



## **NORTH WEST HIGH COURT, MAFIKENG**

CASE NO. 1787/2011

In the matter between:

**GRAND PALACE TRADING 121 (PTY) LTD**

PLAINTIFF

and

**LINS VICTOR CC**

1<sup>ST</sup> DEFENDANT

**XUEHUE LIN**

2<sup>ND</sup> DEFENDANT

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### **JUDGMENT**

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**GUTTA J.**

#### **A. INTRODUCTION**

[1] The plaintiff applied for summary judgment against the first and second defendants jointly and severally the one paying the other to be absolved for:

1.1 payment of the sum of R212 884.19;

- 1.2 interest at the rate of 9% per month *a tempore morae*;
- 1.3 confirmation of the cancellation of the agreement of lease entered into between the plaintiff and the first defendant;
- 1.4 eviction of the first and second defendants from Shop No. 14, Sun Village Shopping Centre, Erf No. JQ3/910, Farm Doornhoek, Pilanesberg, North West ("the premises");
- 1.5 costs of suit on an attorney and client scale.

- [2] The plaintiff's claim against the first defendant arises from a written lease agreement alternatively an oral lease agreement concluded between the plaintiff and the first defendant, represented by the second defendant, in terms of which the plaintiff let the premises for the purpose of conducting a Chinese restaurant for a period of 36 months, commencing on 01 December 2010 and terminating on 30 November 2012.
- [3] The plaintiff alleged that the defendant breached the lease agreement and is in arrears in the sum of R212 884.19, which amount is made up of arrear rental, costs and other charges for the period February to September 2011.
- [4] The plaintiff's claim against the second defendant arises out of a written suretyship agreement in terms of which the second defendant bound himself as surety and co-principal debtor on behalf of the first defendant

to the plaintiff for the due and proper fulfillment of all the obligations of the first defendant arising from or out of or in terms of the agreement of lease or any renewal, amendment, breach or cancellation.

- [5] The defendant, in his affidavit opposing summary judgment, admitted that he withheld certain rental payment and alleged that the plaintiff breached clause 13.2 of the lease agreement, which states that, "the lessor grants the lessee exclusivity to operate a Chinese Restaurant at the premises", by allowing another tenant to operate a Chinese restaurant on the premises.
- [6] The defendant alleged that when the agreement was signed, he asked the plaintiff's representative what will happen with the other Chinese restaurant and he was told that the restaurant will be relocating as their lease agreement had come to an end. The restaurant continues to operate and has not moved. The defendant alleged that he brought his concern to the plaintiff and there was no change, hence the defendant decided to retain rental payment until the breach or an alternative solution was reached.
- [7] He alleged further that he would have paid a lower rental if the plaintiff had been clear that there would be a second Chinese restaurant, that he chose that location as he thought he would have exclusivity as the only Chinese restaurant. It is alleged that the first defendant has a counter-claim against the plaintiff as he would have generated more income if the other restaurant had not been allowed to operate.

[8] The defendant also alleged that the amount claimed by the plaintiff is inclusive of value added tax ("VAT") while this was not agreed to in the lease agreement.

[9] It appears to be common cause after hearing submissions by both counsel that:

9.1 there was a written lease agreement concluded between the plaintiff and the first defendant;

9.2 the plaintiff and the second defendant concluded a written suretyship agreement;

9.3 the first defendant breached the lease agreement by withholding payment;

9.4 there is an exclusivity provision in the lease agreement that the lessee can exclusively operate a Chinese restaurant on the premises.

[10] In brief, the defendants raised two defences, namely:

10.1 the first defendant, in terms of the lease agreement, had an exclusivity right to operate a Chinese restaurant and that the plaintiff breached the lease agreement in that another Chinese restaurant was operating in the premises. The first defendant has suffered damages and has a counter-claim against the plaintiff;

10.2 the amount claimed by the plaintiff in the particulars of claim is incorrect.

## **B. THE LAW**

[11] To avoid summary judgment the defendant is required, in terms of Rule 32(3) (b) of the High Court Rules, to set out in an affidavit facts, which if proved at the trial, will constitute an answer to the plaintiff's claim. The rule also requires that the defendant satisfy the court that the defence is *bona fide*. This means that the defendant must swear to a defence, valid in law, in a manner which is not seriously unconvincing. Finally, it is required of the defendant that he discloses fully the nature and grounds of the defence and the material facts relied upon therefore. This means that the statement of material facts must be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. If the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of *bona fides*. See ***Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T) at 227G–227F; Marsh v Standard Bank of SA Ltd 2000 (4) SA 947 (W) at 949.***

[12] The Court merely considers whether the facts alleged by the defendant constitute a good defence in law and whether the defence appears to be *bona fide*. See ***Maharaj v Barclays National Bank Limited 1976 (1) SA 418 (A).***

- [13] For the Court to do this, the Court should be appraised of the facts upon which the defendant relies with sufficient particularity and completeness as to be able to hold that if these statements of fact are found at the trial to be correct, judgment should be given for the defendant. See *Maharaj v Barclays National Bank Limited supra*.
- [14] The comprehensive disclosure of the material facts upon which the defence is based is of crucial importance. This is particularly so as the evaluation of the defendants opposing affidavit frequently entails not a consideration of what the defendants have said, but of what they did not say. See *Kassim Brothers (Pty) Ltd v Kassim 1964 (1) SA 651 (SR), 653B*.
- [15] A defendant relying on an intended counter-claim in an unliquidated amount must state the extent of such counter-claim. See *A E Motors (Pty) Ltd v Levitt 1972 (3) SA 658 (T)*.
- [16] Although a defendant is not expected to formulate his opposition with the same precision as is required in a plea, a defendant's opposing affidavit must have a sufficient degree of clarity to enable the Court to ascertain whether he has deposed to a defence which, if proved at the trial, would constitute a good defence to the action. See *Maharaj v Barclays National Bank Limited supra*, at 426.
- [17] There should be a full disclosure of the nature and grounds of the counter-claim, as well as the material facts upon which it relies. See *Standard Bank of SA Limited v Naude & Another 2009 (4) SA 669 (ECP)*.

- [18] It is not a defence if the unliquidated counter-claim is less than the plaintiff's claim. See *Citibank NA South African Branch v Paul N.O* 2003 (4) SA 180 (T) at 196.

## C. ANALYSIS OF THE DEFENCE

### a) Exclusivity to operate a Chinese restaurant

- [19] Counsel for the plaintiff, Mr Avvakoumides, directed the Court's attention to a description of the leased premises in clause 2 of the lease agreement. This reads:

"LEASED PREMISES	
Measuring approximately :	±300m <sup>2</sup>
Unit number :	Shop No. 14
Name of Building :	Sun Village Shopping Centre
Erf No. :	JA3/910, Farm Doornhoek
Address of Building :	Pilanesberg"

- [20] The Court was also directed to clauses 11 and 13.2 of the lease agreement:

"11. PURPOSE OF WHICH LEASED PREMISES ARE USED.

The premises shall be used for a Chinese Restaurant and for no other purpose and acknowledges that it shall not have an exclusive right to any particular type of business being conducted in the building.

.....

13. SPECIAL CONDITIONS

.....

13.2 The lessor grants the lessee exclusivity to operate a Chinese Restaurant at the premises."

[21] Accordingly, Mr Avvakoumides submitted that the first defendant, in terms of the lease agreement, did not have an exclusive right to operate the Chinese restaurant in the building.

[22] Mrs Zwiegelaar, counsel for the defendants, submitted that the exclusive right to operate the Chinese restaurant was in the building. Mrs Zwiegelaar attempted to give evidence from the bar that although the opposing affidavit refers to premises, the first defendant was referring to the building.

[23] Mrs Zwiegelaar's submission is not only contrary to the lease agreement but contrary to what the second defendant alleged in his opposing affidavit. In paragraph 3, the second defendant avers that:

"I admit that I have missed certain rental payments. I refer the Court to clause 13.2 of the lease agreement which clearly states that the lessor grants the lessee exclusivity to operate a Chinese restaurant on the premises. I submit that the plaintiff breached an agreement by allowing another tenant to operate a Chinese restaurant on the premises."

[24] The second defendant did not state that the lease agreement did not reflect the common intention of the parties in so far as the exclusivity of operating a Chinese restaurant in the building was concerned and did not rely on rectification as a defence. Furthermore, a defence must be put before the Court on affidavit and not merely orally from the bar.



[25] Hence it is apparent from the lease agreement that the first defendant did not have an exclusive right to operate the Chinese restaurant in the building and that the exclusive right that the first defendant had was to operate the Chinese restaurant only in the premises that he occupied.

[26] Accordingly, the defendant's defence on the exclusivity of operating a Chinese restaurant based on the written lease agreement is not good in law. Further, there is no reasonable possibility that the defence raised on exclusivity in the absence of rectification may succeed on trial. See ***Caltex Oil (SA) Ltd v Webb* 1965 (2) SA 914 (N) at 916–917.**

[27] Counsel for the plaintiff, Mr Avvakoumides, also submitted that the defendants have not set out a *bona fide* defence as required by law, for the following reasons:

27.1 that the defendant's defence is bold, vague and embarrassing in that the defendant failed to state when they observed the other Chinese restaurant and for how long this business was operating and whether it is still operating;

27.2 the second defendant failed to state when he brought this issue to the plaintiff's attention and who he spoke to;

27.3 that the defendant cannot withhold rental;

27.4 the lease agreement has been cancelled and that the defendant

cannot hold over the lease premises under the circumstances where they do not pay rental after cancellation of the lease.

[28] I am of the view, as stated *supra*, that the defence in respect of the exclusivity to operate the Chinese restaurant is not a *bona fide* defence and further that the defendants have not complied with the provisions of Rule 32(3)(b), in that they did not make a full disclosure of the nature and grounds of the counter-claim and the material facts upon which they rely. The defendants also failed to state the extent of their counter-claim and whether it exceeds the plaintiff's claim.

**b) The amount claimed is incorrect**

[29] Mrs Zwiigelaar, on behalf of the defendants, submitted that the amounts which the first and second defendants dispute the truth and correctness are those which purport to be:

29.1 the contribution payable to the plaintiff by the first defendant pursuant to clause 7 of Annexure "A" to the lease agreement in respect of the charges payable to the local authority for refuse removal and sewerage;

29.2 a network charge;

29.3 the VAT payable in respect of the amounts referred to in paragraphs 10.1 and 10.2 above.

- [30] She submitted that clause 7 of Annexure "A" to the lease agreement stipulates that the lessee's contribution towards the charges payable by the lessor to the local authority shall be determined by the ratio which the lessee's rental area of the premises bears to the total rentable area of the building and that if the local authority charges increase the lessee shall be liable for the increase *pro rata* his size of the rental area of the premises. That the plaintiff's particulars of claim do not contain any particulars regarding the size of the total rentable area of the building and of the leased premises as well as of the charges of the local authority for refuse removal and sewerage.
- [31] She further submitted that neither the lease agreement nor Annexure "A" thereto nor the plaintiff's particulars of claim makes provision for the payment of a network charge to the plaintiff by the first defendant.
- [32] Mr Avvakoumides submitted that it is common sense that if a company is registered for VAT and charges VAT on the rental, rates and operating costs that it will also include all other charges that it is entitled to charge VAT on other charges.
- [33] He submitted that this is not a *bona fide* defence, but only a defence on the actual amount owing and that if the defendant is only disputing those charges, that this Court can grant judgment for the rental, operating costs and rates.
- [34] I am of the view that there is a dispute in so far as the amount that the plaintiff claimed, especially with regards to the network charge.

Accordingly, I accept the submission by Mr Avvakoumides to grant judgment for only the rental, operating costs and rates, which are not disputed by the defendants, in the amount of R201 484.19.

[35] Further, it stands to reason from the foregoing that the plaintiff is entitled to an order confirming the cancellation of the lease agreement and the eviction of the defendants from the premises.

[36] Accordingly, I grant the following order.

#### **D. THE ORDER**

[37] Summary judgment is granted against the defendants jointly and severally the one paying the other to be absolved for:

- a) payment of the sum of R201 484.19;
- b) interest at the rate of 9% per month *a tempore morae*;
- c) confirmation of the cancellation of the agreement of lease entered into between the plaintiff and the first defendant;
- d) eviction of the first and second defendants and any other occupant from Shop No. 14, Sun Village Shopping Centre, Erf No. JQ3/910, Farm Doornhoek, Pilanesberg, North West;

- e) the defendants are granted leave to defend the balance of the plaintiff's claim, in the amount of R11 400.00;
- f) costs of suit on an attorney and client scale.

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N. GUTTA  
**JUDGE OF THE HIGH COURT**

## **APPEARANCES**

DATE OF HEARING : 22 MARCH 2012  
DATE OF JUDGMENT : 29 MARCH 2012

COUNSEL FOR PLAINTIFF : ADV G.T. AVVAKOUMIDES  
COUNSEL FOR DEFENDANTS : ADV C. ZWIEGELAAR

ATTORNEYS FOR PLAINTIFF : CHRIS MARITZ ATTORNEYS  
ATTORNEYS FOR DEFENDANTS : VAN ROOYEN TLHAPI WESSELS INC.  
(Instructed by VAN VELDEN-DUFFEY INC.)