

SOUTH AFRICA / JUDGMENT

**Pareto (Pty) Ltd and Another v Theron
and Another (9804/2023) [2024]
ZAWCHC 249 (6 September 2024)
[2024] ZAWCHC 249**

COURT

Western Cape High Court, Cape Town

BEFORE

A Montzinger

CASE / FILE NUMBER

9804/2023

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IN THE HIGH COURT OF
SOUTH AFRICA
WESTERN CAPE DIVISION,
CAPE TOWN
Case number: 9804/2023

In the matter between:

PARETO
(PTY) LTD
First
Plaintiff/Applicant
MOMENTUM
METROPOLITAN LIFE LTD
Second
Plaintiff/Applicant
and
SULIZE
CECILIA THERON
(Identity
number: 8[...])
First
Respondent/Defendant
MOHAMED
OSMAN ABDI
((Identity
number: 8[...])
Second
Respondent/Defendant

Coram:

Acting Justice A Montzinger

Heard: 06 September 2024
Delivered: 06
September 2024

JUDGEMENT

Montzinger AJ

Summary Introduction

1. This is an application for summary

judgment.

2. The plaintiffs seek summary judgment against the defendants, Mr. and Mrs. Theron, for R 602,790.26, together with interest and costs on an attorney and client scale. The claim arose from the defendants' liability as sureties for the obligations of Monclair Trading CC ("Monclair").
3. On 9 June 2019 the plaintiffs, as co-owners and landlords of Shop UL508A at the Tyger Valley Shopping Centre ("the premises"), entered into a commercial written lease agreement (the "main lease") with Monclair for the rental of the premises to conduct a coffee shop. The lease was concluded for a fixed term of 3 years to commence on 1 July 2019 and to expire on 30 June
2022. Monclair undertook to pay rental and other related charges in accordance with the terms of the main lease. To guarantee Monclair's obligations to the plaintiffs, the defendants each executed a deed of suretyship, binding themselves as co-principal debtors for all amounts due under the main lease.
4. Montclair fell behind on rental payments, and by August 2020, it had accrued arrears totalling R71,078.51. However, what was not pleaded in the particulars of claim but does not seem in dispute, is that on or about 1 August 2020 Montclair entered into a sublet agreement with a certain Mr. Willem Greyling ("Greyling") who would continue to lease the premises from 1 August 2020 onwards for a period of 11 months until at least June 2021.
5. Greyling also did not comply with his obligations in terms of the sublet agreement as Montclair continued to incur liability towards the plaintiffs for outstanding rental and related charges. At some point the plaintiffs must have instituted a liquidation application against Montclair seeking its winding-up. The application was successful and on 25 January 2022 Montclair was finally liquidated by an order of this court. Following Monclair's liquidation, the plaintiffs sought payment from the defendants as sureties for the outstanding arrear rental amounts.

6. The plaintiffs, on 20 June 2023, instituted the current action which was defended with the filing of the required notice on 28 January
2024. The defendants represented themselves. A month later on 28 February 2024 the defendants filed their plea. In response, the plaintiffs applied for summary judgment, asserting that the defences raised are not bona fide and are in any event without merit. The summary judgement application was launched on 25 March 2024 to which the defendants filed an affidavit opposing the granting of judgement.

The defences raised

7. The first ground of opposition is that the plaintiffs' claim is not liquidated. Secondly, also tied to the first ground, is the contention that a substantial portion of the amount claimed consists of legal fees, which is not taxed. Thirdly, the defendants assert that their obligations under the suretyship agreement fell away when the plaintiffs accepted the sublease agreement between Monclair and Greyling. The defendants maintain that by consenting to the sublease, the plaintiffs effectively absolved them from continued liability under the original lease as sureties. As a fourth ground, the defendants claim that they have suffered prejudice as sureties due to the plaintiffs' conduct, particularly in allowing Greyling to occupy the premises without ensuring that the monthly rental payments were made, basically claiming that the plaintiffs' failure to mitigate their damages, resulted in prejudice to the defendants as sureties.
8. The defendants also rely on a counterclaim for the repayment of the balance of a deposit amount of R 70,704.03, which they allege should be returned to them following Monclair's liquidation. They also claim that they are entitled to the value of the moveable goods left at the premises, as these goods belonged to them.
9. I now turn to summarise the legal principles, before evaluating the merits of the plaintiffs' application in light of the defences raised.

The legal principles

10. The legal principles governing summary judgment are well-established and had been consistently applied and endorsed across numerous decisions over the years. Given the settled nature of the principles, it is unnecessary to restate every specific aspect thereof. A substantial body of case law provides clarity on how to apply and evaluate the requirements for granting or refusing summary judgment. Although, the recent amendments to the summary judgment procedure have initially caused a furore, the fundamental considerations a court should have regard to when faced with a summary judgement remain consistent. For instance, in *Tumileng Trading*[1], the court reaffirmed the established principles laid down in earlier cases such as *Maharaj*[2] and *Joob Joob Investments*[3], specifically noting that despite the procedural amendments, the core principles when evaluating a summary judgement application remain intact.

11. Considering the drastic nature of a summary judgement a helpful starting point when evaluating the request must always be whether the procedural requirements outlined in rule 32(1)(a - d) of the Uniform Rules of Court have been satisfied. Common sense dictates that a drastic remedy requires a high degree of strict compliance. The claim must therefore be based on a liquid document, or a liquidated amount of money, delivery of specified movable property or for ejectment, together with any claim for interest and costs.
12. In opposing a summary judgement request the defendant must present an affidavit[4] disclosing fully the nature and grounds of the defence. The defence must be a bona fide defence that is legally cognisable and factually supported, as underscored in Breitenbach[5]. However, even if a defendant's defence appears weak or insubstantial, the court retains a residual discretion to refuse summary

judgment[6]. This discretion allows the court to consider whether granting summary judgment might result in an injustice, particularly where there is a reasonable possibility that a fuller exploration of the issues at trial could reveal a valid defence[7].

13. In the context of the liability of a surety and the granting of a summary judgment the court must consider whether a valid surety

agreement has been concluded. According to the General Law Amendment Act 50 of 1956, for a suretyship agreement to be valid, the terms must be embodied in a written document signed by or on behalf of the surety[8]. Once there is no qualm over the validity of the surety agreement, a surety's liability arises and is contingent upon the principal debtor's failure to satisfy the debt[9].

Procedural aspects of the application

14. As foreshadowed it is incumbent on me to first consider whether the application for summary judgement suffers from any procedural defects. In my assessment the application suffers from at least 2 defects. The application was not delivered in time and is also not for one of the claims as contemplated in rule 32(1)(a
- d). If I am persuaded that there are merits in either of these procedural shortcomings, I do not have to venture further into the merits of the matter and summary judgement must be refused.

Application not delivered in time

15. At the time the plaintiffs launched the application for summary judgement the defendants were still representing themselves. Uniform rule 32(2)(a) requires that within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts. Uniform rule 32(2)(c) provides further that the notice of application for summary judgment shall state that the application will be set down for hearing on a stated day not being less than 15 days from the date of the delivery thereof. On closer scrutiny of the application, neither of these requirements were met.

16. Although the plea was dated 28 February 2024, it was served on 1 March 2024. I will accept this date as the point at which the plaintiffs'

obligation to file the application within 15 days was triggered. Excluding 1 March^[10] and noting that 21 March was a public holiday, the plaintiffs were required to deliver the application by 25 March 2024. This was

acknowledged in a letter by the plaintiffs' attorney addressed to the defendants on the last-mentioned date.

17. On 25 March 2025, approximately 11:31, the plaintiffs addressed a letter to the defendants attaching an application for summary judgement that did not contain a date on which the application will be heard. The relevant paragraph of the letter proceeds as follows:

"You will, however, note that the date of the Application has not yet been completed on the enclosed document, that being due to the fact that we have not yet been able to obtain a date for the hearing of the Applicant for Summary Judgement from the Registrar of the Court. However, your Plea was received by us on 1 March 2024 and therefore today, 25 March 2024, is according to the Rules of Court the last date that we can inform you of our clients' intention to proceed with an Application for Summary Judgment, hence the reason why we serve this Application on yourselves today, although no date has as yet been obtained from the Court."

18. On 26 March 2024 the plaintiffs again served the application for summary judgement on the defendants by e-mail. This time the e-mail to which the application is attached is sent at 15:10 in the afternoon. The notice of application now had a hearing date of 30 May 2024. The first page of the application contains the court stamp of 26 March 2024.

19. There are several difficulties with the plaintiffs' compliance with the subrule when the application was served. Firstly, there was in fact no compliant application served on the defendants on 25 March 2024, the last day on which the plaintiffs could deliver the application. Secondly, the application for summary judgement contains a stamp by the registrar dated 26 March 2024. This means even if I accept that the incomplete application of 25 March 2024 can be condoned, it was only filed at court on 26 March. This means that delivery of the summary judgement application was only complete then. The rule is peremptory that the application

'shall deliver' the notice of application within 15 days. Deliver means served and file with the Registrar^[11]. This was not done.

20. There is another difficulty. According to the e-mails in the record the plaintiffs served the 'issued' application for summary judgement on the 26 March 2026 on the defendants by e-mail. The time of the e-mails ranges from 15:10 – 15:33 in the afternoon. It is the practice in this division that the Registrar does not accept the delivery of pleadings or notices after

15:00 in the afternoon. The date stamp of 26 March 2024 could therefore not have been affixed on the first page of the application

for summary judgement. It is obvious that the plaintiffs obtained the date for the hearing of the summary judgement application on 26 March 2024, already a day out of time, caused the date stamp to be affixed on the first page of the application and e-mail the court stamped application later during the day. In any event by this time the application was out of time. Alternatively, the application, which now complied with the subrule, had to be delivered to the Registrar again.

21. The difficulty with the application is therefore not only a technical difficulty that could simply be informally condoned by the court. I can overlook the fact that the application on 25 March 2024 did not mention a date of the hearing, as the plaintiffs could have filed a notice of set down as soon as the date was known. However, in this case the application was delivered out of time.
22. Mr. Bence who appeared for the plaintiffs also aimed to persuade me on the basis that there was no obvious prejudice to the defendants. He called on the court's inherent power to condone non-compliance with the rules as the court is not there for the rules. While the court will in appropriate circumstances not yield to the dogmatic and strict requirements of the rule, a court should be apprehensive to do so in summary judgement proceedings where strict compliance has always been a feature of the rule. I am persuaded to follow the same approach in *Firststrand Bank v Maenetja Attorneys*[12] that there is little[13] latitude with the Rules when it comes to the summary judgement applications. There must be strict compliance and in the absence of a condonation application, the court should refuse the application.
23. Mr. Bence impressed on me to allow the plaintiffs to then launch an application for condonation to prevent my inclination to refuse the application on the basis that there has not been compliance with the subrule. I was reluctant to do so, considering the long lapse of time already in the matter and also, it is incumbent on the plaintiffs to present a cogent compliant application to the court. However, to be fair I was willing to allow the application if the plaintiffs only impediment to be granted judgement is the fact that the application was served a few hours late. Unfortunately this was not the case as the application had another shortcoming.
24. I have had regard to fact that the strict compliance in this instance is only a very fine line between what is meant with 'serve' and 'deliver' as contemplated in the rules. In practice the difference between 'serve' and 'deliver' often gets flouted in particular having regard to the ever-changing influence of technology on the practice of law. However, the flouting of the rules is less intrusive where the exchange of a particular pleading or notice has minimal consequences and also since our jurisprudence has always been open to condone immaterial or non-consequential non-compliance with the rules. However, the jurisprudence on summary judgement has always been consistent. What is required is strict compliance and until rule 27, that requires a condonation application, and the definition of 'serve' and 'deliver' are adapted to be more in sync with each other or removed from the rule book, the court in the context of a summary judgement application will in most instances insist on strict compliance.

25. In any event, as indicated the application suffered from a further procedural defect that is unassailable and to which I now turn the focus.

The claim is not one contemplated by rule 32(1)(a – d)

26. In this case Mr. Engelbrecht, who appear for the defendants, pressed the point that the claim of the plaintiffs is not a claim as envisaged in rule 32(1)(a - d).
27. The plaintiffs have relied on the main rental agreement and a document in the form of a statement, attached to the particulars of claim. However, it is clear from the pleadings and the application for summary judgement that the plaintiffs are relying on the fact that their claim is a liquidated amount and not a liquidated document. If it was a liquidated document it was required to be annexed to the affidavit in support of summary judgement[14], but in this case there was nothing attached.
28. It is therefore necessary to consider what the basis is for the plaintiffs to regard the amount claimed as a liquidated amount:

28.1 In the particulars of claim the plaintiffs pleaded that annexure A2, being a tenant/debtor transaction report, contained detail of the unpaid monthly rentals and related charges. This reliance was repeated in the affidavit supporting the summary

judgement

application, but nothing else was said why the amount should be regarded as liquidated.

28.2 In the heads of argument on behalf of the plaintiffs the submission was made that the claim was liquidated, and that the obligation was on the defendants to raise primary facts in support of their allegations that the claim is not a liquidated claim. The submission is made that the defendants failed to provide any substantiation why the plaintiffs' claim is alleged to not be liquidated.

29. A liquidated amount for purposes of summary judgment is an amount that is either agreed upon or capable of prompt ascertainment[15]. In determining whether an amount is liquidated, the courts have traditionally referred to whether the quantum is calculable with precision, either through a simple calculation or by reference to agreed facts[16]. A claim is regarded as liquid if it stems from a liquid document (such as a contract where the amount is specified), or if the amount can be ascertained through a simple calculation based on the terms of the agreement. One such an example by academics is in fact in cases of commercial leases, if the rent or charges are agreed upon in the lease, the unpaid portion would typically constitute a liquidated amount. In Tredoux[17], the court emphasised that a claim is not liquidated if the quantum of the amount claimed is uncertain or if it depends on the court's assessment of what is reasonable, as in the case of untaxed legal fees or disputed remuneration for services rendered[18].

30. It is simply impossible to reconcile the statement on which the plaintiffs rely as a basis to regard the claim as a liquidated amount. The following difficulties in respect of the statement that is relied on by the plaintiffs and the main lease are evident:

30.1 The statement starts with an opening balance during November 2020 of R 189 021,69. Neither the statement nor the plaintiffs have explained what this amount constitutes. It only contains the reference “Balance B/f”.

30.2 The statement includes legal fees amounting to an amount of R 185 000,00. This amount is evidently not taxed and is therefore not due. There is also no indication how the amount of the legal fees is calculated. Although the main lease agreement at clause 40 does entitle the landlord to hold the lessee liable for legal fees and associated costs, the plaintiffs still had to tax the legal fees[19].

30.3 Since, the legal fees cannot be due the interest charge on the legal fees also cannot be due. Further, clause 40 of the main lease did not entitle the plaintiffs to interest on the legal fees.

30.4 Clause 9.1 – 9.13 with subclauses of the main lease agreement contain a multitude of charges the tenant would be liable for. However, when one considers the statement on which the plaintiff relies there is no connection between the amounts in the statement and the basis or the rates explained in these paragraphs. By way of example the main lease at paragraph 9.10.1 provides that “the TENANTS contribution of sewerage and effluent disposal charges levied against the PROPERTY calculated in accordance with the local supply authorities tariffs, if metered, alternatively the TENANT’s pro rata share of such charges;” The statement in turn does contain a line item with a charge for sewerage but does not indicate the basis for the rate levied or the globular amount against which the rate is calculated. There are also no allegations in the particulars of claim to give context to the relevant line item on the statement and connecting it to a charge as provided for in the main lease.

30.5 The criticism in respect of sewerage is similarly applicable against all the other items on the statement. There are no allegations in the particulars of claim that explains how the rates in the main lease agreement resulted in the amount on the statement. This means evidence will have to be led on how this was done.

30.6 Furthermore, although there appears to be the possibility that on closer scrutiny of the provisions of the main lease agreement one can ‘figure out’ the globular amount and work backwards to work it against the rate provided for in the main lease, such an exercise is not comparable in this instance to a situation of a simple calculation based on the terms of the agreement.

31. Therefore, the plaintiffs have not persuaded me that the amount claimed constitutes a liquidated amount for the purposes of summary judgment. The unexplained opening balance, the inclusion of untaxed legal fees, and the failure to clearly link the various charges in the statement to the provisions of the main lease agreement all contribute to uncertainty regarding the accuracy of the amount claimed. The test for a liquidated amount

requires that the sum be readily ascertainable, either through a simple calculation or by reference to agreed contractual terms. In this case, such a determination is not possible for the reasons mentioned.

32. It has been held that summary judgment should be refused if it is arguable whether the existence and quantum of the amount claimed is easily and promptly ascertainable. In this case I am of the view that the amount is at best arguable.

Conclusion

33. In light of the foregoing, the plaintiffs have failed to make out a case for summary judgement. For the reasons foreshadowed the application did not comply with the peremptory requirements of the subrule. In the alternative, the claim is not one of the claims contemplated by rule 32(1)(a – d).

34. In the circumstances I make the following order:

The application for summary judgement is refused, costs to be costs in the cause.

The defendants are granted leave to defend the action.

A MONTZINGER

Acting Judge of the High Court

Appearances:

Plaintiffs' counsel:

Mr. J Bence (in person)

Plaintiff's attorney:

Rubenstein Attorneys

Defendants' counsel:

Mr. A Engelbrecht

Defendants' attorney:

R Allom Attorneys

[1] Tumileng Trading CC v National Security and Fire (Pty) Ltd 2020

(6) SA 624 (WCC) ("Tumileng Trading"),

[2] Maharaj v Barclays National Bank Ltd 1976

(1) SA 418 (A) ("Maharaj")

[3] Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009

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- [5] SA 1 (SCA) (“Joob Joob”)
- [4] Uniform Rule 32(3)(b).
- [5] Breitenbach v Fiat SA (Edms) Bpk 1976
- (2) SA 226 (T) (“Breitenbach”)
- [6] Tesven CC v SA Bank of Athens [1999] 4 All SA 396 (A), 2001 (1) SA 268 (SCA)
- [7] Breitenbach at 227 D
- [8] Inventive Labour Structuring (Pty) Ltd v Corfe 2006
- (3) SA 107 (SCA) for an exposition on this issue. (“Incentive Labour”)
- [9] Botha v Mibit and Another (2238/2021)
- [2022] ZAECQBHC 9 (19 May 2022)
- [10] Interpretation Act 33 of 1957 s 4
- [11] Rule 1 of the Uniform Rules
- [12] FirstRand Bank Ltd t/a Wesbank v Maenetja Attorneys Inc (8557/2021) [2021] ZAGPPHC 612 (17 September 2021) (“FirstRand v Maenetja”)
- [13] I intend to put it as the honourable judge did by saying there is ‘no’ latitude, as that appears to me a too onerous approach. I am happy to accept there is very little wriggle if the subrule has not been complied with.
- [14] Rule 32(2) (c): “If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit...”
- [15] Tredoux v Kellerman 2010
- (1) SA 160 (C) (“Tredoux”) par 18
- [16] Lester Investments (Pty) Ltd v Narshi 1951
- (2) SA 464 (C) and
- [17] Tredoux v Kellerman supra
- [18] Also reiterated in: Northern Cape Scrap & Metals (Edms) Bpk v Upington Radiators & Motor Grave-yard (Edms) Bpk 1974
- (3) SA 788 (NC),
- [19] Tredoux par 18

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