

SOUTH AFRICA / JUDGMENT

Smolly N.O and Others v 4F Fashion (Pty) Limited t/a 4F Fashion and Another (2022/062550) [2023] ZAGPJHC 1139 (9 October 2023) [2023] ZAGPJHC 1139

COURT

South Gauteng High Court, Johannesburg

BEFORE

W G La Grange

CASE / FILE NUMBER

2022/062550

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2022/062550

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED. YES/NO

09

OCTOBER 2023

In

the matter between:

PETERSEN,
IZAK SMOLLY N.O. in his capacity
as
trustee for the DIPULA PROPERTY First
Plaintiff /
INVESTMENT
TRUST (IT NO. 7[....]6) First
Applicant
ASMAL,
RIDWAAN N.O. in his capacity
as
trustee for the DIPULA PROPERTY Second
Plaintiff /
INVESTMENT
TRUST (IT NO. 7[....]6) Second
Applicant
AZIZOLLAHOFF,
BRIAN HILTON N.O. in his capacity
as
trustee for the DIPULA PROPERTY Third
Plaintiff /
INVESTMENT
TRUST (IT NO. 7[....]6) Third
Applicant
JUNKOON,
JUJDEESHIN N.O. in his capacity
as
trustee for the DIPULA PROPERTY Fourth
Plaintiff /
INVESTMENT
TRUST (IT NO. 7[....]6) Fourth
Applicant
and
4F
FASHION (PTY) LIMITED
First
Defendant /
t/a
4F FASHION (ID No.
2[....]7) First
Respondent
MOHMEDNAIM
MOHMED ISRAR KALFATI
Second Defendant /
Second
Respondent

JUDGMENT

LA GRANGE AJ

- [1] This is an application for summary judgment arising from an action instituted by the applicants as trustees of the Dipula Property Investment Trust against the respondents for payment of outstanding rental and damages pursuant to the first respondent's breach of a lease agreement. Only the claim for outstanding payments during the currency of the lease agreement are pursued in the summary judgment application (claim 1 in the action); the applicants concede that the claim for damages arising from the breach (claim 2) is not liquidated and that leave to defend in relation to that claim ought to be granted. As far as the prayer for ejectment in claim 1 is concerned, counsel for the applicants advised orally in court that the applicants no longer pursue this relief.
- [2] The affidavit opposing summary judgment was filed late and condonation therefore is sought by the respondents. The applicants' counsel indicated that the applicants do not oppose the application. Accordingly, condonation for the late filing of the affidavit opposing summary judgment was granted and the application proceeded on an opposed basis. For ease of reference, I will refer to the parties as in the main action and will refer to the Dipula Property Investment Trust as "the Trust".
- [3] The claim for summary judgment in respect of claim 1 is pursued on the basis that it is a liquidated amount of money, being susceptible to prompt ascertainment. The defendants have seemingly not disputed that the claim is for a liquidated amount of money. The lease agreement in issue was concluded between the Trust as lessor and the first defendant as lessee and stipulated the rental and other amounts payable sought to be recovered under claim 1 by the Trust. The second defendant furnished the Trust with security in respect of the first defendant's indebtedness under the lease in the form of a suretyship, in consequence thereof, the plaintiffs seek relief against the defendants jointly and severally for the amount of the outstanding payments.
- [4] The lease comprises a written document the terms whereof were not in issue – at least not the terms as at the time of the conclusion of the lease. In this regard, whilst the defendants contend in their plea that they did not witness the signature of the written lease on behalf of the Trust, there is no dispute that on 3 May 2021 the second defendant signed the written lease on behalf of the first defendant (whereof it was a director and on whose behalf it was authorised to conclude the lease). There is also no dispute that the second defendant issued the Trust with security in the form of a written suretyship.

- [5] The lease related to certain commercial premises known as Shop No. 01, Ground Floor, Express Centre Kempton Park, 23 Pretoria Road, Kempton Park, Gauteng and was for a duration of five years, commencing on 1 April 2021 and terminating on 31 March 2026. Whilst the provisions of the lease in relation to the payment of a monthly rental, a monthly contribution towards rates and taxes and the payment of various other associated charges as recorded in the lease were seemingly uncontentious at the time of the conclusion of the lease, the defendants plead that these terms were by oral agreement altered subsequent to the conclusion thereof. I deal with this in greater detail below.
- [6] There is no dispute that the first defendant took occupation of the premises in terms of the lease and, initially at least, paid the amounts due to the Trust in terms of the lease. Notably the defendants also do not place in dispute the correctness of the calculation of the outstanding payments, in the aggregate amount of R184 808.68, insofar as the calculation purports to be in accordance with the written terms of the lease. The defendants plead as follows in relation thereto:[1]

“The amount of R184 808.68 is noted however the Defendants request the Plaintiffs to be specific as to which month/s does this debt emanate from and how it was computed as this alleged amount was never claimed by the Plaintiffs.”

- [7] The clarity sought in relation to its precise calculation of the outstanding amount was furnished in “DP4” to the summons; other than seeking clarity, the defendants do not appear to challenge the calculation of the outstanding amount with reference to the written terms of the lease. The defendants do, however, specifically contend (a) that the payment terms under the lease were altered and
- (b) that it was agreed that the lease would be terminated prior to the termination of the five-year term. In relation to the former, the defendants plead that the second defendant “on various occasion[s] told [the Trust] of his intention to have the rental money reduced and subsequently [the Trust] accepted payments different from the initially agreed amount of R26 250.00 [and] this drastically changed the terms of monthly payments as contained: in the lease agreement”. In relation to the agreed early termination, the defendants contend that the first defendant “had no choice but to leave the premises due to economic hardship” and that the Trust “had knowledge of this issue prior to the defendants leaving the leased premises as same was communicated” to the Trust.[2] The defendants proceed to plead that “the parties had some form of agreement that the Defendants can vacate the premises, and a replacement be found to occupy the premises”. [3] The allegation of an agreed termination is of no moment for purposes of the claim for payments during the currency of the lease; the defendants do not suggest that the lease was terminated prior to September 2022 when the premises were vacated. The defendants’

allegations regarding the vacation of the premises do, however, confirm that the first defendant had beneficial occupation of the

premises in respect of the period for which the Trust seeks payment from the defendants.

[8] In addition to the pleaded defence of an altered lease, the defendants also raised the following defences to the claim for payment in their plea:

8.1 The defendants contended that the lease was governed by the Consumer Protection Act, 68 of 2008 and that the plaintiffs failed to comply with the requirements thereof. The plea did not identify in what respects the provisions of the Act were not adhered to.

8.2 The defendants contended that the plaintiffs failed to annex a certificate of indebtedness signed by a director, company secretary, credit manager or internal accountant of the Trust or the Trust's quantity surveyor or agent (as envisaged by clause 33.5 of the lease).

8.3 The defendants also contend that the suretyship does not comply with the formalities required of such an instrument. The formalities are not identified in the plea. The defendants do, however, plead that "the deed of surety amounts to a credit guarantee" and that "therefore [it] is a credit agreement under the National Credit Act, 34 of 2005" and that the formalities laid down in that Act must have been complied with. (The defendants also suggest that the terms of the lease, in addition to the suretyship, were governed by the National Credit Act, 34 of 2005.)

[9] In its summary judgment application, the property manager of the Trust confirmed that the amount of R184 808.68 (comprising

outstanding rental and other payments in terms of the lease, made up of the amounts contained in "DP4" to the summons)

remained outstanding and due and payable until the date of cancellation of the lease (which was September 2022).[4] In support thereof, the property manager annexed a certificate of indebtedness in terms of clause 33.5 to the summary judgment

application confirming that, as at the date of issue of the summons (which coincides with the date of cancellation of the lease), the first defendant was indebted to the Trust in the amount of R184 808.68. The deponent to the summary judgment application

also pointed out why the defences raised in the plea were neither valid nor bona fide.

[10] In his affidavit opposing summary judgment, the second defendant (answering both on his own behalf and on behalf of the first

defendant) answers some of the allegations contained in the summary judgment application. As indicated above, the defendants did not place in dispute the correctness of the amounts claimed as falling due in terms of the written lease; the defendants merely sought clarification in relation thereto. The calculation of the outstanding amount of R184 808.68 is clearly set out in annexure "DP4", was confirmed by the deponent in the affidavit filed in support of the application for summary judgment and accords with the amount reflected in the certificate of indebtedness annexed to the summary judgment application. Aside from answering the allegation in the plea that a certificate of indebtedness as envisaged in clause 33.5 was not annexed to the summons,

the certificate of indebtedness invokes the provisions of clause 33.5 to the effect that it

“... shall be apparent proof of the amount of any indebtedness owing by the [first defendant] to the [Trust] at any time and also of the fact that the due date of payment of the whole or, as the case may be, any portion of that amount has arrived”.

[11] In the face hereof, the defendants do not contend for a different calculation of the amounts due under the lease and have not

challenged the correctness or validity of the certificate of indebtedness in their affidavit opposing summary judgment. Nothing

was placed before me to challenge the Trust’s calculation and claim for the outstanding payment of R184 808.68, other than the alleged defences with reference to the Consumer Protection Act, the National Credit Act and the allegations in the plea that the terms of the lease were altered by oral agreement.

[12] On this latter score, whilst in their plea the defendants allege an agreement that the amounts due under the lease were to be reduced, nothing was said about the defence in the affidavit opposing summary judgment. There was no indication as to what the outstanding amount due to the Trust ought to be, other than the amount of R184 808.68 claimed by the Trust. Not only was no evidence presented before me to challenge the correctness of this amount, but the defendants also did not challenge the validity or correctness of the certificate of indebtedness annexed to the summary judgment application, and seemingly abandoned the special plea regarding the certificate of indebtedness.

[13] The lack of any allegations in the opposing affidavit disputing the calculation of the amount of R184 808.68 aside, the defence in the plea to the effect that the payment terms of the lease had been altered, is met with the following hurdle in clause 39.1 of the lease:

“This lease incorporates the entire agreement between the [Trust] and the [first defendant] and no alteration, consensual cancellation or variation hereof shall be of any force or effect unless it is in writing and signed by both the [Trust] and the [first defendant] who hereby acknowledge that no representations or warranties have been made by either the [Trust] or the [first defendant], nor are there understandings or terms of lease, other than those set out herein.”

[14] There was no allegation and no evidence to the effect that the terms of the lease were altered in writing and signed on behalf of both the Trust and the first defendant. The notion put forward by the defendants in their plea to the effect that the Trust accepted reduced payments of rental, despite being met with opposition in the application for summary judgment (and not disputed in the affidavit opposing summary judgment), does not suffice for purposes of establishing a variation to the lease. Moreover, that allegation is also met with the following contractual hurdle in clause 39.2 of the lease:

“No relaxation or indulgence which the [Trust] may show to the [first defendant] shall in any way prejudice the [Trust’s] rights

hereunder and, in particular, no acceptance by the [Trust] of rent after due date (whether on one or more occasions) nor any other act or omission by the [Trust] Including, without limitation, the rendering of accounts after due date, shall preclude or stop it from exercising any rights enjoyed by it hereunder by reason of any subsequent payment not being made strictly on due date. Unless otherwise stated by the [first defendant] in writing, the receipt by the [Trust] or its agents of any rent or other payment shall in no way whatsoever prejudice or operate as a waiver, rescission or abandonment of any cancellation or right of cancellation effected or acquired prior to such receipt. The [Trust] shall be entitled in its sole discretion to appropriate any amounts received from the [first defendant] towards the payment of any cause, debt or amount whatsoever owed by the [first defendant] to the [Trust].”

[15] In short, there was no evidence before me and no plausible case made out to suggest that the terms of the lease were altered; accordingly, payment thereunder falls due in accordance with the written provisions of the lease. That leaves only the defences pertaining to the Consumer Protection Act and the National Credit Act and the points in limine raised in the opposing affidavit. Each of these are considered below.

[16] The points raised in limine relate to the fact that the deponent was not a trustee of the Trust and that he does not allege in his opposing affidavit that he was authorised to depose to the affidavit on behalf of the Trust and no resolution by the Trust is annexed to illustrate that he has authority. In this matter, the summary judgment application was brought by the plaintiffs’ attorney of record. The authority of the plaintiffs’ attorney was not challenged in terms of Rule 7 of the High Court Rules. There is no need for a deponent presenting evidence in support of an application, instituted by an authorised attorney of record, to have authority to do so in addition to the authority of the plaintiffs’ attorney. (See in this regard *Eskom v Soweto City Council* 1992

(2) SA 703 (W) at 705F to 706C, as confirmed in *Ganes and another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at para [19].) It follows that there is no merit in the points in limine raised by the defendants.

[17] Whilst it is plain from the face of the lease (annexed to the summons marked “DP3”) that it was not signed by all four the trustees (the defendants alleging that it was only signed by the second plaintiff), the authority of the signatory of the lease to represent the Trust was not challenged in the plea. (The only allegation was that the signature on behalf of the Trust of the lease was not witnessed.)[5] Moreover, as already indicated, there can be no question that the Trust intended to enter into an agreement with the first defendant on the terms set out in “DP3”, nor have the defendants suggested otherwise. The Trust performed in terms of the lease, gave occupation of the premises to the first defendant in accordance with the lease, received payment in terms of the lease and sought payment of outstanding amounts due in terms of the lease from the first defendant and instituted proceedings in terms of the lease. There can be no question that the Trust considered its commercial relationship with the first defendant to be regulated by the terms of the lease. As such, the failure by the three remaining trustees to sign the lease neither invalidates the lease nor suggests that the second

plaintiff was not authorised to enter into the lease on behalf of the Trust. There is no merit in the defence raised by the defendants and no evidence in support of the contention was contained in the opposing affidavit.

- [18] The allegation by the defendants that the lease was regulated by the provisions of the National Credit Act are without merit. The Act specifically excludes in section 8(2)(b) thereof its operation in relation to lease agreements in respect of immovable property. It provides as follows

“An agreement, irrespective of its form, is not a credit agreement if it is—

- (a) a policy of insurance or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance;
- (b) a lease of immovable property; or
- (c) a transaction between a stokvel and a member of that stokvel in accordance with the rules of that stokvel.”

- [19] As such, there is no merit in the allegation that the lease was a credit agreement as contemplated in the National Credit Act. By virtue of the Act having no application to the lease, it also has no application to the security issued by the second defendant for the due performance by the first defendant in terms of the lease. In this regard section 8(5) of the National Credit Act provides that

“An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation

of another consumer in terms of a credit facility or a credit transaction to which this Act applies.” [emphasis added]

- [20] By implication, to the extent that the Act does not apply to a credit transaction, it also does not apply to the promise to satisfy any obligation of a consumer in relation to a credit transaction. To place this issue beyond doubt, section 4(2)(c) of the Act provides that

“this Act applies to a credit guarantee only to the extent that this Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted”.

- [21] It follows that neither the lease concluded between the Trust and the first defendant, nor the suretyship concluded between the second defendant and the Trust was governed by the National Credit Act. The allegations regarding the application of the National Credit Act are accordingly without merit and the validity and enforceability of both the lease and the suretyship are unaffected thereby.

[22] As far as the alleged application of the Consumer Protection Act is concerned, the requisite facts to bring the defendants within the reach of its provisions were not alleged in the opposing affidavit.

Section 5(1)(a) of the Consumer Protection Act extends its reach to every transaction occurring within the Republic, unless the transaction is exempted by section 5(2), or in terms of sections 5(3) and 5(4). Section 5(2)(b) provides that the Act does not apply to any transaction in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister and published by notice in the Government Gazette in terms of section 6 of the act. The threshold value, as at the date of the conclusion of the lease, was R2 million. It follows that the first defendant ought to have presented at least prima facie evidence in its affidavit opposing summary judgment to indicate that its turnover and asset value did not exceed R2 million; it failed to do so.

[23] The aforesaid aside, the defendants do not indicate in what respects they contend that the lease failed to comply with the Consumer Protection Act – neither in the plea nor in its affidavit opposing summary judgment. The high-water mark of the allegations made by the defendants in their opposing affidavit is that “the plaintiffs are entitled to early termination of the lease agreement in terms of the NCA and the CPA”. The allegation does not disclose a defence to the claim for outstanding payments due in terms of the lease from its commencement

until its termination in September 2022. In the defendants’ heads of argument it was suggested that the Trust had “failed to terminate the lease agreement by providing the defendants a notice in terms of the Consumer Protection Act”. When probed on this issue at the hearing of the application, the defendants’ representative did no more than point to section 14 of the Act. That section deals with the expiry and renewal of fixed term contracts. Not only had the lease neither expired nor been renewed, but section 14(1) expressly records that it does not apply to transactions between juristic persons regardless of their annual turnover or asset value. In any event, the claim for payments under the lease (pursued in terms of claim 1) are unaffected by the date or validity of the cancellation of the lease.

[24] In their heads of argument and at the hearing of the application, the defendants’ representative raised the application of clause 40 of the lease, suggesting in argument that the referral of the payment dispute to the High Court (and the hearing of the summary judgment) was premature. Whilst clause 40.1 read with 40.2 provides that any one of the Trust or the first defendant shall be entitled to refer a dispute to arbitration, clause 40.10.2 records that:

“Nothing which is contained in this clause 40 shall preclude... anyone of the parties from seeking interim and/or urgent and/or the following relief hereunder, a rent interdict, rent interdict summons, a summons in respect of a claim for rental and other imposts, an application to attach any Items falling under the landlords’ hypothec, an interim interdict interdicting the removal of any items from the premises or the property of which the Premises form part, a cancellation of this agreement and/or an eviction from a Court of competent Jurisdiction, and insofar as the High Court is approached in respect

of any such relief, the parties hereby consent to, insofar as it is legally permissible, the jurisdiction of the South Gauteng High Court.” [emphasis added]

[25] As such, the plaintiffs were entitled to pursue their claim for payment under the lease in this Court. Moreover, this Court’s

jurisdiction was not challenged on the pleadings and clause 40 is not a prerequisite or a bar to this court hearing the matter.

[26] For these reasons I conclude that the defendants have failed to disclose any bona fide defence to the plaintiffs’ action for payment under claim 1 and I am satisfied that I should enter summary judgment in favour of the plaintiffs in relation thereto. As far as claim 2 is concerned, I grant the defendants leave to defend.

[27] Accordingly I grant the following order:

1 In respect of claim 1 the defendants are ordered jointly and severally to pay the plaintiffs, the one paying the other to be absolved:

1.1 The sum of R184 808.68;

1.2 Interest on the aforesaid sum from the date of service of the summons until date of payment at the prevailing prime rate plus 2% per annum, compounded monthly in arrears; and

1.3 The costs of the opposed summary judgment application and the identifiable costs that of suit that relate solely to claim 1.

2 In respect of claim 2 the defendants are granted leave to defend the action.

W G LA GRANGE

Acting Judge of the High Court

Gauteng Division, Johannesburg.

The judgment was handed down electronically by circulation to the parties and or parties representatives by email and by being uploaded to Caselines. The date for the hand down is deemed to be the 09 October 2023.

Heard: 04 October 2023

Judgment:

09 October 2023

Appearances:

For the Plaintiff: Adv J G Dobie

Instructed by: Rooseboom Attorneys

For the Defendant: Mr V O M Seloane

Instructed by: Seloane Vincent Attorneys

- [1] Paragraph 7 of the plea.
 - [2] Paragraph 6.4 of the plea.
 - [3] Paragraph 7 of the plea.
 - [4] Paragraphs 3, 4.3 and 4.4 of the affidavit in support of summary judgment, read with paragraphs 7, 9 and 11 of the plaintiffs' particulars of claim.
 - [5] Paragraph 4 of the plea.
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