

SOUTH AFRICA / JUDGMENT

Liberty Group Limited and Others v Le Looks Hair and Beauty Parlour CC t/a Le Looks Hair and Beauty and Another (031742/2023) [2024] ZAGPPHC 654 (3 July 2024)

[2024] ZAGPPHC 654

COURT

North Gauteng High Court, Pretoria

BEFORE

A Mtembu

CASE / FILE NUMBER

031742/2023

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case No: 031742/2023

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

03

July 2024

In

the petition of: LIBERTY
GROUP LIMITED
First Plaintiff
LIBERTY
TWO DEGREES
Second Plaintiff
PARETO
LIMITED
Third Plaintiff
(All
of whom are herein represented by JHI RETAIL (PTY) LTD)
and
LE
LOOKS HAIR AND BEAUTY PARLOUR CC
First Defendant
t/a
LE LOOKS HAIR AND BEAUTY
MENZI
BERYL KUNENE
Second Defendant
"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 03 July 2024."

JUDGMENT

MTEMBU AJ

- [1] This is an opposed application for summary judgment brought under the provisions of Rule 32 of the Uniform Rules of Court. The applicants/plaintiffs' claim against the respondents/defendants is for payment in the amount of R2 148 365.09 (Two Million One Hundred and Forty-Eight Thousand Three Hundred and Sixty-Five Rand Nine Cents). The application is opposed by the respondents/defendants.
- [2] In addition, the plaintiffs seek an order that the defendants pay the plaintiffs the aforesaid amount with interest at the rate of 7.5% per annum a tempore morae and costs on the attorney-client scale.
- [3] In paragraph 1 of the particulars of claim, the plaintiffs are described as Liberty Group Limited, a public company registered and incorporated in accordance with the Company Laws of the Republic of South Africa; and Liberty Two Degrees, a portfolio established under the Liberty Two Degrees Scheme, a collective scheme in property established in

terms of the Collective Scheme Act 45 of 2002; and Pareto Limited, a public company duly registered and incorporated in accordance with the Company Laws of the Republic of South Africa. Apparently, the three entities are all represented by JHI Retail (Propriety) Ltd, a private company with limited liability duly registered and incorporated in accordance with the Company Laws of the Republic of South Africa. There is no clear description as to which one is the first, second, and third plaintiff. To put salt on the wound, it is unclear whether JHI Retail (Propriety) Ltd is also one of the plaintiffs. The same arrangement is repeated in the

body of the Combined Summons. The description is only made at the heading of the Combined Summons. However, the defendants' citation is clear, and no ambiguity could be attributed to it.

Summary of the facts and submissions

[4] The plaintiffs contend that on 26 March 2018, they entered into a Lease Agreement with the first defendant. In terms of this Lease Agreement, the first defendant occupied commercial premises known as Shop B[...], B[...] C[...] Level in Sandton City Shopping Centre, effective from 1 February 2018 to 31 January 2023. Again, on 09 July 2018, the plaintiffs and the first defendant concluded an addendum to the Lease Agreement. In terms of this addendum, the plaintiffs additionally let to the first defendant commercial premises known as Shop B[...], B[...] C[...] Level in Sandton City Shopping

Centre, effective from 1 April to 31 January 2023. The second defendant interposed and bound herself as surety for a co-principal

debtor with the first defendant for the payment of all debts of the first defendant due to the plaintiffs.

[5] The respective leased premises would be utilised for the purposes of a hair and beauty salon service and the sale of ancillary products. The plaintiffs, the contention goes, complied with their obligations in terms of the lease agreements and the first defendant took occupation of the subject properties.

[6] In terms of the Lease Agreement, the first defendant was required to pay a monthly rental. The basic monthly rental payable by the first defendant for the first year of the lease would be in the amount of R66 294.31 plus VAT thereon per month. For the second year of the lease, the monthly rental would be R71 597.85 plus VAT. For the third year of the lease, the monthly rental would be R77 325.68 plus VAT. The monthly rental would be R83 511.71 plus VAT for the fourth year of the lease. For the fifth year of the lease, the monthly rental would be R90 192.67 plus VAT. In addition, the first defendant was required to pay monthly contributions to the property expenses.

[7] Similarly, in respect of Shop B[...], the first defendant was required to pay a monthly rental. The basic monthly rental payable by the first defendant for the first year of the lease would be R69 651.86 plus VAT thereon. The monthly rental would be R75 224.01 plus VAT for the second year of the lease. For the third year of the lease, the monthly rental would be R81

241.93 plus VAT. The monthly rental would be R87 741.28 plus VAT for the fourth year of the lease. For the fifth year of the lease, the monthly rental would be R94 760.59 plus VAT. In addition, the first defendant was required to pay monthly contributions to the property expenses.

- [8] The first defendant failed to pay all amounts due in terms of the Lease Agreement and the addendum thereto. The plaintiffs, therefore, contend that the defendants are indebted to them for arrear rentals and other charges for the period from May 2018 to January 2023 in the sum of R2 148 365.09.
- [9] On the other hand, the defendants raise a number of issues resisting summary judgment. The defendants contend that JHI Retail (Proprietary) Limited (“JHI”) is not competent to represent the plaintiffs. Liberty Group Limited (“Liberty Group”) and Pareto Limited (“Pareto”) are separate and distinct juristic persons to JHI. It is further argued that the plaintiffs failed to plead, which is the first, second, and third plaintiffs. Therefore, according to the defendants, the plaintiffs’ claim is excipiable.
- [10] The defendants, in addition, argue that Liberty Two Degrees is not a juristic person, and therefore, it lacks locus standi to sue and be sued. Judgment cannot be granted in favour of a party that does not have locus standi. It is thus axiomatic that one cannot conclude an agreement with a party that lacks legal standing. It is contended that no valid, binding and enforceable agreement was concluded between the parties, as a non-legal entity could not enter into a binding contract. So, the defendants continue, no allegations are pleaded as to the basis upon which JHI could lawfully represent the plaintiffs. While representing the plaintiffs, bewilderingly, it does not seek any relief. The defendants’ contention is also that the plaintiffs failed to plead a material term in terms clause 6 of the addendum, which is a suspensive condition whether the existing

lease mentioned in clause 6 was successfully cancelled. In terms of clause 6, the agreement is suspensive upon successful

cancellation of the existing lease between the landlord and Predipkumar Laljit Bhaktawer and Fernanda Maria Batis, t/a Hair Images, and successful vacation thereof.

- [11] During the hearing, Mr Silver, appearing on behalf of the defendants, submitted that a party relying on a contract that is subject to a condition must plead and prove the condition and its fulfilment. In support of this contention, this court was referred to the Supreme Court of Appeal decision in *Kate’s Hope Game Farm (Pty) Ltd v Terblanchehoek Game Farm (Pty) Ltd*[1] where it was stated that: “The rule is that the litigant, whether the plaintiff or the defendant, relying on a contract that is subject to a condition must plead and prove that condition and its fulfilment”.

- [12] In addition, the defendants have an issue with the manner in which quantum is pleaded. The defendants' contention is that the plaintiffs pleaded a globular amount in respect of arrear rental and other charges. The annexed reconciliation statement runs up to 30 pages, and thus, it is not for defendants to trawl through the reconciliation in order to identify "the other charges".
- [13] The defendants also contend that the deponent, Mr Dimitri Kokkinos, asserts in the application for summary judgment that he is an "Asset Manager in the employ of applicants, employed as at its offices..". According to the defendants, Liberty Group and Pareto are separate and distinct legal persons. Liberty Two Degrees is not a legal entity. Therefore, the submission goes, Mr Kokkinos could not be employed as an Asset Manager in both Liberty Group and Pareto. Similarly, he could not be employed by a non-legal entity. Mr Kokkinos also does not assert his connection with JHI. Mr Kokkinos is not a person envisaged in Rule 32(2) who can swear positively to the facts and verify the cause of action.
- [14] Ms Pretorius, appearing on behalf of the plaintiffs, when confronted with submissions that Liberty Two Degrees is not a legal entity, submitted that at least the summary judgment should be granted with respect to Liberty Group and Pareto. The defendants be granted leave to defend in respect of Liberty Two Degrees.

The law and analysis of the facts

- [15] There is an abundance of authorities about summary judgments, and thus, there is no need for exclusive exposition. The issue to be decided is whether the defendants have a bona fide defence. Uniform Rule 32(3)(b) 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*[2].
- [16] 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[3]
- [17] In order to defeat the summary judgment application, the defendants must meet the aforesaid test. Equally, in order for the plaintiffs to succeed in their summary judgment application, they must also comply with Rule 32(2). As I have already stated, the defendants raised a number of issues; therefore, I will only deal with those I think have merits.
- [18] I agree with the defendant's Counsel that the plaintiffs have failed to set out facts with sufficient particularity as to who is actually claiming. It is unclear whether it is JHI, as alleged, or Liberty Group, Liberty Two Degrees, and Pareto. There is also no allegation whether they are claiming jointly or severally. This might be considered pedantic. In my view, it is not. This court was told that the plaintiffs are Liberty Group, Liberty Two Degrees,

and Pareto. While following that logic, there was a change of tune, and this court was told that the plaintiff is JHI, suing on behalf of Liberty Group, Liberty Two Degrees, and Pareto. For purposes of summary judgment, this kind of Potjiekos pleading cannot be countenanced. I do not make a finding that JHI cannot represent these other entities, but surely, one would have expected a legal foundation for such representation. It is not pleaded, and this court cannot thumb suck a legal foundation for such representation. On this basis, it cannot, in my view, be said that the pleadings are technically correct. It was also common cause that the second lease agreement (addendum) was subject to a condition precedent and was not pleaded whether it was fulfilled[4]. It is of course trite law that summary judgment should not be granted where the plaintiff has not put up a clear claim. The dictum of the court in *Gulf Steel (Pty) Ltd v Rack-Rite Bop (Pty) Ltd* and another 1998 (1) SA 679 (O) expresses this legal position succinctly at 683I–684B where it was said:

"In view of the nature of the remedy the Court must be satisfied that a plaintiff who seeks summary judgment has

established its claim clearly on the papers and the defendants have failed to set up a bona fide defence as required in terms of Rules of this Court. There are accordingly two basic requirements that the plaintiff must meet, namely a clear claim and pleadings which are technically correct before the Court. If either or these requirements is not met, the Court is obliged to refuse summary judgment. In fact, before even considering whether the defendant has established a bona fide defence, it is necessary for the Court

to be satisfied that the plaintiff's claim has been clearly established and its pleadings are technically in

order. Even if a defendant fails to put up any defence or puts up a defence which does not meet the standard required of a defendant to resist summary judgment, summary judgment should nevertheless be refused if the plaintiff's claim is not clearly established on its papers and its pleadings are not technically in order and in compliance with the Rules of Court. [My Emphasis]

[19] The other issue that concerns me is the involvement of Liberty Two Degrees. It was less disputed that it is not a legal entity with the required locus standi to sue and be sued. If it is true, as submitted, a submission of which was less discounted, this, in my view, inflicts injury into the heart of its claim and non-compliance with Rule 32(2).

[20] Ms Pretorius submitted that at least the summary judgment should be granted with respect to Liberty Group and Pareto, and the defendants be granted leave to defend in respect of Liberty Two Degrees. I regret to disagree with the plaintiffs' Counsel and thus agree with Mr Silver, for the defendants, that this court cannot be selective. For purposes of a summary judgment, an injury to one is an injury to all; more in particular, in this case, it is not pleaded whether the plaintiffs are claiming jointly or severally. A summary judgment cannot be granted under these circumstances. Summary judgment is a drastic remedy which is sparingly granted by our courts.

- [21] While I note that for a deponent to swear positively and verify the cause of action does not have to be employed by the plaintiff applying for a summary judgment, but I agree with the defendants' submission that Mr Kokkinos could not be employed as an Asset Manager by all Liberty Group, Pareto and Liberty Two Degrees. Mr Kokkinos also does not assert his connection with JHI. The specificity is important for a simple reason: how Mr Kokkinos obtained personal knowledge as to the cause of action in that he could swear positively and verify the cause of action. This renders Mr Kokkinos not a person envisaged in Rule 32(2) who can swear positively to the facts and verify the cause of action.
- [22] The few points that I have addressed are dispositive of this matter. I do not, therefore, intend to deal with the other remaining points.

Order

[23] Consequently, I make the following orders:

- (a) The application for summary judgment is dismissed;
- (b) The defendants are granted leave to defend this action; and
- (c) Costs of this application shall be determined at the trial.

A.M. MTEMBU AJ

Acting Judge of the High Court of South Africa

Gauteng Division, Pretoria

Date of Hearing: 22 April 2024 Date of judgment: 03 July 2024 Counsel for the Applicant: Adv L A Pretorius Instructed by: Mark Efstratiou Inc, Pretoria Counsel for the Respondent: Adv M D Silver Instructed by: Moss Cohen & Partners, Johannesburg

[1] 1998

(1) SA 235 (SCA) at 241

[2] 1976 (1) SA 418 (A) at 425G–426E.

[3] 1976(2) SA 226 (T) at 228B.

[4] In Dowson & Dobson Industrial Ltd v Van der Werf and Others 1981

- (4) SA 417 (C) at 430, it was held that if a written agreement did in fact require a condition precedent to be fulfilled before any liability would arise, and no allegation that it had been fulfilled has been made in the summons or particulars of claim, it would surely be a good defence for the defendant to annex the written agreement to his opposing affidavit, and point to the absence of any such allegation in the summons or particulars of claim. Whether, in addition, the defendant actually denies the fulfilment of the condition does not matter.

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