Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA

Case No.: 073151/23

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

[redacted] **Date:** 12/06/2024

In the matter between:

HERACLES PRIME PROPERTY (PTY) LTD **Applicant**

and

CYBER LOFT 021 CC **Respondent**

JUDGMENT

MTEMBU AJ

Introduction

[1] This is an opposed application for summary judgment brought under the provisions of Rule 32 of the Uniform Rules of Court. The applicant/plaintiff's claim against the respondent/defendant is for payment in the amount of R216 211.40 (Two Hundred and Sixteen Thousand Two Hundred and Eleven Rand Forty Cents). The application is opposed by the respondent/defendant.

[2] In addition, the applicant seeks an order that the respondent pay the applicant the aforesaid amount with interest thereon at the rate of 7.5% per annum a tempore morae, and costs on the attorney and client scale on the Magistrate Court tariff.

Brief Background

[3] It is common cause that on 21 November 2019, the respondent and Imberba Rakia Properties CC, both duly represented, entered into a written lease agreement in which the respondent rented the commercial premises at shop 18, Jean Village Shopping Centre. The lease was for a period of five years, commencing from 01 December 2019 to 30 November 2024. The premises were leased for the purpose of operating a restaurant.

[4] In terms of clause 8.4 of the lease agreement, any sale by the Landlord of the property, the lease would continue in full force, and any purchaser would automatically acquire all the rights and obligations of the Landlord.

[5] On 18 November 2022, the applicant purchased the immovable property within which the leased premises is situated from its predecessor, Imberba Rakia Properties CC. The rights and obligations arising from the lease agreement were ceded to the applicant.

[6] In terms of this lease agreement, clause 7 thereof, the respondent is liable to pay a basic monthly rental for the period 1 December 2019 to 30 November 2020 in the amount of R78 840 plus VAT thereon per month, for the period 1 December 2020 to 30 November 2021 in the amount of R83 570.40 plus VAT thereon per month, for the period 1 December 2021 to 30 November 2022 in

the amount of R88 584.62 plus VAT thereon per month, for the period 1 December 2022 to 30 November 2023 in the amount of R93 899.70 plus VAT thereon per month and for the period 1 December 2023 to 30 November 2024 in the amount of R99 533.68 plus VAT thereon per month.

Parties' contentions

[7] The applicant contends that the respondent is indebted to it for arrears and other charges for the period from December 2022 to July 2023 in the sum of R216 211.40, which was due and payable on 01 July 2023.

[8] The respondent, in its plea, admits almost everything. Where there is a denial of the allegations, it is simply a bare denial with no substantiation whatsoever. The attempt to rebut the allegations is only made in paragraph 3 of the plea, where it is averred that in May 2019, the parties entered into an addendum to the current lease agreement that the monthly rental would be calculated at R120,00 per square meter and would include rates and taxes as well as operational costs.

[9] The respondent has also put in a counter-claim. In its counter-claim, there is nothing much except to repeat the averments that in March 2019, the parties entered into an addendum to the lease agreement in question. This time, the period in which the alleged addendum was entered into is March 2019, not May 2019, as averred in the plea. According to the respondent, the parties agreed that this addendum to the lease agreement would be effective from November 2019.

[10] I must highlight, though, that the alleged addendum by the respondent is not attached to its plea. Instead, the respondent blames the applicant for not attaching it to the particulars of claim.

[11] In the affidavit resisting summary judgment, the respondent simply repeats its averment that the parties renegotiated the lease in June 2019. Again, this time,

the period in which the addendum was entered into is June 2019, not May 2019, as averred in the plea, and not March 2019, as pleaded in the counter-claim.

[12] Mr. Steyn, appearing on behalf of the respondent, submitted that a deponent to the applicant's affidavit does not have personal knowledge as required by Rule 32(2)(a) of the Uniform Rules. This issue was raised for the first time since, in the affidavit resisting summary judgment, the personal knowledge of the deponent in relation to the claim is not disputed. In fact, it is admitted. However, I will deal with this issue later in this judgment.

[13] The applicant, on the other hand, contends that the respondent has failed to place a *bona fide* defence. The purported addendum agreement entered into in May 2019 preceded the lease agreement concluded on 21 November 2019. It is simply untenable that the terms purported to be in the addendum would not have been encapsulated in the lease agreement which was subsequently concluded and signed on behalf of the respondent, so went the submission.

[14] In support of this contention, the applicant contends that clause 31.1.2 of the lease agreement stipulates that:

> *"This agreement shall only become binding on the LANDLORD and LESSEE after the due signature of this agreement by or on behalf of both the LANDLORD and the LESSEE. It is recorded that the only binding agreement between the parties is that recorded herein. The terms of any prior negotiations, discussions and the like between the parties relating to the premises shall not be binding in any way save as they are repeated herein". [My Emphasis]*

[15] On this basis, it is submitted that since neither of the basis of opposition raised by the respondent is tenable, this implies that the respondent has simply failed to set out any *bona fide* defence to the relief sought, which requires further ventilation at trial.

Legal principles

[16] There is an abundance of authorities about summary judgments, and they require no exclusive exposition. The issue to be decided is whether the respondent has a *bona fide* defence.

[17] Uniform Rule 32(3) requires that the court be satisfied that the defendant's defence, as stated in his affidavit, constitutes a bona fide defence to the plaintiff's claim. In deciding whether the defendant has set out a bona fide defence, all the court enquires is whether, on the facts so disclosed, the defendant has disclosed the nature and grounds of her/his defence; and 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 bona fide and good in law. See ***Maharaj v Barclays National Bank Ltd***[1]***.***

[18] Rule 32(3)(b) expects defendants to satisfy the court by disclosing their *bona fide* defence to the action. The defendant has to disclose fully the nature and grounds of the defence and the material facts relied upon therefor.

[19] Uniform Rule 32 was amended with effect from 1 July 2019. Under the amended Rule, a plaintiff must wait for the defendant to deliver a plea before a plaintiff may institute summary judgment proceedings. Therefore, a Judge cannot entertain a summary judgment application in terms of the said rule without a plea having been filed. There have been no material changes. The requirements for how a defendant may successfully oppose summary judgment remain the same.

[20] The issue to be determined is whether the respondent, indeed, has disclosed a *bona fide* defence. Before I deal with the respondent's *bona fide* defence, it is apt that I, first, deal with the point *in limine* raised by the defendant.

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[1] 1976 (1) SA 418 (A) at 425G–426E.

Lack of personal knowledge

[21] Mr Steyn, appearing on behalf of the respondent, submitted that the deponent to the verifying affidavit does not have personal knowledge and, therefore, cannot objectively verify all the facts relating to this matter. The applicant took cession of the lease agreement. The applicant would not be able to give evidence about the negotiations regarding the lease agreement and all other matters that preceded the cession to the applicant. It could only be a representative of Imberba who could give evidence of all the facts preceding the cession, including the negotiations relating to the addendum. The applicant, the submission goes, should at least have attached a confirmatory affidavit from the cedent to its verifying affidavit, which specifically addresses the facts to the date of transfer of registration and the cession taking effect in order to comply with the requirements of Rule 32.

[22] As I have already stated, this issue was raised for the first time since, in the affidavit resisting summary judgment, the personal knowledge of the deponent is not disputed but admitted. This issue is only raised in the heads of argument. I must also add that the heads of argument only deal with the lack of personal knowledge of the deponent and nothing on merits. It is trite that a litigant must stand or fall with its founding papers. I, however, note that this is a summary judgment application which is *sui generis* compared to other general applications.

[23] Notably, it happens quite often, in summary judgment applications, that defendants with no *bona fide* defence would mostly rely on strict compliance with Rule 32(2)(a) of the Uniform Rules so as to defeat the summary judgment application, and this becomes the only defence, as it is the case in this matter. While non-compliance by a plaintiff with the requirements for a summary judgment application is fatal, but I do not think that a robotic approach should be applied by the courts. Where it is evident that the defendant has no *bona fide* defence at all, the court should observe compliance with Rule 32(2)(a) with minimal formalism. It is often said that form should not override substance. Rule

32 must be interpreted in the light of its purpose that insignificant formalism ought not to be pursued. The principle is that, in deciding whether or not to grant summary judgment, the court looks at the matter "at the end of the day" on all the documents that are properly before it.[2] The Supreme Court of Appeal in ***Stamford Sales & Distribution (Pty) Limited v Metraclark (Pty) Limited***[3] stated that the high court decisions requiring personal knowledge of all material facts on the part of the deponent to the verifying affidavit are thus inconsistent with the principles established in Maharaj.

[24] Whilst I accept that the mere assertion by a deponent that he can swear positively to the facts is not sufficient, in that it must appear from the verifying affidavit that he has such personal knowledge, I disagree that it is the case in this matter before me.

[25] The deponent to the applicant's affidavit in support of summary judgment is described as the applicant's Director. The deponent asserts that in the ordinary course of his duties as the Director of the applicant and having regard to the applicant's file, records, documents, and accounts under his control, has acquired personal knowledge of the indebtedness of the respondent. In addition, he also asserts that he perused all documents exchanged in respect of the institution of the claim. He states that he verifies the relief sought against the respondent in respect of the payment of arrear rental and other charges for the period December 2022 to July 2023.

[26] It is, therefore, glaring that the deponent, in his capacity as the Director, is conversant with the parties' files, records, and accounts. The nature of the deponent's office in itself suggests very strongly that he would, in the ordinary course of his duties, acquire personal knowledge of the respondent's financial standing with the applicant. Thus, he is able to swear positively thereto as required by Uniform Rule 32. It is not necessary for the deponent to have first-

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[2] *Stamford Sales & Distribution (Pty) Limited v Metraclark (Pty) Limited* 676 of 2013) [2014] ZASCA 79 (29 May 2014)

[3] Ibid at para 11

hand knowledge of every fact that contributes to the applicant's cause of action, and where the applicant is a corporation, the deponent may well legitimately rely on records in the corporation's possession for their personal knowledge of at least certain relevant facts and the ability to swear positively to such facts.[4]

[27] In **Brand House Ltd v Sasfin Bank Ltd; Brandhouse Beverages (Pty) Ltd v Sasfin Bank Ltd,**[5] it was held that:

> *"Concerning the finding by the court below that the reconciliation statement attached to Ms Juul's affidavit constituted inadmissible hearsay evidence and also Sasfin's submission that her designation does not suggest that she has any personal knowledge of the facts, I am constrained to disagree. She says in clear terms that she has personal knowledge of the facts and even if she was not the author of the document she was able to verify its contents. The reconciliation statement was, therefore, admissible. (Cf: Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 424 [also reported at [1976] 2 All SA 121 (A) – Ed]" (My Emphasis)*

[28] Saldulker JA held in **Rees and Another v Investec Bank Ltd**[6] that:

> *"undue formalism in procedural matters is always to be eschewed and must give way to commercial pragmatism. At the end of the day, whether or not to grant summary judgment is a fact-based enquiry. Many summary judgment applications are brought by financial institutions and large corporations. First hand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit on behalf of such financial institution or large corporation. To insist on firs-hand knowledge is not consistent with the principles espoused in Maharaj".*[7] **(My Emphasis)**

[29] The respondent's contention that the deponent would not be able to give evidence about the negotiations regarding the lease agreement and all other matters that preceded the cession to the applicant is, in my view, without merit.

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[4] See Standard Bank of SA Ltd v Secatsa Investment (Pty) Ltd and Others 1999 (4) SA 229 (C) at 235A - C

[5] 2009] 1 All SA 22 (SCA) at para 6

[6] 2014 (4) SA 220 (SCA) at para 15

The applicant's claim, as I understand it, relates to the respondent's indebtedness for arrears and other charges for the period from December 2022 to July 2023. It is common cause that on 18 November 2022, the applicant purchased the immovable property within which the leased premises is situated. Meaning that the deponent, as a Director, became in charge of the applicant's business activities, at the very least, from November 2022. Surely, the deponent, as the applicant's Director, is a rightful person to give evidence in relation to the applicant's claim from December 2022 to July 2023.

[30] I am struggling to understand how a cedent could give evidence in relation to the claims accumulated after the cession had taken place. There is no claim for the period before the transfer of the immovable property. If there were some outstanding rentals ceded to the applicant, perhaps under those circumstances, a confirmatory affidavit from the cedent would have been required. The submission that seeks to suggest that there were some negotiations that took place before the conclusion of the lease agreement is of no consequence. Such submission flies in the face of clause 31.1.2 of the lease agreement, which stipulates that the terms of any prior negotiations, discussions and the like between the parties relating to the premises shall not be binding. Therefore, such evidence from the cedent would be unnecessary in the presence of this clause, which is a common cause.

[31] I am satisfied as to the reliability of the statement by the deponent in the verifying affidavit that he is able to 'swear positively to the facts and verify the cause of action. Consequently, the respondent's point *in limine* regarding the applicant's personal knowledge must fail. Having cleared the point *in limine,* it remains for this court to consider the remainder of the defences.

[32] I now turn to deal with the respondent's defence on merits.

Analysis of the respondent's defence

[33] As already stated above, to avoid summary judgment a defendant wishing to satisfy the court by affidavit that he has a *bona fide* defence to the action, shall "disclose" fully the nature and grounds of the defence and the material facts relied upon therefor. (Rule 32(3)(b)). The test of *bona fide* means that the defendant's allegations ought not to be inherently and seriously unconvincing. See **Breitenbach v Fiat SA (Edms) Bpk**[8]

[34] The respondent's defence, as already stated, is that the parties entered into an addendum to the current lease agreement that the monthly rental would be calculated at R120,00 per square meter, including rates, taxes and operational costs. Correctly so, Mr Steyn did not press much on this defence. The main submission was based on the applicant's lack of personal knowledge in relation to the cause of action. Indeed, it would appear that the respondent's challenge was nothing, but a tactical and dilatory device aimed at stalling the applicant's suit against the respondent regarding its summary judgment.

[35] I agree with the applicant's Counsel that the purported addendum agreement entered into in May 2019 preceded the lease agreement concluded on 21 November 2019. It is simply untenable that the conditions purportedly contained in the addendum would not have been incorporated in the lease agreement that was subsequently concluded in November 2019. A defence based on prior negotiations cannot be said to be *bona fide* in the face of clause 31.1.2 of the lease agreement, which stipulates that the terms of any prior negotiations, discussions and the like between the parties relating to the premises shall not be binding.

[36] This defence falls short of the requirements for a successful defence to summary judgment.

[37] After careful consideration, I can only conclude that the defense is a blatant attempt to delay the applicant's claim and is not *bona fide*. In all the

[8] 1976(2) SA 226 (T) at 228B.

circumstances the respondent has made out no defence to the applicant's claim. It has set out no facts upon which I could exercise a discretion in its favour. On all the information before the court, the applicant is entitled to a summary judgment.

Costs

[38] What remains is the question of costs. The general rule is that the successful party should be given his costs, and this rule should not be departed from, except where there are good grounds for doing so. In this matter, there is nothing that warrants deviation from the general rule. I am also persuaded that costs on an attorney and client scale on the Magistrate Court tariff are warranted. Judging by the plea, which is full of bare denials, indeed, opposing this application was an abuse of the court process.

Order

[39] Consequently, summary judgment is granted, and I make the following orders:

(a) The Defendant to pay in the sum of R216 211.40;

(b) The Defendant to pay interests on the said sum of R216 211.40 at the rate of 10.75 per annum *a tempore morae; and*

(c) Costs on the attorney and client scale on the Magistrate Court tariff.

A.M. MTEMBU AJ

Acting Judge of the High Court of South Africa

Gauteng Division, Pretoria

"This judgment was prepared and authored by the Judge whose name is reflected herein, duly signed, and is submitted electronically to the Parties/their legal representatives by email. This judgment is further uploaded to the electronic file of this matter on Case Lines by the Judge or his Secretary. The date of this judgment is deemed to be 12 June 2024."

Date of Hearing: 22 April 2024

Date of judgment: 12 June 2024

Counsel for the Applicant: Adv L A Pretorius

Instructed by: Mark Efstratiou Inc, Pretora

Counsel for the Respondent: Adv T Steyn

Instructed by: Diemieniet Attorneys, Germiston