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

CASE NO: 2023 - 042676

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

8/3/2024
DATE

[redacted]
SIGNATURE

In the application by

PETERSEN, IZAK SMOLLY *N O*	First Plaintiff
ASMAL, RIDWAAN *N O*	Second Plaintiff
AZIZOLLAHOFF, BRIAN HILTON *N O*	Third Plaintiff
JUNKOON, JUJDEESHIN *N O,* in their capacity of trustees of the MERGENCE AFRICA PROPERTY INVESTMENT TRUST (IT NO. 11263/2006)	Fourth Plaintiff
and	
T R FUNERAL SOLUTIONS CC trading as TIRO FUNERAL SOLUTIONS (REG NO. 2009/009227/23)	First Defendant
RATONE, MATSHIDISO	Second Defendant
RATONE, TIRO STEPHEN	Third Defendant

JUDGMENT

MOORCROFT AJ:

Summary

Summary judgment – bona fide defence - electricity supply problems do not justify a defence of supervening impossibility

Order

[1] In this matter I make the following order:

1. *Summary judgment is granted in the amount of R114,725.28;*
2. *Interest thereon at the prevailing prime rate from time to time plus 2% per annum compounded monthly from 19 May 2023 to date of payment;*
3. *Costs on the scale as between attorney and client.*

[2] The reasons for the order follow below.

Introduction

[3] This is an application for summary judgement as provided for in rule 32 of the uniform rules. The application is based on the alleged breach of a written lease agreement in respect of commercial premises by the first defendant and on suretyship granted by the second and third defendants who bound themselves as sureties and co-principal debtors for the debts of the first defendant.

[4] The lease agreement was entered into on 12 June 2020 and an addendum was signed on 24 June 2020. The lease period commenced on 1 August 2020 with beneficial occupation from 1 July 2020 and was to terminate on 31 July 2025. The agreement provided that in the event of the first defendant not meeting its obligations the plaintiff as landlord would have the right to recover interest from the first defendant on the amount outstanding at the rate equal to the prime overdraft rate charged from time to time plus 2 percentage points compounded monthly in arrears. The agreement also provided for cost on the scale as between attorney

and client the event of litigation between the parties.

[5] The National Credit Act does not apply to the transaction as leases of immovable property are exempted.[1]

[6] The first defendant unilaterally cancelled and then vacated the premises prior to the expiration of the lease period and owed an amount of R114,725.28 in respect of arrear rental and other charges for the period December 2022 to May 2023. The plaintiff interpreted the unilateral cancellation as a repudiation and claimed the amount owed together with contractual damages in the amount of R253,328.40 in respect of the period 1 June 2023 to 31 May 2024. It did not persist with this claim when the summary judgment application was argued.

[7] The amount of the claim is not in dispute but the defendants allege that the first defendant had cancelled the lease because of a failure by the plaintiff as landlord to provide the first defendant with electricity. The first defendant carries on business as a funeral parlour and electricity is of course essential for its business.

[8] Even though the amount of the claim is not in dispute the defendants nevertheless argue that the summary judgement procedure is not at the disposal of the plaintiff as the claim is not based on a liquid document or a liquidated amount. The first defendant argues that the amount of the claim is not liquid as the first defendant did not derive any benefit from the agreement.

[9] The defendants also referred the court to a payment made to the plaintiff in respect of the lease of other premises. This payment is not relevant to the present application.

[10] The defendants also alleged that the first defendant's obligations were terminated when it caused a mandate to relet the property to be signed. The document relied upon is annexed to the defendants' plea. The document is not signed by or on behalf of the plaintiff and it consists of a request by the first defendant to be released from the obligations of the lease subject to a lease being finally concluded with a new tenant. The document indicates that the plaintiff was prepared to substitute the first defendant with a new tenant provided a new tenant could be found. The mandate document therefore did not release the first defendant from any of its obligations in terms of the lease and it is common cause on the papers that no such

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1 Section 8 (2) (b) of the National Credit Act 34 of 2005.-

new lease was ever entered into with third party.

Supervening impossibility of performance and *vis maior*

[11] This is not a matter where it was impossible for the first defendant to use the premises. The electricity crisis in South Africa is of course a disruptive influence on commerce and no doubt the crisis affected the plaintiff and the first defendant. The impact of the crisis was however limited in that the plaintiff installed a generator in the centre where the funeral parlour situated and this alleviated the hardship experienced by the funeral parlour and no doubt by other businesses. It is so that the tenants in the centre have to pay for diesel and diesel is quite expensive, but under prevailing circumstances the expense of electricity generation is unavoidable and not something that the plaintiff is responsible for. Tenants are liable for such running costs including the costs of diesel and the lease agreement provides for the payment of these costs in clauses 11.2 and 11.4.

[12] Supervening impossibility does not arise from a difficulty in performing under a contract;[2] it arises from an absolute impossibility.[3] Commercial impossibility or undesirability does not give rise to supervening impossibility.[4]

[13] The possibility of interruptions in the supply of electricity is specifically dealt with in clause 23.1.2 of the lease agreement. In terms of the agreement and the plaintiff as landlord is exempted from liability for losses or damages arising out of interruptions in the supply of amenities and services for any reason whatsoever.

[14] The defendant cannot rely on *vis maior* and performance of either parties' obligations never became impossible or prohibited by legislation.

[15] The applicant is entitled to the order it seeks, including an order for attorney and client

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2 See *Nogoduka-Ngumbela Consortium (Pty) Ltd v Rage Distribution (Pty) Ltd* 2021 JDR 2622 (GJ)

3 Compare *Heyneke v Abercrombie* 1974 (3) SA 338 (T) 344H to 345F.

4 Compare *Hennops Sports (Pty) Ltd v Luhan Auto (Pty) Ltd* 2022 JDR 3763 (GP) para 22.

costs. The attention of the taxing master is directed to the amount of the judgment.

I therefore make the order in paragraph 1 above.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **8 MARCH 2024**

COUNSEL FOR THE APPLICANTS	G DOBIE
INSTRUCTED BY:	ROOSEBOOM ATTORNEYS
COUNSEL FOR THE RESPONDENT	B TEMBA
INSTRUCTED BY	B TEMBA ATTORNEYS
DATE OF ARGUMENT:	22 FEBRUARY 2024
DATE OF JUDGMENT:	8 MARCH 2024