REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case no: 2017/15168

(1) REPORTABLE: No
(2) OF ~~INTEREST TO~~ OTHER JUDGES: No

16·01·23
DATE SIGNATURE

In the matter between:

NYANGENI SAUL GUMEDE N.O.	First excipient
RIDWAAN ASMAL N.O.	Second excipient
IZAK SMOLL PETERSEN N.O.	Third excipient
BRIAN HILTON AZIZOLLAHOFF N.O.	Fourth excipient

and

NYAMA AND CHIPS CC	First respondent
MARIOS ANDREOU	Second respondent

This judgment was delivered by uploading it to the court online digital database of the Gauteng Division of the High Court of South Africa, Johannesburg, and by email to the attorneys of record of the parties on 16 January 2025.

JUDGMENT

VAN DER WALT AJ

Introduction

[1] This is a judgment about exceptions taken to a plea and counterclaim. The excipients are the trustees of the Mergence Africa Property Investment Trust. Mergence issued summons in May of 2017 against Nyama and Chips CC, and Mr Andreou. The disputes between the parties relate to a lease agreement concluded between Mergence and Nyama in 2015. Mergence is the lessor, Nyama the lessee and Mr Andreou the surety for Nyama's obligations in terms of the lease. The leased property is a store in a shopping centre in Protea Point, Soweto.

The pleadings

[2] The particulars of claim allege that Nyama breached the lease agreement by failing to pay rental and sundry charges. Mergence sought to cancel the agreement in its particulars of claim. It claims the arrears rental and damages it alleges to have suffered because of the early cancellation of the lease.

[3] Nyama pleads that two other lease agreements were also concluded between it and Mergence in respect of similar commercial properties. They are in Tsakane and Pimville. According to Nyama, the three lease agreements would be administered together. Mergence's managing agents in respect of all three agreements were to be the Broll Property Group. Nyama denies that it was in arrears in terms of the lease agreement and pleads that insofar as any rental

amount was not paid, it was because it rightfully withheld payment. Nyama's case is that "prior to" and during the month of April 2017, Mergence repudiated the lease agreement by preventing Nyama's employees from entering the leased premises. By way of a letter dated 18 April 2017, Nyama notified the Trust of its election to accept the repudiation and terminate the three lease agreements. Nyama attaches to its plea the termination notice. It is said to have been delivered to Mergence and Broll.

[4] According to the termination notice, on 7 April 2017 Nyama's site manager and fourteen of its employees attended at the Tsakane store, among other things, to move and remove equipment. While doing so, a person who apparently acted on Broll's behalf made clear that he had been instructed to deny Nyama's employees entry to the store. He was accompanied by shopping centre security and a group of people from the local community. Nyama's staff were assaulted and forcibly removed from the premises. They were not allowed into any of the three stores covered by the three lease agreements after the events at the Tsakane store.

[5] Nyama brought also two counterclaims. The first is for the repayment of a deposit. The second is for damages. The claim for damages is based on Mergence's repudiation, the profit Nyama earned while in occupation, the fact that the sole purpose of operating the business was to realise a profit, and that it would have extended the lease agreement until well into 2021.

[6] Mergence excepts to Nyama's plea and counterclaims on four grounds. I deal with each in turn.

The first exception

[7] The nub of the complaint underlying the first exception is that Nyama relies on events that occurred at the Tsakane store (not the one at Protea Point) as a basis for the pleaded repudiation. Mergence also asserts that the refusal to allow access Tsakane was not done at its instruction.

[8] The exception is in part based on a misreading of the plea and the cancellation notice. The plea and the cancellation notice address not only events at the Tsakane store. They are also about Mergence's conduct at Protea Point, including the fact that Nyama's employees were denied access to that premises. Secondly, in as far as the conduct of the alleged agent of Broll (and Mergence) at Tsakane is concerned, it is not on the pleadings that Mergence denies that he was acting on its (or Broll's) behalf. This is therefore entirely irrelevant to a consideration of the exception.

[9] I do, however, agree with Mergence's counsel that it is not at first blush apparent what role the averments about the events at the Tsakane Store, and for that matter the fact that the three lease agreements are to be seen as one or linked, play in Nyama's pleaded case. As the plea stands, Nyama does not rely on the events at Tsakane for its termination of the Protea Point lease. For instance, the Tsakane and Pimville lease agreements are not even attached to the plea. The plea itself does not set out the express provisions in any of the lease agreements that would connect them to each other, so that a breach or repudiation of one could (possibly) affect the other. It also does not place reliance on any implied terms. It for instance does not rely on an implied term prohibiting criminal self-help by Mergence at one property, the breach of which could arguably give rise to the reasonable perception that it would perpetrate the same conduct at another.

[10] In the final analysis, and on a closer reading of the plea, it is clear to me that the allegations about what transpired at the Tsakane Store are irrelevant to Nyama's case. They may fall to be struck out on that basis, but they do not

detract from the defence clearly pleaded: that Nyama's employees were denied access to the Protea Point property, that, that amounted to a repudiation of the lease in respect of the Protea Point, that Nyama accepted the repudiation and that it accordingly cancelled the Protea Point lease.

The second exception

[11] The second exception takes issue with the fact that Nyama pleads both that it had complied with all its obligations in terms of the Protea Point lease and that it was entitled to withhold payments because of Mergence's repudiation of it. As such, says Mergence, Nyama's defence purports to be that the obligation to pay rental follows upon and is reciprocal to Mergence's obligation to provide access to the premises. Where rental is payable monthly in advance, the argument proceeds, the payment of rent is not contingent upon prior performance by Mergence and, therefore, Nyama would not be entitled to withhold payment. According to Mergence, Nyama's allegations are therefore mutually destructive.

[12] When the plea is viewed in the context of the particulars of claim, Mergence is correct in as far as it asserts that Nyama's case as pleaded necessarily depends on an entitlement to withhold the full rent for some of the months during which the contract was in force. However, no doubt because the rental agreement requires payment of rental on the first day of each month and the its apparent exclusion of any right Nyama may have to reduce its rent, Nyama has not sought to rely on the exceptio non adimpleti contractus (which requires reciprocity of the relevant obligations) or the distinct common law remedy for a remission of rent. What it has done, is to rely in its plea on a right to suspend performance because of Mergence's repudiation which had occurred before the

relevant rental payments became due. This is something, in law, open to Nyama to do.[1] The exception is bad.

The third exception

[13] Mergence argues that Nyama failed to plead the fulfilment of the contractual preconditions to reclaiming the deposit. On the face of the lease agreement, these requirements are that Nyama discharge all its obligations to Mergence and that it vacates the leased premises. The exception is again based on, at best, a misreading of the counterclaim. Nyama has indeed pleaded that it fulfilled these requirements. It therefore properly pleaded a cause of action for the repayment of its deposit. The exception is bad.

The fourth exception

[14] The fourth exception is taken against Nyama's claim for damages. Firstly, Mergence argues that the counterclaim is in effect for loss of profits in or at the leased premises, a claim the lease agreement excludes. Secondly, the exception seems to suggest that Nyama has failed to plead a cause of action in that the counterclaim fails to show that the damages flow naturally from the pleaded breach of the lease agreement or that liability for such damages was within the contemplation of the parties when the lease agreement had been entered into.

[15] Mergence relies on clause 29 of the lease agreement which excludes its liability for any damages incurred by Nyama "on or about the property". It argues that loss of profits is necessarily loss suffered "on or about the property". I, however,

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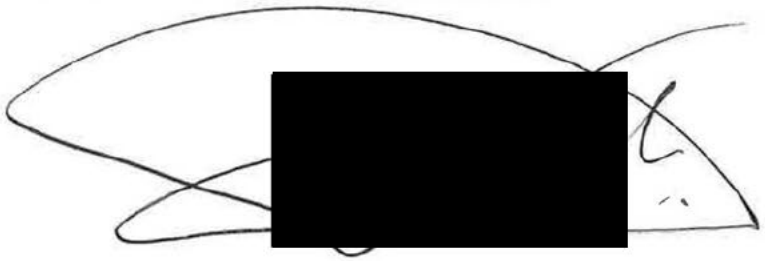
1 *Erasmus v Pienaar* 1984 (4) SA 9 (T) 29I – 30A and *Dawnford Investments CC v Schuurman* 1994 (2) SA 412 (N). Also see T Naudé, "The principle of reciprocity in continuous contracts like lease: What is and should be the role of the exception non adimpleti contractus (defence of the unfulfilled contract)?" 2016 *Stell LR* 323 346 – 350.

remain unconvinced that, that phrase necessarily excludes a claim by Nyama for loss of profits. The clause is reasonably open to an interpretation that it does not exclude Nyama's claim. I am also of the view that the claim for a loss of profits could qualify as general damages in the circumstances of this case,[2] evident from the plea, wherein the breach alleged consists of a lessor preventing a profit-driven lessee access to a commercial property, used for commercial purposes. The exception is bad.

[16] In the event, I make the following order:

The exceptions are dismissed with costs on scale C.



Nico van der Walt

Acting Judge, Gauteng Division,
Johannesburg.

Heard: 24 April 2024

Judgment: 16 January 2025

Appearances:

For the excipients

Mr J.G. Dobie

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2 Cf. *Gloria's Caterers (Pty) Ltd t/a Connoisseur Hotel v Friedman* 1983 (3) SA 390 (W).

Instructed by Reaan Swanepoel Attorneys

For the respondents

Mr S. Tshikila

Instructed by Fairbridges Wertheim Becker