

SOUTH AFRICA / JUDGMENT

Moongate 125 (Pty) Ltd v Burger (2021/56009) [2023] ZAGPJHC 1009 (4 September 2023)

[2023] ZAGPJHC 1009

COURT

South Gauteng High Court, Johannesburg

BEFORE

AB Bishop

CASE / FILE NUMBER

2021/56009

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****(GAUTENG LOCAL****DIVISION, JOHANNESBURG)****CASE****NO: 2021/56009**

Reportable:

Yes/ No

Of

interest to other judges : Yes/No

Revised:

No

AB

Bishop

4

September 2023

In

the matter between: MOONGATE
 125 (PTY) LTD
 Applicant
 And
 SONICA
 BURGER
 Respondent

JUDGMENT

BISHOP AJ:

- [1] On 5 August 2019, Moongate 125 (Pty) Ltd, the applicant, and Ms Sonica Burger, the respondent, entered into a written lease agreement for the property known as 7[...] C[...] R[...] E[...], Mulbarton Road, Lonehill, Johannesburg, in terms whereof Ms Burger rented the property from Moongate for the initial period of 1 September 2019 to 31 August 2020 at a monthly rental of R32 000 and ancillary expenses. This agreement thereafter extended on a month-to-month basis until cancelled by either party on 20 business days' notice to the other. [1]
- [2] Ms Burger disputed that such a lease had been concluded on the basis that "... the purported lease agreement was concluded at a time when the applicant was in deregistration, which rendered the lease relied upon by the applicant ... void". [2] Attached to Moongate's founding affidavit was a printout of an electronic record of its corporate status as at 25 October 2021, [3] which document was not challenged by Ms Burger. [4]
- [3] This printout reflected that Moongate was at that time "in business". [5] It also reflected that as at 26 September 2020, a year after the written lease had been entered into, Moongate was "in [the] process of deregistration" for failing to make payment of an annual return, a situation that was remedied by 6 November 2020.
- [4] In terms of s 82(3)(a) of the Companies Act 71 of 2008, the Companies and Intellectual Property Commission may remove a company from the companies register only if the company (i) has failed to file an annual return in terms of s 33 for two or more years in succession and (ii) on demand by the commission, it has failed to (a) give satisfactory reasons for the failure to file the required annual returns, or (b) show satisfactory cause for the company to remain registered.
- [5] The obligation by Moongate in terms of s 33(1) was to file an annual return in the prescribed form with the prescribed fee and within the prescribed period after the end of the anniversary the date of its incorporation.

- [6] As I read the printout, it signifies that as at 26 September 2020 Moongate had been in breach of its obligations in terms of s 33(1) for at least two consecutive years and that the commission was in the process of exercising its right in terms of s 82(3)(a). The commission is not permitted to deregister a company unless that company has been afforded an opportunity to (a) give satisfactory reasons for the failure to file the required annual returns, or (b) show satisfactory cause for the company to remain registered.
- [7] Where the printout records that as at 6 November 2020 there had been a cancellation of the deregistration process, I read this to mean that Moongate had either (a) given satisfactory reasons for the failure to file the required annual returns, or (b) shown satisfactory cause for the company to remain registered, and hence the deregistration process had been cancelled.
- [8] In terms of s 83(1), a company is only dissolved when its name is in fact removed from the companies register. There is no evidence that Moongate had in fact had its name removed from the companies register (that is, been deregistered) and, therefore, there is no proof that it had been dissolved. The printout confirms quite the opposite. In my view, there was no change in the status of the company at any material time. The commencement of the deregistration process by the commissioner did not affect its status to contract with Ms Burger nor did it affect the status of the written lease agreement, which had been in existence since 5 August
2019. Only where if it had been proven that Moongate had been dissolved would this point taken by Ms Burger have had merit.
- [9] The submission made on behalf of Moongate that it “was not deregistered and ... was merely in danger of being deregistered and remains registered” [6] is correct. The contention to the contrary by Ms Burger is unsustainable and fails. There was a valid lease agreement concluded and it remained valid throughout the deregistration process from 26 September 2020 to 6 November 2020.
- [10] When the initial period of the lease expired, it continued on a month-to-month basis. [7] Ms Burger denies that this is so, because the lease, so she contends, was void as a result of Moongate being deregistered at the time that it was entered into. [8] I have already found that this contention of hers concerning the lease is unsustainable. In the result, her denial of the month-to-month extension of the written lease must also fail.
- [11] On 27 September 2021, Moongate’s attorneys sent a letter to Ms Burger, wherein it was alleged that as at 1 September 2021 she was in arrears in the amount of R666 944,33. [9] Ms Burger did not deny receipt of this letter but contended that the amount could not be owing because of her contention that the lease was void as a result of Moongate’s deregistration at the time of concluding the lease. [10] I have dealt with the unsustainability of Ms Burger’s argument on the lease being void.

- [12] The statement of the account for Ms Burger was produced by Moongate. [11] It was not seriously challenged. [12] Ms Burger contended that she had paid certain amounts between 5 September 2020 and 11 December 2020, which total some R85 611,81. [13] But, as Moongate correctly pointed out, all of these payments had been accounted for in the statement. [14] Certain subsequent payments made by Ms Burger were also acknowledged by Moongate, [15] which payments are undisputed. [16]
- [13] This renders Ms Burger's denial of the quantum owing by her no more than a bare denial, which is clearly untenable in the light of the statement of the lease account. The statement has not been challenged, except on the basis of the lease agreement being void, which challenge I have held fails.
- [14] I am justified in these circumstances in concluding that:
- [14.1] the statement may be relied upon;
- [14.2] Ms Burger's denial of her liability for the quantum of outstanding rental, as set out in the statement, is only a bare denial; and
- [14.3] I may reject Ms Burger's general denial of her liability merely on the papers (compare *Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd*
- [1984] ZASCA 51; 1984 (3) SA 623 (A), 635C).
- [15] I do so reject her denial of her liability on the basis that her denial is untenable. While Moongate's attorney's letter claimed that Ms Burger was indebted to Moongate as at 1 September 2020 in the amount of R666 944,33, the statement indicates that Ms Burger's indebtedness was in the amount of R616 972,93 as at 1 September 2020. I find that Ms Burger's indebtedness was in the amount of R616 972,93, and not R666 944,32, as at 1 September 2021.
- [16] Being significantly indebted to Moongate, in the letter of its attorney of 27 September 2021, Moongate gave Ms Burger 20 business days to settle the outstanding indebtedness to Moongate. [17] The letter also served to give Ms Burger one calendar month's notice to vacate the premises; that is, she was to vacate by 31 October 2021. [18] Ms Burger's denial of these allegations is based on nothing more than a reference yet again to her failed contention that the lease was void. Her denial is therefore no more than a bare denial, which I am entitled to reject on the papers. [19] I do so reject it.
- [17] Ms Burger's denial of receipt of the letter from Moongate's attorneys may be rejected for another reason. On 7 October 2021, Moongate's attorneys received a letter from Feenstra Inc, [20] wherein they acknowledged receipt of Moongate's attorneys' letter of 27 September 2021. [21] In this letter, Mr Feenstra on behalf of his firm, indicated that his firm acted in various matters for Ms Burger's mother, Ms Bianca Swart, who was due to receive R5 000 000,00 from Mikron Holdings (HK) Ltd, purportedly a company in Hong Kong, by 15 December 2021. [22] He attached a letter purporting to be from Mikron, where this payment

was promised. [23] Mr Feenstra went on to assure Moongate's attorney that Ms Swart would settle Ms Burger's indebtedness to Moongate as soon as the funds had been received from Mikron and he called for a statement setting out how the amount was calculated. [24]

[18] This letter gives rise to the inference that after receipt of Moongate's attorneys' letter of 27 September 2021, Ms Burger gave the letter to her mother, Ms Swart, who in turn gave it to her attorneys, Feenstra Inc.

[19] The allegations made by Mr Feenstra in his firm's letter were admitted by Ms Burger, who added that the payment from Mikron did not materialise. [25] Moongate's attorneys responded to Feenstra Inc that Moongate was not prepared to wait and would proceed with an eviction

application. [26] They added that as at 7 October 2021, Ms Burger was indebted to Moongate in the amount of R710 082,03 and they provided an updated statement with their letter. [27] Also attached to this latter was a copy of the previous statement, which ran up until 1 September 2021. [28] It is apparent when reading the original statement with the updated statement that the latter follows on from the former. Also, when reading the two in conjunction with one another, it is apparent that:

[19.1] the amount of R616 972,93 was owed as at 1 September 2021;

[19.2] the amount of R666 944,32 was owed by the end of September 2021; and

[19.3] the amount of R710 082,03 was owed as at 1 October 2021.

[20] Faced with this predicament, it is said that Ms Burger wrote to Moongate on 28 October 2021, tendering R10 000,00 per month as rental to be paid by her until February 2022 and that Ms Swart would assist with arrears. [29] Regrettably, this letter of Ms Swart, although said to be annexure FA9 to the founding affidavit, was not uploaded as part of the annexures on CaseLines. Nothing turns on this, however, as these allegations were admitted by Ms Burger, subject to her repeating her contention that the lease agreement was void. [30] It was also said that Moongate did not accept this tender, [31] which has also been admitted by her subject to the same rider. [32]

[21] At the time of bringing this application, it was said on behalf of Moongate that Ms Burger was in arrears in the amount of R748 692,31. [33] Ms Burger met this with a bare denial coupled with a further reference to her contention that the lease agreement was void. [34] I reject this denial of hers also, as being untenable. [35] Ms Burger made no serious endeavour to disprove the amount owing by her, whether by demonstrating that the statements were materially incorrect or that she had made payment of a substantial amount of some R700 000,00 after 1 October 2021. As she herself had conceded, the source of anticipated funds from Mikron did not materialise. It is impossible from the evidence presented as a whole to infer that Ms Burger had settled the outstanding amount.

- [22] The termination of the lease, once the initial period had expired and it was on a month-to-month basis, could be achieved by either party by giving 20 business days' notice to the other party. [36] Twenty business days is equivalent to 28 days' notice, there having been no public holidays in October 2021. By affording Ms Burger one month's notice of termination in the letter of its attorneys of 27 September 2021, [37] Moongate had given Ms Burger more than adequate notice. Nothing turns on the fact that Moongate's attorney employed the language of a calendar month's notice as opposed to 20 business days' notice.
- [23] On 31 October 2021, the lease agreement terminated and Ms Burger had no right to remain in occupation of the property.
- [24] Shortly before the hearing of this matter, I had the opportunity to read the papers in preparation for the hearing. It was not clear to me whether the matter had been enrolled to deal with the interlocutory issue of compelling Ms Burger to file her practice note, heads of argument and list of authorities; or whether the matter had been enrolled to have the merits of the main application decided.
- [25] The registrar assisting me addressed an email at my instance to the parties' representatives. Ms Chey Ramalho of Moongate's attorneys responded by email advising that (i) the matter had been set down for the determination of the merits and (ii) Ms Burger, her husband, Mr Howard Burger, her daughter, Ms Tanika Du Plessis, and her mother, Ms Swart, had vacated the premises and that Moongate would only be seeking the money orders.
- [26] A further email was sent by the registrar to both attorneys, specifically calling upon Ms Burger's attorneys to confirm that they agreed with what Moongate's attorneys had advised was the situation. A response was received via email from Mr Hans Badenhorst of Ms Burger's attorneys, in which he advised that the property had indeed been vacated and that it was only the money claim that required determination. A further allocation was made and the parties were advised that the matter would be heard at 10h00 in open court on 1 November 2022. Mr Badenhorst confirmed this allocated time and date by way of email.
- [27] Later the same day, Ms Burger's attorneys withdrew as her attorneys. A notice of withdrawal was emailed to the registrar. Another email was sent to Ms Burger's attorneys that same day asking that they upload the notice of withdrawal onto CaseLines and provide proof of service of the notice of withdrawal on Moongate's attorneys and proof of sending of the notice of withdrawal to Ms Burger.
- [28] Ms Burger's attorneys duly did so. The notice of withdrawal was uploaded onto CaseLines; [38] it had been served by Ms Burger's attorneys via email on Ms Ramalho of Moongate's attorneys at 16h52 on 31 October 2022; [39] whereafter it was sent at 16h59 by email to both Ms Burger and Ms Swart. [40]

- [29] On 1 November 2021, the matter was called at the allocated time and Ms Kabelo of Moongate's attorneys appeared on behalf of Moongate. She moved for an order in terms of the draft order that had been uploaded onto CaseLines that day.
- [30] I am satisfied that Moongate has made out a case for the money order sought, together with interest thereon. The question of costs remains. This is patently a case where Ms Burger has strung Moongate along for a protracted period, knowing full well that she was significantly indebted to it for the rental and other amounts owed in terms of the lease.
- [31] She put up the flimsiest of defences in her answering papers. There was her contention that the lease was void because Moongate had been deregistered when it concluded the written lease. I have dealt with this above. She challenged Moongate's assertion in its founding papers that it was the owner of the property, relying on a printout of electronic data which reflected this. [41] She contended that on an evidentiary basis this was insufficient and that only a title deed would suffice. [42] She presented no evidence, nor did she even make a suggestion, as to whom the owner of the property might be if not Moongate. In reply, Moongate provided the title deed. [43] This caused unnecessary additional costs to be incurred. Ms Burger raised non-joinder of the other inhabitants of the property as an issue. [44] This point, although badly taken, in my view, was rendered irrelevant when Ms Burger, Mr Burger, Ms Du Plessis and Ms Swart all moved out of the property. A similarly badly taken point was the failure to serve the application on the municipality, [45] which was also rendered moot when the property was vacated.
- [32] In short, there were no genuine disputes properly raised in the answering papers. Ms Burger's ploy was to delay Moongate in obtaining a final order, even requiring it to compel her to provide her practice note, heads of argument and list of authorities, before the matter could proceed. I take a particularly dim view of all of these stalling tactics.
- [33] In terms of clause 28.1 of the lease agreement, Ms Burger is obliged to pay on demand to Moongate all legal costs as between attorney and own client incurred by Moongate in respect of any legal steps taken in terms of the lease agreement. [46] I can find no reason why this part of their agreement should not be enforced by me. Moongate has sought the costs on the scale as between attorney and client. [47] I am inclined to grant such costs.
- [34] In the result, I make the following order:
- [34.1] the respondent, Ms Sonica Burger, is forthwith to make payment to the applicant, Moongate 125 (Pty) Ltd, of the amount of R748 892,31, together with interest thereupon at 7% per annum from 1 November 2021 to date of payment; and
- [34.2] the respondent is to pay the costs of this application on the scale as between attorney and client.

ANTHONY BISHOP

Acting Judge of the High Court

Johannesburg

Heard:

1 November 2022

Judgment:

4 September 2023

Appearances

For Applicant:

Ms Sekgothadi Kabelo

Instructed by:

KWA Attorneys

For Respondent:

None

Instructed by:

None

[1]

CaseLines 003-3 to 003-4, par 11 to 12, read with 003-22 to 003-33 (annexure FA4).

[2]

CaseLines 010-8, par 14.1. See also caselines 010-7, par 12.2.

[3]

CaseLines 003-2, par 4, read with 003-11 to 003-19 (annexure FA19).

[4]

CaseLines 010-7, par 10.1.

[5]

CaseLines 003-11.

[6]

CaseLines 013-9, par 23. See also caselines 012-6 to 012-7, par 11.

[7]

CaseLines 003-5, par 15.

[8]

CaseLines 010-7, par 12.

[9]

CaseLines 003-5, par 17, as read with caselines 003-35, par 6 (of annexure FA5).

[10]

CaseLines 010-10 to 010-11, par 20.

[11]

CaseLines 003-5, par 17.

[12]

CaseLines 010-10 to 010-11, par 20.

[13]

CaseLines 010-10, par 19.2.

[14]

CaseLines 012-7, par 13. Compare caselines 003-37 to 003-38 (annexure FA6).

[15]

CaseLines 003-5 and 003-6, par 18, as read with caselines 003-37 (annexure FA6).

[16] Compare caseLines 010-11, par 21.

[17]

CaseLines 003-6, par 19, as read with caselines 003-35, par 7 (annexure FA5).

[18] Ibid.

[19]

Plascon-Evans (*supra*), 635C.

[20]

CaseLines 003-6, par 20.

[21]

CaseLines 003-40, first paragraph (annexure FA7).

[22]

CaseLines 003-40, fourth paragraph (annexure FA7).

[23]

CaseLines 003-41 (annexure to annexure FA7).

[24]

CaseLines 003-40, fourth paragraph (annexure FA7).

[25]

CaseLines 010-11, par 23.

[26]

CaseLines 003-6, par 21, as read with 003-43, par 3 (annexure FA8).

[27]

CaseLines 003-44, par 4 (annexure FA8), as read with caselines 003-45 (annexure A to annexure FA8).

[28]

CaseLines 003-44, par 4 (annexure FA8), as read with caselines 003-45 (annexure B to annexure FA8).

[29]

CaseLines 003-6, par 22.

[30]

CaseLines 010-12, par 25.1.

[31]

CaseLines 003-7, par 23.

[32]

CaseLines 010-12, par 25.1.

[33]

CaseLines 003-7, par 25.

[34]

CaseLines 010-12, par 27.

[35]

Plascon-Evans (*supra*), 635C.

[36]

CaseLines 003-23, cl 8.1 (annexure FA4).

[37]

CaseLines 003-6, par 19, as read with caselines 003-35, par 7 (annexure FA5).

[38]

CaseLines 020-1 to 020-2.

[39]

CaseLines 020-3.

[40]

CaseLines 020-4.

[41]

CaseLines 003-3, par 8, as read with caselines 003-20 (annexure FA3).

[42]

CaseLines 010-7, par 12.1 and 12.3.

[43]

CaseLines 012-7, par 12, as read with 012-12 to 012-17 (annexure RA2).

[44]

CaseLines 010-5, par 4.

[45]

CaseLines 010-5, par 5 and 6.

[46]

CaseLines 003-30, cl 28.1.

[47]

CaseLines 001-2, par 7 and 007-6, par 3.

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