REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023/013774

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: [redacted]

24/6/2024

DATE [redacted] SIGNATURE

In the matter between:

SA RETAIL PROPERTIES (PTY) LIMITED Plaintiff

and

BLACK PANTHER LOUNGE (PTY) LIMITED First Defendant

HENRI EL HAGE Second Defendant

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines/Court online and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 24 June 2024.

Order: Paragraph [24] of this judgment.

JUDGMENT

TODD, AJ:

[1] This matter became before me on the unopposed motion roll on 4 June 2024.

[2] The Plaintiff brought three claims arising out of the conclusion of a written agreement of lease between the Plaintiff and the First Defendant. The Second Defendant had bound himself as surety for and co-principal debtor with the First Defendant for its obligations under the lease.

[3] Following a breach of the agreement by the First Defendant, the Plaintiff cancelled the agreement and secured an eviction order against the First Defendant.

[4] The Plaintiff then instituted these proceedings, making three claims. The first, Claim A, was for arrear rental due under the lease agreement. The second, Claim B, was for damages caused by the early cancellation of the lease agreement. The third, Claim C, was for a portion of a tenant installation allowance provided for in the lease agreement, following its early cancellation.

[5] In the default judgment application which came before me on 4 June 2024 the Plaintiff sought judgment for Claims A and C only. In an affidavit explaining the reasons for re-enrolling the matter on the unopposed roll the Plaintiff's attorney set out the history of the matter in some detail. In brief summary, the Defendants had entered appearance to defend but then failed to deliver a plea. On 6 November 2023 the Plaintiff served a notice of bar on the First and Second Defendants. No plea was subsequently delivered and both First and Second Defendants have accordingly been barred from pleading.

[6] The matter was then enrolled for default judgment on 18 January 2024. On 17 January 2024, the day before that hearing, the Defendants served various requests and an "application for condonation and extension of time limits to plead", in effect applying to uplift the bar. These papers were served on the

Plaintiff but had not been filed, by being uploaded to Caselines, when the matter was called on 18 January 2024.

[7] Nevertheless the Defendants' counsel, Mr Mawere, appeared for the Defendants on that date and sought a postponement of the matter to enable the Defendants to proceed with their application to uplift the bar. The matter was then postponed, with the Defendants ordered to pay the wasted costs on an attorney and client scale.

[8] The purpose of the postponement, as explained by the Plaintiff's attorney in the affidavit that I have referred to, which has not been answered or contradicted, was to give the First and Second Defendants an opportunity to file the application for the upliftment of bar which had been served the day before the hearing on 18 January 2024 but had not been uploaded to Caselines. The postponement provided the First and Second Defendants with an opportunity to ensure that that application was properly delivered and to take steps to prosecute it.

[9] In fact, the Defendants took no such step and did not, in the days and weeks following the postponement of the matter on 18 January 2024, either deliver or in any other way proceed with that application.

[10] On 20 February 2024 the Plaintiff's attorneys addressed correspondence to the Defendants recording that despite the Defendants having sought condonation and an extension of the time limit within which to file a plea to the main action they had still not, as at that date, filed their application on the Court Online platform, and that this had caused unnecessary complications and undue and prejudicial delays. The letter continued as follows:

> "*Failure to upload your client's application means that it is not actually before the Court, which cannot consider it, and we cannot formally respond to it. Your clients' failure to upload the application is indicative of its males fides and intention to delay the matter indefinitely.*
>
> *We therefore request that you file your clients' application on the court online platform without delay, and by no later than 26 February 2024. Should you fail to do so our instructions are to proceed with an*

application for default judgment and a copy of this letter will be used in further legal proceedings against your client."

[11] The Defendants did not answer this correspondence, and did not take any further steps to ensure that their application to uplift the bar was delivered. Nor did they take any other steps to prosecute that application.

[12] As a result, the Plaintiff did what it had said it would, which was to again take steps to enrol the matter on the unopposed roll and to seek judgment by default.

[13] When the matter was called on the unopposed roll on 4 June 2024 Mr Mawere again appeared for the Defendants. He conceded that the Defendants had taken no steps to file their application to uplift the bar that had been placed on them, and similarly conceded that they had taken no steps to prosecute that application in any manner. Mr Mawere submitted, however, that the Plaintiff was nevertheless not entitled to re-enrol the default judgment application.

[14] Mr Mawere submitted that the Plaintiff was precluded from re-enrolling the matter for default judgment in circumstances in which there was an unresolved application to uplift a bar. This was so, Mr Mawere submitted, notwithstanding the fact that the Defendants had not in fact filed that application or taken any steps to proceed with it. Instead, Mr Mawere submitted, the Plaintiff was restricted to filing a notice under Rule 30 of the Rules of this Court, contending that an irregular step had been taken by the Defendants, and applying to set that step aside. The "step" in this case, Mr Mawere submitted, which the Plaintiff needed to set aside, was the service of an application which had never been filed or proceeded with by the Defendants. Mr Mawere submitted that by re-enrolling the matter for default judgment in these circumstances, the Plaintiff was attempting to by-pass the provisions of Rule 30, that this was impermissible, and that the only step available to the Plaintiff in those circumstances was to make use of the provisions of Rule 30.

[15] Mr Mawere concluded by submitting, in the alternative, that an appropriate course of action in the circumstances would be for this Court to stand the matter down until its Thursday roll in order to give the Defendants an opportunity to file the application which they had thus far failed to file or otherwise to pursue over

a period of some 6 months, so that this Court could then consider the Plaintiff's application for default judgment in the context of that application. Mr Mawere made this submission accepting that at the time when this matter was called on 4 June 2024 the Defendants' application to uplift the bar, which had been served on the Plaintiff on 17 January 2024, had still not been filed.

[16] I declined Mr Mawere's invitation to stand the matter down until my Thursday roll, and reserved judgment on the application for default judgment. In the course of preparing this judgment I noted from the court file that on 6 June 2024, two days after I had reserved judgment, a further notice of motion was uploaded by Mudzusi Molobela Atttorneys on behalf of the Second Defendant supported by an affidavit deposed to by the Second Defendant. Those papers had been signed on 31 May 2024, but had not been uploaded prior to the hearing on 4 June 2024 and they were not mentioned by Mr Mawere when he appeared for the Defendants on that date. The new application apparently seeks to have the matter removed from the unopposed roll, ostensibly in reliance on the provisions of Rule 33(4) of the Uniform Rules.

[17] As indicated, that application was not before Court on 4 June 2024 when the matter was argued in Court, and Mr Mawere made no reference to it. The application has not been properly brought, and it is not clear what the purpose was of uploading it after judgment had been reserved in the mater. Nevertheless, since it is possible that the Second Defendant may nevertheless seek to contend that it constitutes a further reason why judgment should not be granted in this matter, I will deal with it briefly. In short, the application was brought late, was not advanced when the matter was called on 4 June 2024, and in any event has no merit.

[18] As to Mr Mawere's principal submission, that when Defendants such as those in the present matter have given notice of their intention to bring an application and have served papers on the Plaintiff without filing them, and have failed to proceed with the application, this constitutes an irregular step and that a Plaintiff is precluded from seeking judgment to which it is otherwise entitled without first invoking the provisions of Rule 30 and requesting this Court to set aside the irregular step, this is in my view clearly not correct. If it were, a Defendant in the

position of the present Defendants would be able to delay judgment indefinitely by taking one spurious step after another on each occasion when a Plaintiff is otherwise entitled to judgment.

[19] This is manifestly not the purpose of Rule 30. The authorities make it clear that a party is not obliged to invoke the provisions of Rule 30 but may also make use of any other remedy available to it under the rules, and that a Plaintiff may apply for judgment by default without first making application to have an irregular notice set aside: see *KDL Motorcycles (Pt) Ltd v Pretorius Motors 1972 (1) SA 505 (O), Swart v Flugel 1978 (3) SA 265 (E).*

[20] In my view, there are no grounds on which to extend any further opportunity to the Defendants to bring an application which they ostensibly wished to prosecute in January of this year but have failed to do so. I agree with the submission of Mr Muchopa, who appeared for the Plaintiff, that the conduct of the Defendants constitutes an abuse of the process of this court, and is clearly a *male fides* and dilatory attempt to avoid judgment being granted in a matter in which the Plaintiffs are entitled to judgment.

[21] Mr Mawere was unable to explain why, having received notice of set down on the unopposed roll, the Defendants had not placed any material before this court that they might wish it to consider. When the matter was argued there was no no application before court to uplift the bar, and it seems to me in any event that in circumstances in which condonation was sought for that application back in January 2024 and no steps have been taken since then to prosecute it, the prospects of condonation being granted would have been remote.

[22] In summary, it is clear that the strategy being adopted by the Defendants is dilatory and amounts to an abuse of the processes of this Court. Had the Plaintiff sought such an order I might have been inclined to grant costs on a punitive scale on those grounds, including an order that some or all of those costs be paid *de boniis propriis*. As it happens, costs on an attorney and client scale are provided for in the agreement on which the claims are founded.

[23] In the circumstances I am satisfied that the Plaintiff was entitled to enrol the matter for default judgment on the unopposed roll as it did on 4 June 2024. I am

also satisfied that a case has been made for default judgment to be granted in respect of Claims A and C.

[24] I make the following order:

Default judgment is granted against the First and Second Defendants jointly and severally, the one paying the other to be absolved, for:

CLAIM A

1. Payment of the sum of R1,368,140.96;
2. Interest thereon at the rate of 10.75% per annum, *a tempore morae,* to date of final payment; and
3. Costs of suit on the scale as between attorney and client.

CLAIM C

1. Payment in the sum of R1,530,000.00;
2. Interest thereon at the rate of 10.75% per annum, *a tempore morae*, to date of final payment; and
3. Costs of suit on the scale as between attorney and client.

C TODD
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing:	4 June 2024
Date of Judgment:	24 June 2024

APPEARANCES

Counsel for the Plaintiff:	M Muchopa
Instructed by:	Hadar Incorporated

Counsel for the First and Second Defendants:	M Mawere
Instructed by:	Carl van Zyl Attorneys and Onah Attorneys Inc