

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Date: 21/02/2008
Case No: 54590/07

UNREPORTABLE

In the matter between:

ABSA BANK LIMITED N.O.AS TRUSTEE FOR
THE CAPITAL PROPEERTY FUND

1ST PLAINTIFF

PROPERTY FUND MANAGERS LIMITED

2ND PLAINTIFF

And

SUNSET BAY TRADING 313 (PTY) LTD
(REG NO: 2005/021993/07)

1ST DEFENDANT

CARREIRA, MIGUEL CON SALVES
(REG NO: 600420 5236 082)

2ND DEFENDANT

JUDGMENT

MAKHAFOLA, AJ

INTRODUCTION

[1] On 22 November 2007, the plaintiffs issued summons under case no: 54590/2007 against the defendants for 2 claims together with interest and costs. The summons was served on the 2nd Defendant by fixing a copy thereof to the main entrance of the given address.

[2] Notice of intention to defend was issued on 7 December 2007 and was received by the Plaintiffs' Attorneys on 8 December 2007. The Plaintiffs' application for Summary Judgment was launched on the basis that the defendants have no bona fide defences to their claim

and that their intention to defend is solely for the purposes of delay.

This is in terms of Rule 32.

Plaintiff s Case

- [3] The Plaintiff wants payment together with interest and asks for ejectment of the defendants from the leased commercial premises. In the main case the plaintiff relies on clause 11 of the lease agreement which excludes any remedy by the defendants (tenants) against the plaintiff (Landlord), and the deed of suretyship.

Defendants' Case

- [4] On the other hand the defendants have averred that this matter having been before this court previously under case no: 38058/2007 pursued a claim on the same subject matter and the cause of action as the present application. In that application the defendants raised their defences by taking *points in limine*. They challenged the authority of the defendant to the affidavit supporting summary judgment, in that he lacks the authority to do so and to swear positively to the facts.
- [5] Further, the defendants aver that the deponent is employed by the 2nd Plaintiff and that his mere allegation that the 1st Plaintiff s claim falls under his control does not meet the requirements of swearing positively to the facts.
- [6] The defendants allege that no beneficial occupation of the premises was ever granted to them by the 1st Plaintiff as a result they are not

obliged to pay rental. They aver inducement to sign the lease agreement by misrepresentations that the premises were dust-free.

The Law:

- [7] (1) Rule 32= Summary judgment is governed by this rule.
- (2) CRISMAR (Pty) LTD V STUTCHBURY AND ANOTHER 1973 (4) SA 123 (R) at 124-5 "The special procedure of summary judgement was conceived so that a *mala fide* defendant might be denied, except under onerous conditions, the benefit of the fundamental principle of *audi alteram. partem*. So extraordinary an invasion of a basic tenet of natural justice will not lightly be resorted to, and it is well established that it is only when all the proposed defences to the plaintiff's claim are clearly unarguable, both in fact and in law, that this drastic relief will be afforded to the plaintiff. See *Shingadia v Shingadia*, 1966(3) SA 24 (R), and the authorities there cited."
- (3) In LOMBARD V VAN DER WESTHUIZEN 1953 (4) SA (C) at 89 it was stated by the learned judge quoting Eisenberg's V O.F.S Textile Distributors (Pty) Ltd 1949 (3) SA 1047 at p.1 054 (0) where Horwitz, J took the view that
- "Summary judgment being a drastic remedy is granted only where the defendant fails to set up a *bona fide* defence or to raise a fairly triable and arguable issue."

(4) Bentley Maudesley & Co Ltd v "Carburol" (Pty) Ltd and Another, 1949 (4) SA 873 (C) where the court stated the following: " a *bona fide* defence meant what it said, i.e. a defence set up *bona fide* or honestly which if 'proved will constitute a defence to the plaintiff's claim."

[8] It was argued on behalf of the plaintiff that a lessee can escape bindingness to pay if he proves fraud on the part of the lessor. The contract of lease excludes any counter-claim or set-off suffered as damage by the tenant. It was further argued that the defendants refuse to pay and that they have not paid any rent since occupation of the premises. And that there is no clause in the agreement that excuses the defendants from paying rent.

[9] Arguments on behalf of the defendants is that the 1st defendant has paid in terms of Annexure "C" page 100 paragraph 19.2 the amount of R70, 711-92. Various grounds, advanced in the opposing affidavit first launched in the previous application were argued together with the various letter correspondences as grounds pointing to *bona fide* defences by the defendants.

[10] It was vehemently argued on behalf of the plaintiff that there is no *bona fide* defence and that its application be granted.

[11] From the papers before court, it cannot be said that the defences raised by the defendants are not arguable in the main case. The issues

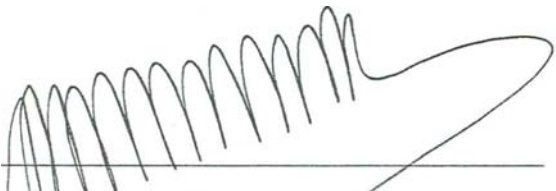
or disputes raised by the defendants require *viva voce* evidence and later the application of the law. The said issues can hardly be dealt with fully under Rule 32. From the defences raised it cannot be said that they are not *bona fide*. Misrepresentations are serious allegations". This is, one of the cases on facts that warrants that the defendants be afforded an opportunity to defend the Plaintiffs' action.

[12] My view is that the defendants have raised issues and disputes in the opposing affidavit to the extent that if proved in court are a basis of an arguable defence which is good to challenge the plaintiffs' claim.

[13] I am inclined to refuse the application for summary judgment. I am also of the view that the order of costs is to stand over for the decision by the trial court.

ORDER

[14] **In the result, summary judgment is refused. Costs will be decided by the trial court.**



K MAKHAFOLA
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
TRANSVAAL PROVINCIAL DIVISION