



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

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

Date: 13 August 2024

Signature:



Case No. 35613/2021

In the matter between

ORPEN BROTHERS PROPERTIES 2 (PTY) LTD

Plaintiff/ Applicant

And

SIEMENS HEALTHCARE (PTY) LTD

Defendant/ Respondent

JUDGMENT

MAHOMED, AJ

The plaintiff, the lessor in this matter has applied for summary judgment for payment of R1 051 677.56, for breach of a lease agreement. The matter is opposed, and the respondent has raised three defences.

THE LAW

1. Rule 32 of the Uniform Rules provides that, for summary judgment the applicant must demonstrate that the defendant is not bona fide and raised a defence simply to delay the proceedings and that the defendant has not raised a triable issue. This is a drastic order in that the defendant is denied its right to a hearing. However, the defendant cannot raise just any defence to avoid judgment, and therefore a plea must be filed in which the defendant in compliance with Rule 18 sets out its defence and the material facts it will rely on.
2. In **Cohen NO and Others v D**,¹ the court stated:

“All that the defendant is required to do is to disclose a genuine defence, as opposed to a sham defence. Prospects of success are irrelevant and as long as the defence is cognisable in the sense that it amounts to a valid defence if proven at trial, then the application for summary judgment must fail.”

¹ (368/2022) [2023] ZASCA 56 par 29

The Defences

3. The defendant raised three defences.
 - 3.1. that the plaintiff's claim is based on charges which it was not liable for in terms of the lease agreement, alternatively,
 - 3.2. that the claim is based on rights which did not accrue to the plaintiff during the period of the lease agreement and is therefore unenforceable, further alternatively,
 - 3.3. that the claim is not sustainable in law due to a tacit term in the lease agreement.
4. Mr H van der Merwe appeared for the plaintiff and submitted that the agreement is clear, and it is common cause that the plaintiff could only render the account once the municipality had finalised its accounting exercise in respect of the leased property. Counsel referred to clause 10 of the agreement:

"10. Levies and Utilities

10.1 In addition to monthly rental, the [defendant] shall be liable for and obliged to pay:

10.1.1 all utility service fees including but not limited to, water server charges and

refuse removal, in respect of the premises hereby let, including charges payable in terms of the relevant City Council's tariffs and By-laws as amended from time to time.,

10.1.2 *All electricity consumption charges."*

5. Counsel submitted that the claim for the costs of electricity demand and service charges or availability charges, is rendered in terms of the city's bylaws and are payable. The charges were rendered only once the amount of the charge had become available to the plaintiff.
6. Counsel proffered that it would serve no purpose to refer the matter to trial there are no witnesses to be led, the by-laws set the tariff and the charge for each property, and therefor the defendant cannot succeed in its defence.
7. Mr Mabuza who appeared for the defendant submitted that the court need not be concerned with the defendant's prospects of success at this stage, but only that the defendant raises bona fide defences, and a triable issue. Counsel argued that clause 10 refers only to electricity consumption charges, and further submitted that according to rules of interpretation, the "expressed word supersedes² what is implied". Counsel argued the plaintiff has not placed before this court any evidence that its defence is

² CL 008 – 28 HOA fn 22

not sound, the defendant's defence is bona fide and must be ventilated at trial.

8. Mr Mabuza further submitted that clause 10.2 provides that the charges in 10.1 as set out above, are” *payable in arrears within 7 days, upon the lessor’s presentation of an account invoice of statement.*” The condition set out above was never fulfilled, the plaintiff conceded that it could only render invoices after January 2023, and by that date the lease had expired. Therefore the rights and obligations of the parties in casu terminated, whatever way the agreement is terminated.³ Counsel submitted that the monies “*must have been due*” and referred the court to **Farocean Marine (Pty) Ltd v Minister of Trade and Industry**⁴, where the court held that, “*a debt must be one in respect of which the debtor is under an obligation to pay immediately.*” The plaintiff failed to render accounts during the lease period, the condition in 10.2 was not fulfilled, the debt did not accrue during the lease period therefor the claim is unenforceable. It was submitted that the plaintiff failed to meaningfully engage with this defence, and on the law and the plaintiff’s version this defence is competent.

9. Mr Mabuza argued further alternatively that it was an implied, alternatively tacit term of the agreement that the defendant was only liable for those

³ **Tarspray CC v Ashalt Services CC** (A5061/2016) ZAGPC 307 (8 November 2017), **Cellular Insurance Managers (Pty) Ltd v Foshini Retail Group (Pty) Ltd** (456/2010) [2011] ZASCA 85 par 6

⁴ 2007 (2) SA (SCA) 334 par 12

charges, if the plaintiff supplied electricity to the lease property. In paragraph 11 of the founding affidavit the plaintiff conceded it did not supply electricity to the leased property, and the defendant would not have agreed to pay for this service charge.

JUDGMENT

10. The court must decide if the plaintiff's claim is unimpeachable and whether the defendant's defence is a sham, or bad in law.
11. The amended Rule 32 aims to avoid speculative summary judgment applications. This means that a plaintiff would be justified in bringing such an application only if it demonstrates that the pleaded defence is not bona fide.
12. I agree with Mr Mabuza, that the plaintiff knew that the lease had expired and therefore the duties and obligations between the parties had ceased. This defence was pleaded, however the plaintiff failed to meaningfully engage with this defence. In **Ingenuity Property Investments (Pty) Ltd v Ignite Fitness (Pty) Ltd**⁵ was held that "*the plaintiff must engage meaningfully with the content of the plea, so that the application may be adjudicated on the basis of defendant's pleaded defence,*" more is needed of the plaintiff, than a formulaic supporting affidavit, to substantiate its

⁵ 2023 (5) SA 439 WCC at [47]

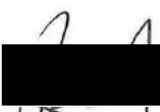

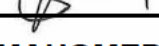
averments that the defence is not bona fide and is raised merely to delay proceedings.

13. In terms of the amended rule the plaintiff is obliged to, in its supporting affidavit, inter alia, verify the cause of action. If the condition in 10.2, as set out in paragraph 8 of this judgment was not fulfilled, the cause of action cannot properly be verified, the defendant has an arguable point and must be allowed to ventilate its defence. The plaintiff ought not to have applied for summary judgment, given it did not indicate in its papers if it complied with the condition in 10.2 prior to termination of the lease.
14. Similarly, regarding the defence of a tacit term of the agreement, the evidence is that no claim for provision of electricity services was ever raised during the period of the lease agreement, the defendant was serviced from an adjoining property, the defendant has raised a bona fide defence, and at this stage the defendant's prospects of success is irrelevant.
15. I am of the view that the defendant has "genuinely" raised issues for trial, and therefore summary judgment is refused.
16. Mr Mabuza is correct, the application was an unnecessary and not justified, the pleaded defence was clear, and the plaintiff ought to have known at the very least, on its version that it had not met the condition in 10.2, and

triable issue was raised it ought to have proceeded to trial. In the circumstances, the costs on an attorney client scale are appropriate.

Accordingly, I make the following order:

1. The application for summary judgment is dismissed.
2. The defendant is granted leave to defend.
3. The papers stand as the pleadings and supplemented where necessary.
4. The applicant is to pay the respondent's costs on an attorney client scale.

MAHOMED AJ
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Case lines. The date for hand-down is deemed to be 13 August 2024.

Appearances:

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