



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

Case No: 038375/2022

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

08/06/2023

DATE

SIGNATURE

In the matter between

THE MUNICIPAL EMPLOYEES' PENSION FUND

Applicant / Plaintiff

And

CHRISTO ELIOPOULOS

Respondent / Defendant

Neutral citation: *The Municipal Employees' Pension Fund v Christo Eliopoulos* (Case No: 038375/2022) [2023] ZAGPJHC 669 (08 June 2023)

JUDGMENT

PEARSE AJ:

AN OVERVIEW

1. An applicant lessor (MEPF) seeks summary judgment against a respondent lessee (Mr Eliopoulos) for confirmation of cancellation of a lease agreement, eviction of Mr Eliopoulos and all those who occupy the leased premises through or under him and payment of a sum of R10,365.94 plus interest and costs of suit on the attorney and own client scale.
2. The agreement relates to premises described as Shop 15, Bredell Square, Kempton Park, Gauteng, and situated at Erf 464, Farm Rietfontein No. 31, Bredell, Gauteng.
3. Whilst taking issue with the late delivery of that application and contesting interlocutory non-compliance and condonation applications, Mr Eliopoulos – inexplicably – has delivered no affidavit resisting summary judgment. The absence of an affidavit is a pivotal omission or oversight on his part because the pleaded defences paraphrased in paragraph 14 below are unconfirmed on oath and appear inconsistent with (at the least) Mr Eliopoulos' further letter of 18 February 2022 referred to in paragraph 11 below.

4. The absence of an opposing affidavit and the striking inconsistency in the factual versions put up by Mr Eliopoulos are not plausibly explained on the papers and thus undermine the genuineness of the pleaded defences. In what follows:

4.1. the parties' contentions in respect of the summary judgment, non-compliance and condonation applications are outlined in paragraphs 15 to 28 below; and

4.2. I decide the three applications, in reverse order, in paragraphs 33 to 58 below. For the reasons set out in this judgment, I consider that Mr Eliopoulos' non-compliance application should fail; whereas MEPF's condonation and summary judgment applications should succeed.

THE PROCEEDINGS

The conclusion, extension and termination of the agreement

5. The parties concluded a written agreement of lease in respect of the premises on 17 March 2016. In terms of clauses 4.6 and 4.7, the agreement would endure for one year commencing on 01 January 2016 but be subject to an option period of three years commencing on the expiry of the initial period. MEPF would be entitled to cancel the agreement if Mr Eliopoulos failed to pay the monthly rental or breached any other term or condition of the agreement and failed to remedy his breach within seven days of receipt of written notice requiring him to do so.

6. On 14 December 2017 the parties concluded a written “*renewal addendum*” to the agreement. The addendum records that Mr Eliopoulos “*has exercised the said right of renewal*” and would continue to lease the premises “*for the period: 01 January 2018 to 31 December 2020*”. Clause 6 provides that “*[a]ll the other terms and conditions of the existing AGREEMENT OF LEASE shall apply mutatis mutandis to this addendum except that there will be a further right of renewal for an option period of 3 years to be exercised 4 months before expiry date of this Addendum.*”
7. According to MEPF, the agreement:
 - 7.1. terminated by effluxion of time on 31 December 2020; but
 - 7.2. continued by tacit consensus of the parties on a month-to-month basis.
8. On Mr Eliopoulos’ pleaded version:
 - 8.1. the right of renewal referred to in paragraph 6 above was exercised by him on 06 November 2020; and
 - 8.2. the parties concluded a written second addendum extending the agreement for three years from 01 January 2021 to 31 December 2023.
9. On 02 February 2022 MEPF wrote to Mr Eliopoulos notifying him of its termination of the agreement with effect from 28 February 2022.

10. By email dated 08 February 2022, Mr Eliopoulos responded to MEPF in the following terms:

"Dear Board of Directors, can I please plead to you and ask for a second chance or can I ask what made you decide I am not worthy to be a tenant anymore.

I'm so sorry, I just have so many questions as to have I done anything wrong and you do not want to renew my lease agreement.

I have been a tenant for 6 years and am very happy. I was always up to date when Covid hit. it was something no-one had ever seen and did the whole world economy harm.

I won't lie the last two years have been very challenging and slowly I see we're getting back to normal.

Can I ask why cant you give me a chance to sell my store as it has sum value and with that I will be able to settle you and have something to look at starting up somewhere else.

Please can I ask if you can review my lease agreement."

11. Although his further letter does not form part of the record, it appears that Mr Eliopoulos wrote to MEPF on 18 February 2022 contending that the agreement had been renewed in May 2021 for three years from 31 December 2021 to 31 December 2024.
12. On 11 July 2022 attorneys for MEPF responded to attorneys for Mr Eliopoulos denying the contention that *"the lease agreement was renewed in May 2021, for 3*

years from 31 December 2021”, asserting the termination and continuation recorded in paragraph 7 above, contending for the termination recorded in paragraph 9 above and demanding that “your client vacate the leased premises by no later than Monday, 18 July 2022, failing which our client will, without further notice, institute urgent ejectment proceedings against your client, and shall seek a costs order against your client.”

The summons, plea and counterclaim

13. MEPF issued summons against Mr Eliopoulos on 26 October 2022. In its particulars of claim, MEPF pleads:

- 13.1. conclusion on 17 March 2016 and material terms of the agreement (annexure POC1), including that the agreement would endure for one year and terminate on 31 December 2016 unless Mr Eliopoulos exercised an option to extend it for a further period of three years;
- 13.2. compliance by MEPF with its obligations under the agreement;
- 13.3. conclusion on 14 December 2017 and material terms of an addendum (annexure POC2), including that the agreement would endure for three years and terminate on 31 December 2020 unless Mr Eliopoulos exercised an option – in writing within four months of the termination date – to extend it for a further period of three years;

- 13.4. termination of the agreement by effluxion of time on 31 December 2020;
 - 13.5. continuation of the agreement by tacit consensus of the parties on a month-to-month basis, subject to its termination on written notice by either party;
 - 13.6. breach by Mr Eliopoulos of his obligations under the agreement, including that *"the defendant has since 01 June 2021 failed to make full payment of the rental on due dates and despite demand has also failed to remedy its breach, when called upon to do so"*;
 - 13.7. cancellation of the agreement by MEPF on 02 February 2022 with effect from 28 February 2022; and
 - 13.8. entitlement to confirmation of cancellation of the agreement, eviction of Mr Eliopoulos and all those who occupy the premises through or under him and payment of a sum of R10,365.94 plus interest and costs of suit on the attorney and own client scale. Annexed to the particulars of claim is a *"Tenant/Debtor Transactions"* statement for the period January 2015 to October 2022 reflecting a balance due by Mr Eliopoulos to MEPF of R10,365.94 at the end of the period.
14. Mr Eliopoulos delivered a plea and counterclaim on 14 December 2022. As appears therefrom:

14.1. the plea avers that:

- 14.1.1. the right of renewal referred to in paragraph 6 above did not have to be exercised in writing and was exercised by Mr Eliopoulos on 06 November 2020;
- 14.1.2. the parties concluded a written second addendum extending the agreement for three years from 01 January 2021 to 31 December 2023, save that Mr Eliopoulos would have a right of renewal – to be exercised within four months of the termination date – to extend the agreement for a further period of three years;
- 14.1.3. the second addendum is in the possession of MEPF;
- 14.1.4. Mr Eliopoulos was not in arrears at March 2020, at which time the Covid 19 pandemic and resultant “*level 5 lockdown*” regulations precluded him from conducting his business at the premises and created “*a vis major situation*” beyond Mr Eliopoulos’ control that deprived him of beneficial occupation of the premises and entitled him to a complete remission of rentals and charges under the agreement for the 3.5-month duration of hard lockdown;

- 14.1.5. MEPF's purported cancellation of the agreement on 02 February 2022 was unlawful; and
- 14.1.6. the claims against Mr Eliopoulos should be dismissed with costs; and
- 14.2. the counterclaim contends that MEPF is liable to pay Mr Eliopoulos:
 - 14.2.1. a sum of R49,947.07 in consequence of the complete remission of rentals and charges under the agreement for the 3.5-month duration of hard lockdown; and
 - 14.2.2. damages in a sum of R400,000 *"in respect of renovations that were done to the premises to which the defendant renovations the defendant has a lien on."*

The summary judgment application

- 15. On 02 February 2023 MEPF initiated an application for summary judgment against Mr Eliopoulos for the relief claimed in its summons and particulars of claim. It is common cause that the application was out of time – Mr Eliopoulos says that it was 17 court days late; MEPF says that it was seven court days late. An affidavit in support of the application was deposed to by Zamani Letjane, a director of MEPF's administrator, on the same day. The deponent:

- 15.1. swears positively to the facts set out in the particulars of claim and verifies the causes of action underpinning MEPF's ejectment and liquidated money claims;
- 15.2. denies that the plea and counterclaim raise any triable issue;
- 15.3. submits that, on a proper interpretation, the agreement did not provide for an oral extension of its duration;
- 15.4. denies conclusion of a second addendum;
- 15.5. submits that the email referred to in paragraph 10 above constitutes a concession by Mr Eliopoulos that *"he did not exercise a right of renewal and understood that the agreement applied on a month-to-month tacit basis from 01 January 2021"*;
- 15.6. adds that, even if the parties did conclude such an addendum, it would have been on the terms of the agreement, clause 30 of which empowers MEPF to terminate the agreement on written notice, as it did on 02 February 2022;
- 15.7. argues that Mr Eliopoulos pleads no statutory or common law right to a remission of rentals and charges under the agreement and, in any event,

that he was in arrears with such amounts before the start of hard lockdown;
and

15.8. submits that the counterclaim is irrelevant to the merits of the summary judgment application and, in any event, that clauses 19.1, 19.3 and 19.5 of the agreement exclude any lien over renovations and thus destroy the counterclaim.

16. At no time thereafter did Mr Eliopoulos deliver an affidavit opposing the summary judgment application. I address the significance of this omission or oversight in what follows.

The non-compliance application

17. On 15 February 2023 Mr Eliopoulos delivered a notice in terms of rule 30A contending that *"[t]he applicant has failed to comply with the provisions of s 32(2)(a) of the Uniform Rules of Court, in that they have failed to deliver their application for Summary Judgment within 15 days from the delivery of the Respondents plea to the Registrar of the above Honourable Court"* and notifying MEPF of *"the Respondent's intention to after the lapse of 10 (ten) days, apply to the above Honourable Court for an order that applicants claim be struck out."*

18. Mr Eliopoulos' attorneys wrote to MEPF's attorneys on 12 March 2023 referring to the rule 30A notice and recording that, *"should we not hear from you by close of*

business Monday 12 March 202 as to whether your client shall be withdrawing your application for Summary Judgment due to non-compliance with provisions of s32(2)(a), we shall have no alternative, as stated in the Notice, but to apply for your client's claim to be struck out."

19. The summary judgment application was not withdrawn by MEPF.
20. On 16 March 2023 Mr Eliopoulos delivered an application in terms of rule 30A seeking an order "[c]ompelling the Respondent to withdraw their application for Summary Judgment as they failed to deliver this application to the Applicant's attorneys within 15 days from the delivery of the Respondent's plea to the Registrar of the above Honourable Court" and granting him "leave to approach this Honourable Court on the same papers, duly amended where necessary, for an Order in terms whereof the Respondent's claim be struck out and judgment be granted in favour of the Applicant under Case Number 38375/2022 with costs should the Respondent fail to comply with prayer 1." An affidavit in support of the non-compliance application was deposed to – not by Mr Eliopoulos but by a partner of his attorneys – on the same day. It contends that "*the Applicant is prejudiced in defending the matter as the Respondent in spite of receiving the Notice and the email of 12 March 2023, has failed to withdraw the application for Summary Judgment necessitating the Applicant to proceed by way of this application to ensure that the Rules of Court are complied with by the Respondent.*"

21. By email dated 16 March 2023, MEPF's attorneys wrote to Mr Eliopoulos' attorneys advising that their client would deliver a notice of intention to oppose the non-compliance application on the following day and requesting that any opposition to the summary judgment application be confirmed by 17:00 on 17 March 2023, *"failing which we shall proceed to have the summary judgment application enrolled, on an unopposed basis."*
22. Mr Eliopoulos delivered a notice of intention to oppose the summary judgment application on 17 March 2023.

The condonation application

23. On 24 March 2023 MEPF delivered a notice of a *"conditional counter-application"* seeking an order, in the event that Mr Eliopoulos' non-compliance application was not dismissed, *"condoning ... the late filing of the summary judgment application"* or *"extending the period for MEPF filing the summary judgment application to 02 February 2023, with any results of MEPF's delay in delivering this application cancelled."* Mr Eliopoulos was notified of MEPF's intention to seek an order dismissing the non-compliance application with costs in the event of opposition to the condonation application. An affidavit answering the non-compliance application and supporting the condonation application was deposed to by a partner of MEPF's attorneys and confirmed by two of his colleagues on 23 and 24 March 2023. As regards:

- 23.1. the non-compliance application, the deponent submits that Mr Eliopoulos gave notice incompetently under rule 30A, which regulates situations in which something is required to be done to remedy non-compliance with the rules, as opposed to under rule 30, which regulates situations in which a claim or defence is sought to be struck out on account of non-compliance with the rules. Hence the application seeks invalidly to strike out MEPF's action as opposed to the summary judgment application. It should thus be dismissed with costs; and
- 23.2. the condonation application, the deponent explains that, if the court finds the non-compliance application to be competent, he, the lead attorney on the matter, was on year-end leave between 15 December 2022 and 12 January 2023 whilst the other attorney on the matter was on leave between 23 December 2022 and 11 January 2023 *"but had resurfacing health issues throughout December 2022 and January 2023, requiring him to resume a treatment plan that was prescribed by an orthopaedic surgeon, which meant that he could not dedicate sufficient time to deal with all the matters in which he is involved."* In addition, key officials of MEPF and its administrator were away from 22 December 2022 to between 13 and 20 January 2023. MEPF instructed its attorneys to initiate the summary judgment application in late January 2023, at which time the application was compiled and served on 02 February 2023. Finally, it is submitted that the application enjoys strong prospects of success and Mr Eliopoulos is not prejudiced by the delay of two or three weeks.

24. Mr Eliopoulos delivered a notice of intention to oppose the condonation application on 20 April 2023.

The submissions

25. Counsel for MEPF, Matthew Kruger, filed a practice note and supplementary practice note in the proceedings on 17 April and 17 May 2023 respectively; as well as heads of argument.
26. On 15 May 2023 MEPF delivered a notice of set down of the summary judgment, non-compliance and condonation applications.
27. In accordance with a directive issued by this court, counsel for the parties uploaded on CaseLines a joint practice note on 19 May 2023. It confirmed a common awareness that the three applications would serve before court in the week of 29 May 2023.
28. Counsel for Mr Eliopoulos, Kobus Lowies, handed up short heads of argument at the hearing on 01 June 2023. As appears therefrom, it is submitted on behalf of Mr Eliopoulos that:

- 28.1. *“the applicant does not outright apply for condonation or for an extension of the time period within which it could file its application for summary judgement. The respondent’s argument is that, unless condonation is*

granted to the applicant for the late filing of its application for summary judgment, then the application for such judgment would be premature”;

28.2. *“until and unless the rule 30A application of the respondent is disposed of the respondent did not have the opportunity (as is its right) to reply to the merits of the application for summary judgment”;*

28.3. *Mphahlele*¹ is authority for the proposition that an applicant for summary judgment under amended rule 32 may not annex to its affidavit in support thereof documents that are not annexed to its particulars of claim;² and thus

28.4. the email referred to in paragraph 10 above should be disregarded by this court.

GENERAL PRINCIPLES

29. An application for summary judgment is competent in action proceedings where a plaintiff believes that a defendant does not have a genuine defence to a claim and opposes it merely to delay the grant of relief.³

¹ *ABSA Bank Ltd v Mphahlele NO and Others* [2020] JOL 47649 (GP) [32]-[37]

² See, in particular, rule 32(4).

³ *Meek v Kruger* 1958 (3) SA 154 (T) 159B-160E

30. In deciding whether the defendant has a genuine defence, the court considers whether the plea discloses the nature and grounds of a defence to the claim that, on the face of it, is *bona fide* and good in law.⁴
31. Rule 32 recognises that a hopeless defence may occasion the plaintiff costs and delays that amount to an abuse of process;⁵ whereas, as an extraordinary remedy, the rule is not intended to deprive the defendant of an opportunity of placing a triable issue before court.⁶
32. As amended, therefore, rule 32 provides *inter alia* that:
- 32.1. within 15 court days of delivery of the defendant's plea, the plaintiff applying for summary judgment in respect of a claim must, by affidavit, verify the cause of action and amount of the claim, identify any point of law and the material facts on which it is based, and explain briefly why the pleaded defence does not raise a triable issue (rule 32(2)(a) and (b); and
- 32.2. in response, the defendant may satisfy the court, by affidavit or, with leave of the court, oral evidence, that the defendant has a genuine defence to the claim. The affidavit or evidence must disclose fully the nature and

⁴ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) 426A-F

⁵ *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) [30]-[33]

⁶ *He & She Investments (Pty) Ltd v Brand NO and Others* 2019 (5) SA 492 (WCC) [10]-[11]

grounds of the defence and the material facts on which it is based (rule 32(3)(b)).

THE ISSUES

The condonation application

33. In his submissions on behalf of MEPF, Mr Kruger sought to explain that the condonation application is dependent on a finding by this court that Mr Eliopoulos' rule 30A challenge to the summary judgment application is competent. When pressed on whether condonation was required *in any event*, he clarified that MEPF *does* seek condonation for its delay and invited me to have regard to the explanation provided and confirmed in his instructing attorneys' affidavits. Mr Kruger submitted that I should exercise my discretion in favour of MEPF since the summary judgment application enjoys good prospects of success, Mr Eliopoulos identifies no prejudice suffered by him in consequence of a delay of two or three weeks and the delay is properly explained on behalf of MEPF. He added that Mr Eliopoulos had delivered no affidavit in opposition to the condonation application.
34. On behalf of Mr Eliopoulos, Mr Lowies submitted that, regardless of whether rule 30 or rule 30A was applicable to the late delivery of the summary judgment application, the conditional nature of MEPF's application is such that there is no application before this court for condonation of the common-cause late delivery of that application. In his submission, were I to grant condonation, Mr Eliopoulos

would be prejudiced in that the application would or could proceed in the absence of any opposing affidavit. Thus Mr Lowies submitted that the hearing should be adjourned to enable Mr Eliopoulos to deliver an answering affidavit in the summary judgment application. When put to him that it had at all times been open to Mr Eliopoulos to deliver such an affidavit, even if only in case condonation were to be granted, Mr Lowies responded that a request for an adjournment was "*the best argument*" available to him in the circumstances of the case.

35. I am satisfied that the condonation application is before me and falls to be decided at this time. I consider too that the summary judgment application enjoys good prospects of success and that no case is made out that Mr Eliopoulos was prejudiced by the relatively brief delay in its delivery. In addition, the uncontested evidence of the attorneys for MEPF provides an adequate explanation for such delay. Nor would the interests of justice be served by consigning the parties to prepare for and conduct a trial in the circumstances of this case.
36. The late delivery of the application for summary judgment is condoned. Since it seeks an indulgence, MEPF should bear the costs of the condonation application on the ordinary scale.

The non-compliance application

37. It was submitted by Mr Kruger that any challenge to the late delivery of the summary judgment application ought to have been brought under rule 30 and that

prayers 1 and 2 of the non-compliance application are incompetent under rule 30A.

In his submission, that application falls to be dismissed with costs.

38. It was fairly conceded by Mr Lowies that Mr Eliopoulos enjoys no right to seek either the withdrawal of the summary judgment application or the striking-out of MEPF's action or application. With reference to this court's discretion under rule 30A(2) to "*make such order thereon as it deems fit*", however, he submitted that this court should adjourn the proceedings to afford Mr Eliopoulos an opportunity to deal with the applications for condonation and summary judgment.
39. It is common cause that the relief sought in the non-compliance application is incompetent. Since Mr Eliopoulos elected not to answer the condonation and summary judgment applications, I consider there to be no sound basis on which to accede to a last-minute request for an adjournment of the proceedings. In any event, since the non-compliance application was and is without merit, reliance on rule 30A(2) is misplaced.
40. Thus, the non-compliance application should be dismissed with costs on the ordinary scale.

The summary judgment application

41. Although insistent that Mr Eliopoulos could and should have delivered an affidavit opposing summary judgment, even if under protest or reservation of rights, Mr

Kruger noted that the defences to the claims – extension and remission – are set out in the plea and counterclaim and could be considered by this court. However, it was submitted that, in the absence of any answering affidavit, Mr Eliopoulos fell short of the standard required of a defendant, as confirmed in *Breytenbach*,⁷ that *“the statement of material facts be sufficiently full to persuade the Court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff’s claim. What I would add, however, is that, if 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.”*

42. According to Mr Kruger, both pleaded defences are fundamentally undermined by Mr Eliopoulos’ email of 08 February 2022, which makes no mention of them such that there is *“a glaring absence of any assertion of rights under any second addendum to the agreement”*. In any event, any such addendum would have included rights of termination entitling MEPF to act as it did on 02 February 2022.
43. As regards remission of rentals and charges under the agreement, Mr Kruger submitted that the plea and counterclaim did not satisfy the test set out in *Slabbert*,⁸ being that: (a) a loss of beneficial occupation, i.e. use and enjoyment, of the premises must be the direct and immediate result of the *vis major* event; (b) a

⁷ *Breytenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) 228B-H

⁸ *Slabbert NO and Others v Ma-Africa Hotels (Pty) Ltd t/a Rivierbos Guest House* [2022] JOL 56182 (SCA) [21]-[28]

remission is only competent where reciprocity of performance is not excluded by the contract (payment monthly in advance being indicative of such exclusion); and (c) the computation of the amount of remission, if not promptly ascertainable, should be determined by a court rather than simply estimated and withheld by a lessee.

44. In the result, in his submission, no *bona fide* defence to the claims is established on the papers before court.
45. In answer, Mr Lowies submitted that Mr Eliopoulos' email should not have been annexed to MEPF's affidavit since to allow a debate on its contents would bring about the "*mini trial*" that *Mphahlele* seeks to avert.
46. If this court were minded to have regard to the email, however, he submitted that Mr Eliopoulos should be afforded an opportunity to deliver an affidavit explaining its contents. In that regard, Mr Lowies surmised that, in the circumstances of the case, a lessee would seek to appease rather than to antagonise a lessor and, viewed in that light, the email is not necessarily inconsistent with the plea and counterclaim.
47. There is force to the submission quoted in paragraph 42 above.
48. However, in the absence of an explanation of its contents, I regard the email of 08 February 2022 as a curious but ultimately unreliable basis on which to assess the

genuineness of the defences pleaded by Mr Eliopoulos. It is conceivable that the email's contents could be contextualised in a manner that would not be destructive of the pleaded defences. In any event, on the authority of *Mphahlele* and in favour of Mr Eliopoulos, I exclude the email from my consideration of the merits of the summary judgment application.

49. A more intractable problem for Mr Eliopoulos is the jarring and unexplained inconsistency between his versions paraphrased in paragraphs 11 and 14 above, being that the agreement was renewed:

49.1. in May 2021, for three years, from 31 December 2021 to 31 December 2024 (per the letter of 18 February 2022); and

49.2. in November 2020, for three years, from 01 January 2021 to 31 December 2023 (per the plea of 14 December 2022).

50. In my view, the veracity of the first of Mr Eliopoulos' pleaded defences – the alleged renewal captured in paragraph 49.2 above – is drawn into serious doubt by what he had contended for in an earlier letter to MEPF – the alleged renewal captured in paragraph 49.1 above.

51. Absent that inconsistency and resultant doubt, the pleaded defences paraphrased in paragraph 14 above could have been acceptable to this court as being cognisable in our law and not plainly without merit in the circumstances of this

case. Had they been confirmed and detailed on oath as required by rule 32(3)(b), that is, I would likely have been minded not to grant summary judgment and to allow the matter to proceed to trial in the ordinary course of events.

52. The absence of an affidavit opposing summary judgment is however a pivotal omission or oversight on the part of Mr Eliopoulos. Rule 32(3)(b) is clear; and Mr Eliopoulos has been legally represented since at least July 2022. It could not responsibly have been assumed by him or his legal team that the non-compliance application would succeed or that, in the event of its failure, the court would not proceed to hear and decide the summary judgment application. It is not in dispute that Mr Eliopoulos was aware that all three applications were set down for simultaneous hearing. He could – even at a late stage – have delivered an answering affidavit confirming, and explaining the apparent inconsistency in, the defences advanced on his behalf.
53. The inexplicable failure to do so – viewed in the light of the inconsistency in versions paraphrased in paragraphs 11 and 14 above – draws into serious doubt the veracity of such defences and supports a conclusion that there is no *bona fide* defence to the claims of MEPF. I therefore decline the belated request to adjourn these proceedings to enable Mr Eliopoulos to place before another court an affidavit that could and should have been placed before this court.

54. In the result, it is established on the papers that:

54.1. after 31 December 2020 the agreement continued by tacit consensus of the parties on a month-to-month basis, subject to its termination on written notice by either party, and was cancelled by MEPF on 02 February 2022 with effect from 28 February 2022; and

54.2. a sum of R10,365.94 was due by Mr Eliopoulos at 31 October 2022.

55. It follows that liability for interest and costs should be in accordance with clauses 8.2 and 6.1 of the agreement.

56. Thus, the summary judgment application should be granted with costs on the agreed scale.

The outcome and order

57. The absence of an opposing affidavit and the striking inconsistency in the factual versions put up by Mr Eliopoulos are not plausibly explained on the papers and thus undermine the genuineness of the pleaded defences.

58. In the circumstances, I grant the following order:

58.1. Cancellation of the written agreement of lease in respect of the premises described as Shop 15, Bredell Square, Kempton Park, Gauteng, and

situated at Erf 464, Farm Rietfontein No. 31, Bredell, Gauteng (the premises), concluded on 17 March 2016 and thereafter renewed, is confirmed.

58.2. The respondent (defendant) and all those who occupy the premises through or under him are:

58.2.1. ejected from the premises; and

58.2.2. directed to vacate the premises within 10 court days of service of this order.

58.3. Failing such vacation of the premises, the sheriff or his deputy of the area in which the premises are located is authorised and directed to take such steps as may be necessary to ensure that the respondent (defendant) and all those who occupy the premises through or under him vacate the premises as soon as possible.

58.4. The respondent (defendant) is ordered to pay to the applicant (plaintiff):

58.4.1. the amount of R10,365.94; and

58.4.2. interest thereon at the prime lending rate of the Standard Bank of South Africa from time to time, plus 3%, reckoned from the date of service of summons to the date of final payment.

58.5. The applicant (plaintiff) is to bear the costs of the condonation application on the party and party scale.

58.6. The respondent (defendant) is to bear the costs of:

58.6.1. the condonation application on the party and party scale; and

58.6.2. the action and the summary judgment application on the attorney and own client scale.

A handwritten signature in black ink, appearing to be 'P. AJ', written over a horizontal line.

PEARSE AJ

This judgment is handed down electronically by uploading it to the file of this matter on CaseLines. It will also be emailed to the parties or their legal representatives. The date of delivery of this judgment is 08 June 2023.

Counsel for Applicant:

Advocate Matthew Kruger

Instructed By:

Webber Wentzel Attorneys

Counsel for Respondent:

Advocate Kobus Lowies

Instructed By:

Vardakos Attorneys

Date of Hearing:

01 June 2023

Date of Judgment:

08 June 2023