

SOUTH AFRICA / JUDGMENT

Growthpoint Properties Ltd v M Bay Specialist (Pty) Ltd and Another (62145/2019) [2020] ZAGPPHC 416 (21 August 2020)

[2020] ZAGPPHC 416**COURT**

North Gauteng High Court, Pretoria

BEFORE

N Davis

CASE / FILE NUMBER

62145/2019

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Source record**HIGH****COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****(1)****REPORTABLE: NO.****(2)****OF INTEREST TO OTHER JUDGES: NO.****(3)****REVISED: YES****CASE****NO: 62145/2019****In**

the matters between:

GROWTHPOINT

PROPERTIES LTD

Plaintiff/Excipient

and

M

BAY SPECIALIST (PTY) LTD

First

Defendant/Respondent

PINTO

OMONGE KIDIGE

Second

Defendant/Respondent

This

exception has been heard in a virtual hearing via Microsoft Teams in

terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgment and orders are accordingly published and distributed electronically.

JUDGMENT

DAVIS, J

[1]

Introduction

This is the judgment in an exception taken by a prospective landlord against the plea and counterclaim by its intended tenant and its surety.

[2] The background facts

The facts surrounding the litigation between the parties, as alleged by them, can be gleaned from the plaintiff's particulars of claim read with the defendants' initial plea and counterclaim and their amended plea and counterclaim. They are the following:

2.1 During approximately June 2019, the second defendant, Mr Kidige approached a property agent, Anvil Properties. He spoke to a certain "Dylan". The discussions related to the rental of a property fit for the first defendant's purposes. This would be a property being capable of accommodating or being able to be converted to such an extent that it would allow the first defendant to house and operate x-ray machines therein. Mr Kidige was told that one of Anvil's clients, the

plaintiff, had such a property available for rent.

2.2 Based on what Anvil and Dylan had represented to the defendants, they contracted an architect to do the necessary planning and design to effect the installation of the x-ray machine according to specifications. The first defendant

paid the architect R 10 000,00 for this.

2.3 On 24 June 2019, the plaintiff and the first defendant signed the written agreement of lease for the premises in question. No rental would be payable for the first month but thereafter the monthly rental and costs exceeded R 20 00 per month. The lease period would commence on 1 July 2019 and run until 31 July 2022. A deposit was also payable. At the time of the signing of the lease agreement in Durban, the plaintiff was being represented by a Mr Worst. The property was situated in Umhlanga.

2.4 Shortly after the signing of the agreement, but before occupation, the plaintiff, then represented by one “Dave”, informed the defendants that the premises would not be able to accommodate the defendants’ x-ray machines and neither could alterations be made to the premises. The premises were to be used for administrative purposes only. Upon learning this, the defendants verbally cancelled the agreement. They followed this up with a written cancellation on 4 July 2019.

2.5 The plaintiff saw the cancellation as a repudiation of the contract which repudiation it accepted on 26 July 2019, thereby terminating the agreement.

2.6 Pursuant to the above, the plaintiff instituted action, claiming full rental and costs for the full period of the lease. It also seeks to hold Mr Kidige liable for the same amount based on a deed of suretyship which had somehow been signed on 18 June 2019, that is preceeding the lease agreement.

2.7 As a result of being without premises, the first defendant almost lost a contract it had with the RAF. It turns out that a penalty of some R 174 000,00 was imposed on it by the RAF, but it is not entirely clear on what basis.

2.8 The defendants filed an initial plea and counterclaim, but after some objections thereto and after giving formal notice, delivered an amended plea and counterclaim. The plaintiff, although not having objected to the amendment, now takes exception to the plea on the basis that it does not disclose a defence and to the counterclaim on the basis that it is vague and embarrassing or lacks necessary averments.

[3] The applicable legal principles

3.1 The purpose of an exception alleging that a pleading lacks averments that are necessary to sustain a defence or (counter) claim is to dispose of the leading of evidence at a trial. Such an exception must go to the root of the claim or defence. See: *Vermeulen v Goose Valley Investments (Pty)Ltd* 2001(3) SA 986 (SCA) and *Trustees for the time being of the Bus Industry Restructuring Fund v Break Through Investments CC* 2008(1) SA 67 (SCA).

3.2 An exception is decided on the allegations of the respondent/s thereto only and cannot be used to solve a factual dispute. See: *First National Bank of SA Ltd v Perry* NO 2001(3) SA 960 (SCA).

[4] Evaluation

4.1 The amended plea does not set out the representations made to the defendants as referred to in paragraph 2.1 above, nor does it deal with the aspect that the premises were not fit for the first defendant’s use. It also does not address the contents of the agreement itself. I interpose to state that the agreement consists of 8 pages of small script, accompanied by a 26-page set of “Standard Terms and Conditions”.

4.2 What the amended plea does state however, is that the defendants did not repudiate the contract but cancelled it based on the plaintiff's failure to "deliver" the leased premises on 1 July 2019. Reliance was also placed on clause 5 of the agreement wherein the commencement date of 1 July 2019 had been stipulated.

4.2 The plaintiff's exception to the plea is based on two legs: it contends firstly that clause 5 does not contain a sufficient indication as to what obligation the plaintiff has breached and secondly that the defendants appear to

impermissibly rely on an *exceptio non adimpleti contractus*.

4.3 Regarding the first ground of exception: Clause 5 of the agreement indicates the date of commencement of the lease. It stipulates 1 July 2019 as being that date. The Standard Terms and Conditions imposes in clause 3 thereof an obligation on the plaintiff to provide the first defendant with beneficial occupation of the premises on the date specified in clause 1.3 thereof, being in turn a date specified in a schedule thereto. The agreement appears to be a "Schedule of Fundamental

Terms" if regard is had to what has been printed on the top right-hand corner of each page thereof. Upon a proper interpretation of the agreement as a whole, the date of beneficial occupation can only be that specified in Clause 5, being the clause on which the defendants rely.

4.4 As to the second ground of exception, the plaintiff contends that the *exceptio non adimpleti contractus* can only be relied on in a case where there exist reciprocal obligations. The plaintiff contends that is not the case here. I beg to differ. The obligation to provide beneficial occupation of leased premises is at the very least reciprocal to the obligation to pay rent. I say "at least" on the most beneficial interpretation for the plaintiff because generally, as in this case, the plaintiff's obligation to provide beneficial occupation, precedes any obligation to pay rent. See: Harms, Amler's Precedents of Pleadings, Fourth Edition at 201 and the cases quoted there. The failure to provide beneficial occupation goes to the root of the contract which would ordinarily entitle an innocent party to cancel the agreement. Although the defendants probably meant to plead facts in accordance with those set out at the commencement of this judgment, I find that what had been pleaded are sufficient to constitute a defence.

4.5 During argument of the matter, it was contented that despite the obligation to provide beneficial occupation going to the root of the contract, the defendants had been obliged to first give the plaintiff a written notice and 14 days'

opportunity to remedy its breach before they became entitled to cancel the agreement. I find that this is something that the plaintiff can deal with in a replication.

4.6 Regarding the counterclaim: there are simply too little information pleaded in the amended counterclaim regarding both the payment of the architect and the basis for the imposition of the fine by the RAF as well as why the plaintiff should be liable for these amounts. This pleading is deficient and this has been conceded on behalf of the defendants during the hearing of the matter. The exception against the counterclaim should be upheld and the customary order regarding an opportunity to rectify the deficiencies should follow.

[5] Costs

It does seem somewhat opportunistic for a plaintiff to claim as damages allegedly suffered, the full contract value of a contract which, although it came into existence on paper, was never implemented, not even during the month of free rental, but that is merely an obiter observation. What is of more importance is that both sets of parties have been equally successful in having the exception upheld or discharged. In the exercise of my discretion, it would therefore be fair if each party were to pay its own costs.

[6] Order:

1. The exception against the defendants' plea is dismissed.
2. The exception against the first defendants' counterclaim is upheld and the first defendant is granted a period of twenty court days within which to deliver a notice of amendment to the counterclaim, failing which the counterclaim shall be struck out.
3. Each party shall pay its own costs.

N DAVIS

Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 11 August 2020

Judgment

electronically delivered: 21 August 2020

APPEARANCES:

For the Plaintiff/ Excipient: Adv. U Lottering

Attorney for Plaintiff/Excipient: Eversheds Sutherland (KZN) Inc c/o Jacobson
& Levy, Pretoria

For the Defendants:

Adv. S Nkuna

Attorney for Defendants: Nhubunga Attorneys, Pretoria

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Prepared on 10 October 2026 · Esheria