bona fide* defence to the Plaintiff's claim in respect of rentals and ancillary charges in terms of the agreement. Arising therefrom, this judgment will concentrate on those grounds of opposition or defences which may possibly have some merit in assisting the Defendant to avoid having Summary Judgment granted against her and give judgment in respect thereof.

[24] For the record, it is worthy to note, at this stage, that the defences raised by the Defendant which clearly have no merit but yet which the Defendant insisted in persisting with, are, *inter alia*, the following:

24.1 The special plea of *locus standi*;

24.2 Whether or not the Plaintiff is registered as a Value Added Tax ("VAT") vendor and has paid the VAT recovered from the Defendant to "SARS";

24.3 The condition of the property and the Defendant's purported set-off of costs in respect thereof against amounts due by her to the Plaintiff;

24.4 The Defendant is excused from making payments to the plaintiff in terms of the agreement as a result of the COVID pandemic;

24.5 That the affidavit filed by the Plaintiff in support of Summary Judgment does not comply with the provisions of subrule 32(2)(b).

[25] This Court then turns to consider the remaining defences raised by the Defendant to the Plaintiff's application for Summary Judgment.

Has the Defendant set out a *bona fide* defence to the action and fully disclosed the nature and grounds of that defence and the material facts relied upon therefor within the proper meaning thereof and as provided for in terms of subrule 32(3)(b)?

- [26] This question, as postulated above, must be answered in terms of the correct application of the accepted legal principles in relation to Summary Judgment procedure in our law. Ultimately, as has been stated in a number of decisions since *Maharaj v Barclay's National Bank Ltd*¹ the remedy of Summary Judgment should be resorted to and accorded only where the Plaintiff can establish his claim clearly and the Defendant fails to set up a *bona fide* defence. Further, a court must be careful 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 it that he has a *bona fide* defence.²
- [27] It is also important to note that a court, in exercising its discretion whether to grant Summary Judgment or not, will generally not be disposed to grant Summary Judgment where, giving due consideration to the information before it, is not persuaded that the Plaintiff has an unanswerable case.³
- [28] As noted at the beginning of this judgment the Plaintiff seeks Summary Judgment in terms of subrule 32(1)(b) for a liquidated amount in money arising from the breach of the agreement by the Defendant. In its Particulars of Claim (amended twice prior to the institution of this application) the Plaintiff claimed a total amount of R2 665 713.54 being the alleged amount outstanding by the Defendant as at 1 July 2021 in respect of rental, electricity and refuse charges. This total amount was referred to in paragraph 14 of the amended Particulars of Claim following an incorporation of a schedule reflecting that amount as annexure "D" which is referred to in sub-paragraph 12.2. Subparagraph 14.1 of the amended Particulars of Claim deals broadly with evidence of electricity charges and incorporates annexure "E".
- [29] In the application for Summary Judgment the total amount claimed by the Plaintiff is reduced to the sum of R2 452 516.94. Whilst an explanation for this deduction was provided to the Court by the Plaintiff's Counsel at the hearing of the application, no such explanation appears in the Plaintiff's Affidavit in Support of the Application for Summary Judgment.
- [30] The Defendant avers that the Plaintiff has failed to bring its claim within the meaning of a claim for a liquidated amount in money and within the meaning thereof for the purposes of Summary Judgment in terms of subrule 32(1)(b). In doing so the

¹ *Maharaj v Barclay's National Bank Ltd* 1976 (1) SA 418 (A)

² *Erasmus: Superior Court Practice* at D1-383 ("*Erasmus*"); *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 227D-H; *Marsh v Standard Bank of SA Ltd* 2000 (4) SA 947 (W) at 950A-B

³ *Shepstone v Shepstone* 1974 (2) SA 462 (NPD).

Defendant raises a number of grounds of opposition or defences. These are, *inter alia*, the following:

- 30.1 It is not clear how the Plaintiff has calculated the electricity and refuse charges in respect of which it avers the Defendant is indebted to the Plaintiff in terms of the agreement;
- 30.2 Irregular debits were made to the Defendant's statement of account with the Plaintiff;
- 30.3 Defects to the property; and
- 30.4 The claim of the Plaintiff appears to incorporate charges from 2015 whilst it is common cause that the Plaintiff's cause of action commences from the 1st of November 2018.

[31] Broadly speaking the Defendant avers that the Plaintiff has failed and/or refused to:

- 31.1 Exclude amounts included in the accounts for periods outside of the contractual terms;
- 31.2 Restore credits lawfully agreed upon;
- 31.3 Reverse unjustified debits; and
- 31.4 Justify consumption accounts for electricity and water.

[32] In response to these defences the Plaintiff relied on the terms of the agreement and/or on the principle that the Defendant had failed to fully disclose the nature and grounds of these various defences (all relating to the fact that the claim of the Plaintiff was not for a liquidated amount in money) and the material facts relied upon therefor as required in terms of the provisions of subrule 32(3)(b).

Conclusion

[33] When deciding whether, in the exercise of its discretion, to grant Summary Judgment in favour of the Plaintiff and, more particularly, whether the claim of the Plaintiff is one for a liquidated amount in money, it is not the intention of this Court to burden this judgment by examining, in detail, each of the defences raised by the Defendant in respect thereof (as set out above). The delivery of this judgment has already been delayed, not by the complexity of the issues involved but rather by, *inter alia*, (a) the number of "sub-issues" raised by both parties and (b) the onerous workload imposed on both Judges and acting Judges in this Division. Instead, the approach shall be,

whilst not losing sight of the fact that it remains necessary for a Defendant in Summary Judgment proceedings to satisfy a Court that he/she/it has a *bona fide* defence to a Plaintiff's claim or, at least, raise a triable issue, it is also necessary for a Plaintiff to have a valid claim. In this case, a claim that falls within the provisions of subrule 32(1)(b).⁴

- [34] As noted in a footnote by the learned authors in *Erasmus*⁵ if from the defence as disclosed it appears to the court that proof of the claim may be protracted and difficult rather than prompt, that is a factor which must be taken into account in deciding whether or not the claim is liquidated.
- [35] The Plaintiff's claim is for a considerable amount of money and covers a period of not less than five years. In addition, the claim is not simply in respect of rentals but also includes ancillary charges in respect of electricity and refuse. Moreover, apart from the claim for rectification the amended Particulars of Claim (amended twice) include averments pertaining to the passing of a credit (without any reason therefor) and an additional credit allegedly passed in error for maintenance carried out by the Defendant. As set out earlier in this judgment the amount claimed in the Summary Judgment application is less than that claimed in the Particulars of Claim with no explanation therefor in the Affidavit in Support of Summary Judgment. Electricity charges for August 2020 to July 2021 are purportedly set out in Annexure "E". These are less than clear to this Court. A complicated formula as to how refuse charges were calculated is set out in the Affidavit in Support of Summary Judgment but no actual workings are presently before the Court in respect thereof.
- [36] Taking all of the foregoing into account, it cannot be said that the defences raised by the Defendant in relation to the amount owing to the Plaintiff in terms of the agreement are not *bona fide* or, at least, do not raise certain issues for trial. This is especially so in light of the lack of particularity in the Plaintiff's Particulars of Claim which is not assisted but only complicated by the contents of the Affidavit in Support of Summary Judgment. At the very best for the Plaintiff, proof of its claim will be protracted and difficult, rather than prompt. Whilst this Court listened patiently to submissions from both legal representatives, this matter must be decided on the application papers before it and not by facts extraneous to those application papers. In the premises, the Plaintiff's application for summary judgment must be dismissed.

Costs

- [37] It is trite that the issue of costs falls within the general discretion of the Court. That said, costs normally follow the result unless unusual circumstances exist. In this matter

⁴ *Edwards v Menezes* 1973 (1) SA 299 (NC) at 304-5; *Neves Builders & Decorators v De La Cour* 1985 (1) SA 540 (C) at 543C-544F; *Tredoux v Kellerman* 2010 (1) SA 160 (C) at 166G.

⁵ At footnote 4 at D1-391.

the Defendant raised an inordinate number of defences; points *in limine* and special pleas that had absolutely no prospects of success. It is true (as dealt with in this judgment) that the Defendant did abandon two of those “grounds of opposition” to the Plaintiff’s application for Summary Judgment. However, the Defendant persisted with the remainder thereof. By doing so the Defendant not only took up a considerable amount of this Court’s time during the course of argument but has burdened this Court with having to consider each of the aforesaid grounds of opposition in preparing this judgment. Whilst every litigant has the constitutional right of access to court, this cannot be condoned. In light thereof this Court, in the exercise of its discretion, is of the opinion that the costs of the Summary Judgment application should be reserved for the decision of the Court hearing the trial in this matter.

Order

[38] This Court makes the following order:

1. The application for Summary Judgment is dismissed;
2. The Defendant is given leave to defend the action under case number 2021/38261;
3. The costs of the Summary Judgment application are reserved for the decision of the Court hearing the trial under case number 2021/38261.


B.C. WANLESS

Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard:	17 January 2023
Ex Tempore:	09 May 2023
Transcript:	22 May 2023

Appearances

For Plaintiff:	V Vergano
Instructed by:	Joshua Apfel Attorneys

For Defendant:	T Pillay
Instructed by:	Pillay Thesigan Inc.