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

CASE NO:2022/5357

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED. YES
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GD WICKINS	**9 SEPTEMBER 2024**

In the matter between:

AZRAPART (PTY) LIMITED Plaintiff

and

HUSEYIN (PTY) LTD T/A DUFY First Defendant
(REGISTRATION NO. 2015/384235/07)

SERKAN ERGUL Second Defendant
(ID NO. 8[…])

JUDGMENT

WICKINS AJ

[1] This is an application for summary judgment in which the plaintiff seeks orders against the defendants for arrear rental and ejectment from certain commercial premises. The claim arises from a written lease agreement between the plaintiff as lessor and the first defendant as lessee in respect of certain shop premises within the Fourways Mall. The second defendant is a surety for and co-principal debtor with the first defendant.

[2] The defendants plead that the plaintiff breached the lease agreement in October 2019 by failing to maintain the exterior of the premises and roof and that this breach rendered the premises unfit for the purpose for which it was let, prevented the first defendant from trading, caused it to suffer losses of R3 635 100,00 (which forms the basis of its counterclaim), and entitled it to cancel the lease in May 2020, whereafter it vacated the premises in March 2021. They plead further that the lease agreement must either be rectified *inter alia* to delete the clause recording that the plaintiff did not warrant that the premises were fit for their intended purpose, as well as the clauses preventing the first defendant from claiming a remission of rental, damages and cancelling the lease, or *alternatively* that such clauses are *contra bonis mores.* The defendants also dispute the calculation of the claim for the arrear rental.

[3] In its affidavit in support of summary judgment, the plaintiff contends that the defendants have not established a basis for rectification; that it did not breach the lease agreement; that it maintained the premises in accordance with its obligations; that there was some water ingress due to certain design flaws but this did not amount to a breach for which it is liable and did not render the premises unfit for the purpose for which it was let; that the first defendant approbated and reprobated by indicating that it cancelled the lease while remaining in occupation; that the provisions of the lease are not *contra bones mores*; and that the first defendant ceased trading but has not returned the premises to it.

[4] In their affidavit resisting summary judgment, the defendants contend that they have set out the facts, which need not be proven at this stage; that their plea of rectification requires evidence; and that the plaintiff's claim is illiquid, as it includes water and electricity charges even though the first defendant no longer occupies the premises.

[5] In terms of the new rules, summary judgment is applied for after delivery of the plea. The defendant must set out a *bona fide* defence concisely and precisely in its plea and

raise the triable issues; it cannot do so in its answering affidavit if the issue was not pleaded. The plaintiff must then explain in its application for summary judgment why the defences do not raise issues for trial and that what is raised in the plea cannot be regarded as *bona fide*.[1] In its affidavit resisting summary judgment, the defendant must still satisfy the court that it has a *bona fide* defence and must disclose fully the nature and grounds of the defence and the material facts relied upon.[2] The grounds of the defence relate to the facts upon which the defence is based.[3] The defendant must set out sufficient facts which, if proved at trial, would constitute an answer to the plaintiff's claim. The court must be appraised of the facts with sufficient particularity and completeness so as to be able to hold that if those facts are found at trial to be correct, judgment should be given for the defendant.[4]

[6] Summary judgment should not be resorted to unless, and should be accorded only where, the plaintiff can establish its claim clearly and the defendant fails to set up a *bona fide* defence or raise a triable and arguable issue.[5] If there is doubt whether the plaintiff's claim is unanswerable, the defendant must get the benefit of the doubt and the court must refuse summary judgment.[6] A defendant is not required to show that its defence is likely to prevail. A legally cognisable defence on the face of it that is genuine or *bona fide* is sufficient to defeat an application for summary judgment. The defendant's prospects of success are irrelevant.[7]

[7] Thus, a court must enquire:

7.1 whether the defendant has 'fully' disclosed the nature and grounds of its defence and the material facts upon which it is founded; and

7.2 whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law.[8]

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1 Nedbank v Weideman 2020 JDR 2746 FB at par 5

2 Rule 32(3); PCL Consulting (Pty) Limited t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Limited 2009 (4) SA 68 (SCA), par 8. See also: Breytenbach v Fiat SA (Edms) Bpk.1976 (2) SA 226 (T) at p228.

3 Chairperson Independent Electoral Commission v Die Krans Ontspanningsoord (Edms) Beperk 1997 (1) SA 244 (T) at 249 G to 250 F

4 Marsh v Standard Bank of SA Limited 2000 (4) SA 947 (W) at 949 (A)

5 Nair v Chandler 2007 (1) SA 44 (T) at para [7] – [8]

6 Millman NO v Klein 1986 (1) SA 465 (C) at 471G

7 Tumeleng Trading CC v National Security and Fire (Pty) Ltd2 020 (6) 624 (WCC) at para [13]

8 Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426B-C

[8] The essence of the defendants' defence *in casu* is that, because of the water ingress, the plaintiff did not provide the first defendant with premises that were fit for their purpose, that it did not have the full use and enjoyment thereof, and that it was therefore not obliged to pay the agreed rentals.[9]

[9] To demonstrate that their defence is *bona fide* and good in law, the defendants had to fully disclose its nature and grounds and the material facts relied upon in support of their allegation that the plaintiff breached the lease agreement by failing to provide premises that were fit for their purpose,[10] and that consequently the first defendant was entitled to withhold payment of the rentals and claim damages.

[10] To begin with, however, the lease agreement precludes this very defence. Rather than placing any obligation on the plaintiff to provide premises to the first defendant that are fit for any particular purpose, it specifically excludes any warranty to that effect.[11] Moreover, rental was payable monthly in advance and was not contingent upon the prior performance by the plaintiff. The first defendant was not entitled to withhold rental[12] nor to claim a remission in the event of the plaintiff's breach of its obligation to maintain the premises[13]; nor to claim loss or damage as a result of flooding or any other cause;[14] nor to withhold rental or claim damages as a result of such losses[15].

[11] The defendants are alive to the fact that these exclusionary clauses preclude their defence and counterclaim. Hence their plea of rectification directed at negating those exclusionary clauses. In their heads of argument, they put it thus:

> *"The Plaintiff will of course seek to rely on the exclusion clauses contained in the lease agreement as a basis to dispute the counterclaim and the entitlement for a remission of rental … The Defendants however contend that these clauses do not assist the Plaintiff as the agreement does not represent the true intention of the*

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9 Sishen Hotel (Edms) Bpk v Suid-Afrikaanse Yster en Staal Korp Bpk 1987 (2) SA 932 (A)
10 Sweets from Heaven (Pty) Ltd v Ster Kinekor Films (Pty) Ltd 1999 (1) SA 796 (W) at par 9-10
11 Clause 5.9
12 Baines Fashion (Pty) Limited t/a Gerani v Hyprop Investments (Pty) Limited 2005 (JDR) 1382 SCA; Tudor Hotel Brasserie and Bar (Pty) Limited v Hencetrade 15 (Pty) Limited (793/2016) [2017] ZASCA 111
13 Clause 19.1
14 Clause 24
15 Clause 25

parties and thus falls to be rectified."

[12] Rectification, it has been said, is an equitable remedy and a court should not be miserly in granting it where the substantive preconditions for its invocation are present, as to deny rectification in such circumstances would facilitate rather than discourage duplicity. Indeed, a defendant who raises the defence that the contract sued upon does not correctly reflect the common intention of the parties, need not even claim formal rectification of the contract; it is sufficient to plead the facts necessary to entitle him/her to rectification and to ask the Court to adjudicate the matter upon the basis of the written contract relied upon by plaintiff as it stands to be corrected.[16]

[13] The substantive facts that a party claiming rectification must allege and, at trial, prove are: an agreement reduced to writing;[17] the common continuing intention of the parties as it existed when the agreement was reduced to writing;[18] that the document does not reflect the common intention; and a mistake in drafting the document, as a result of a *bona fide* mutual error or an intentional misleading act of one of the parties.[19] In addition, the actual wording of the agreement as rectified must be pleaded.[20]

[14] Therefore, the defendants had to disclose the material facts in relation to each of these requirements to establish a basis for a rectification of the lease agreement[21] before the Court could consider their defence that the first defendant was entitled to withhold payment of rentals and claim damages as a result of the plaintiff's alleged breach.[22] If they cannot establish these requirements and a basis for rectification of the lease agreement, then the exclusionary clauses will prevail over their defence and counterclaim.

[15] *In casu*, the defendants have not even pleaded the requirements for rectification and there are no further facts set out in their affidavit resisting summary judgment to establish a

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16 Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd 2001 (4) SA 1315 (SCA) paras 31-33; Gralio (Pty) Ltd v D E Claasen (Pty) Ltd 1980 (1) SA 816 (A) at 824A-C.
17 Meyer v Kirner 1974 (4) SA 90 (N) at 103.
18 Kathmer Investments (Pty) Ltd v Woolworths (Pty) Ltd 1970 (2) SA 498 (A) at 503B.
19 Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd 2001 (4) SA 1315 (SCA) at para [32]; Mtsetfwa v Copper Sunset Sand (Pty) Ltd 2019 JDR 1355 (FB) at para [46].
20 Benjamin (*supra*); Levin v Zoetendijk 1979 (3) SA 1145 (W).
21 Benjamin v Gurewitz 1973 (1) SA 418 (A) p. 428.
22 Schroeder v Vakansieburo (Edms) Bpk 1970 (3) SA 240 (T).

basis for rectification. Thus, on the pleadings, the defence of rectification is still-born, and the lease agreement cannot be rectified. Accordingly, I cannot find that this defence constitutes a *bona fide* defence that is good in law, nor one that gives rise to a triable issue.

[16] In addition to their plea of rectification, the defendants also contend that any clause in the lease agreement that forces them to pay for unusable premises is contrary to public policy and may be set aside once evidence is led. They rely on *Barkhuizen v Napier* for this proposition,[23] which is put forward thus in their heads of argument:

> *"When all is said and done, it is an essentialia of the contract of lease for the lessor to provide peaceful and undisturbed occupation of the leased premises to the lessor; the lessor cannot exclude this obligation through a contract as this conflicts with the fundamental basis of a lease."*

[17] I have several difficulties with this argument. The obligation to provide full use and enjoyment can indeed be limited or excluded by agreement.[24] The principle of *pacta sund servanda* is a universally recognised legal principle upon which the coherence of society relies.[25] Ordinarily, a constitutional challenge to the contractual terms will give rise to the questions of whether the provisions are contrary to public policy, which represents the legal convictions of the community and the values held most dear by society. It is deeply rooted in our Constitution and the values that underlie it.[26]

[18] A party who attacks a contract and its enforcement bears the onus to establish the facts in relation thereto.[27] The fact that a term of a contract is unfair or may operate harshly does not by itself lead to the conclusion that it offends the values of the Constitution or is against public policy.[28] Neither the Constitution nor the value system it embodies gives the court a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of injustice in order to determine the enforceability on the basis of imprecise notions of good faith. The Constitution only requires contracts to be struck down in exceptional

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23 Barkhuizen v Napier 2007 (5) SA 323 (CC) at para [30]
24 Hyprop Investments Limited v Sofia's Restaurant CC 2012 (5) SA 220 GSJ; Sweets from Heaven (Pty) Ltd v Ster Kinekor Films (Pty) Ltd 1999 (1) SA 796 (W) at par 9-10
25 Barkhuizen (*supra*) at par 87
26 Carmichael v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening) 2001 (4) SA 938 CC, paras 54-56
27 AB and Another v Pridwin Preparatory School 2019 (1) SA 327 (SCA) at par 27
28 Barkhuizen (*supra*) at par 12

circumstances and with restraint.[29]

[19] A court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh. These abstract values have not been accorded autonomous, self-standing status as contractual requirements. Their application is mediated through the rules of contract law, including the rule that a court may not enforce contractual terms where the term or its enforcement would be contrary to public policy. It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it.[30] A court cannot develop the law of contract by infusing the spirit of *ubuntu* and good faith so as to invalidate the terms of the contract.[31]

[20] The defendants have not brought their defence of *contra bonis mores* within any of these principles and requirements. The highwater mark of their case seems to be their bald contention that the exclusionary terms of the contract operate harshly against them and therefore should not be enforced. However, they needed to do more than merely alleging this. They had to fully disclose the nature and grounds of this defence, as well as the material facts relied upon, to show that the exclusionary clauses should not be enforced as a matter of public policy because they are so unfair, unreasonable or unjust.

[21] The defendants have not done so. All that they plead is that there was water ingress into the premises in October 2019 which caused damage to the first defendant's fixtures, fittings and stock in trade. In its counterclaim, the first defendant seeks to recover alleged patrimonial damage from the plaintiff together with an alleged loss of profit. However, the counterclaim does not meet the basic requirements of Rule 18(10) for pleading a claim for damage, which prescribes that a party suing for damages shall set them out in such manner as will enable the other party reasonably to assess the quantum thereof. On the facts pleaded, it is not possible to make a reasonable assessment of the alleged damage, either in nature or extent.

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29 Brisley v Drotsky 2002 (4) SA 1 SCA at page 35
30 Beadica 231 CC v Trustees, Oregon Trust 2020 (5) SA 247 (CC) at par [30]
31 Mohamed's Leisure Holdings (Pty) Limited v Southern Sun Hotel Interests (Pty) Limited 2018 (2) SA 314 SCA at paragraph 30

[22] The defendants had the opportunity, and, indeed, were required, to deal fully with these material issues in their affidavit resisting summary judgment. One would have expected a full disclosure of the facts relating to the water ingress and the alleged patrimonial damage and loss of profits caused thereby. However, the defendants have not provided such facts. Anomalously, despite the water ingress having occurred in October 2019, the first defendant nevertheless remained in occupation of the premises and continued to trade for another 18 months until March 2021 when it eventually vacated. Having done so, however, the defendants did not restore the premises to the plaintiff, which is why the plaintiff now seeks an order of ejectment. In my view, their continued occupation of the premises is inconsistent with their allegations of breach and damage, and also detracts from the *bona fides* of the defence. This highlights the importance of disclosing the material facts to support their defence/s and to place the Court in a position to assess the nature and grounds thereof. The Court is unable to do so on the facts presented.[32]

[23] Thus, like their defence of rectification, the defendants' defence of *contra bonis mores* does not meet the requirements to resist a claim for summary judgment. On the facts before me, the lease agreement was agreed between the parties freely and voluntarily and there is no suggestion that they had different negotiating powers or that the exclusionary clauses were forced upon the defendants.

[24] Accordingly, the lease agreement stands unrectified, and the first defendant is bound by it. As a result, it was not entitled to withhold rental or cancel the agreement for the reasons it pleaded, and its counterclaim is excluded by the provisions of the agreement. Thus, the defendants have not disclosed a legally cognisable defence on the face of it and there is nothing to gainsay the plaintiff's valid cancellation of the agreement.[33]

[25] In the circumstances, the plaintiff is entitled to summary judgment against the defendants for the arrear rental and for the first defendant's eviction from the premises. The second defendant, as surety and co-principal debtor, did not raise any other defences to the claims and is liable to the plaintiff together with the first the defendant.

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[32] See also: Breytenbach v Fiat SA (Edms) Bpk.1976 (2) SA 226 (T) at p228 – 229.
[33]Parkhurst Investments CC v Paul's Homemade (Pty) Limited 2023 JDR 2417 GJ

[26] Insofar as the amount claimed is concerned, the first defendant remained liable for rental, electricity, gas and water whether it occupied the premises or not, while the lease was in place and until it was cancelled in accordance with its terms.

[27] For the purposes of summary judgment, the claimed amount must be liquid i.e. it must either be agreed, determined by a judgment, or ascertained by simple calculation.[34]

[28] The rental amounts are agreed and liquid.[35] However, the defendants contend that the first defendant did not occupy the premises after March 2021, and would not have incurred charges for electricity and water, save possibly for nominal amounts. After cancellation, it was not liable for any charges. As such, they argue that the amount claimed for consumption charges is incapable of prompt ascertainment and is therefore illiquid. Thus, they take issue with the liquidity of the consumption amounts subsequent to vacating the premises. There is no dispute about the amounts before that.

[29] There is merit in this argument because the first defendant's additional liability has to be pro-rated to its share of the water, sanitary fees, electricity, including electricity demand charges and electricity consumption by and on the common areas.[36] This cannot be ascertained at this stage by simple calculation.[37] The defendants are entitled to defend that portion of the claim.

[30] Accordingly, the amount due at the end of May 2021 is R938 042,63, being the rental and other charges up to and including March 2021 (when the first defendant vacated the premises). If the rental (alone) is added to this until the cancellation in February 2022, the plaintiff's claim increases by R568 691,94[38], bringing the total to R1 506 734,57 (R938 042,63 + R568 691,94).

[31] Costs are sought on the attorney and client, for which provision is made in the lease

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34 Oosrandse Bantu Sake Administrasieraad v Santam Versekeringsmaatskappy Beperk (2) 1978 (1) SA 164 (W) at 168 G – 169 E-F

35 Lester Investments v Narshi 1951 (2) SA 464 C to 469

36 Clause 9 of the lease agreement

37 Boesch NO and others v Mason Africa Group (Pty) Ltd 2023 JDR 3148 (GJ) at para [15]-[16`; French Club (Pty) Ltd v Mashego 2023 JDR 1664 (GJ) at para [34

38 Rental of R59 988,60 x 3 (May, June, July) plus rental of R64 787,69 x 6 (September 2021 to February 2022)

agreement.

ORDER

[32] Accordingly, summary judgment is granted against the defendants, jointly and severally the one paying the other to be absolved, for:

1. Payment of R1 506 734,57;
2. Interest thereon at the rate of 10.5% per annum from 2 February 2022 to date of payment;
3. Ejectment forthwith of the first defendant and anyone claiming occupation through it from the commercial leased premises described as Shop F62 (measuring approximately 109,98 square metres) (incorporating one parking bay), Fourways Mall, Erf 1698, 1699, 1700, 1701, 1714, 1715, Fourways Extension 14, Fourways, Johannesburg, Gauteng;
4. Costs of suit on the scale as between attorney and client.

GD WICKINS
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 31 July 2024
Judgment: 9 September 2024

Appearances

For Plaintiff: Adv JG Dobie
Instructed by: Reaan Swanepoel Attorneys

For Defendants: Adv R Bhima
Instructed by: Hajibey-Bhyat and Mayet Incorporated