

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING APPLICATION: SUMMARY JUDGMENT

Case no: HC-MD-CIV-ACT-OTH-2020/03998

In the matter between:

GROOTFONTEIN SHOPPING CENTRE (PTY) LTD

APPLICANT

and

TUSK INVESTMENTS (PTY) LTD

RESPONDENT

Neutral Citation: *Grootfontein Shopping Centre (Pty) Ltd vs Tusk Investments (Pty) Ltd*
(HC-MD-CIV-ACT-OTH-2020/03998) [2021] NAHCMD 197 (27 April 2021)

CORAM: SIBEYA J

Heard: 02 April 2021

Delivered: 27 April 2021

Reasons: 30 April 2021

Flynotes: Practice – Summary Judgment – Defendant opposing summary judgment application disclosing the nature of defence and the material facts relied upon – Court satisfied that the defence raised sufficiently raising triable facts – Summary judgment application dismissed.

Summary: The facts are as they appear in the judgment below

ORDER

1. Summary judgment application is dismissed.
 2. The Applicant must pay the costs of this application, subject to rule 32 (11).
 3. The matter is postponed to 18 May 2021 at 14h00 for status hearing.
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RULING

SIBEYA J

[1] Before me is an opposed application for summary judgment wherein the plaintiff instituted action against the defendant for arrear rental in the amount of N\$227,318.52 accrued over the period of January 2020 to October 2020. The applicant and respondent in these interlocutory proceedings are the defendant and plaintiff in the main action. For ease of reference, I will refer to the parties as they are in the main action.

[2] The cause of action arose out of a written lease agreement (hereinafter referred to as the agreement) that the plaintiff entered into with the defendant during February 2016. The terms and conditions upon which the parties are said to have contracted raises no issues between the parties. The only issue to be determined surrounds the

aspect of cancellation of the agreement by the defendant. The defendant raised the following factual matrix that gave rise to the said cancellation, which will be kept in brief as follows:

a) During the year 2019, the business of the defendant was not doing well and the defendant communicated this fact to the plaintiff. The defendant allegedly also informed the plaintiff that if the situation does not improve, the defendant will have no option but to end the lease agreement.

b) On 01 October 2019, the defendant made a final decision to terminate the agreement and gave notice of termination to the plaintiff indicating that the defendant shall vacate the premises on 31 October 2019. The notice was delivered and served on the plaintiff on 01 October 2019.

c) The defendant has paid its rental amount in full up until the termination date. The defendant allegedly further cleaned the premises, restored it to its original state, removed all its items and handed over the keys of the premises to the plaintiff. The plaintiff accepted the keys in line with the notice of termination. The plaintiff did not contest the notice period nor did it do anything in law to enforce its rights at that point. The plaintiff is silent in its particulars of claim about the said termination of the agreement by notice.

d) The defendant did not breach the agreement as alluded to by plaintiff. The defendant formed the view that the plaintiff's cause of action is not based on the cancellation and if the defendant had breached the agreement, the plaintiff ought to have acted in terms of the agreement and give necessary notices for the defendant to remedy the defect.

[3] The plaintiff, in brief, formed the view that the defendant's notice to terminate the lease agreement fell outside the ambit of the agreement and the fact that it vacated the premises adds no value to defendant's argument. The plaintiff made the point that the

defendant's reliance on the termination notice is completely wrong and does not rely on any other provision in the agreement, entitling it to vacate the premises and escape payment of arrear rental. As a result, defendant retains liability for unpaid rental in terms of the agreement.

[4] The law on summary judgment applications is trite and plentiful and need not be repeated in this ruling. However, the general approach regarding summary judgments can be surmised as follows as set out by Corbett JA in *Maharaj v Barclays National Bank Ltd*:¹

'Accordingly, one of the ways in which the defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.

All that the Court enquires into is:

(a) whether the defendant has fully disclosed the nature and the grounds of his defence and the material facts upon which it is founded, and

(b) 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.

If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word fully, as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence.'

¹ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A.

[5] Further in *Kwikform Formwork and Scaffolding (Pty) Ltd T/A Abacus Modular Space Solutions v Highgate Private School (Incorporated Association Not For Gain)*² this court held the following regarding what the defendant's opposing affidavit should contain:

[18] The affidavit must disclose the nature of defence and the material facts relied upon³. The defendant need not deal exhaustively with the facts and evidence relied upon to substantiate those facts but he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to determine whether the affidavit discloses a *bona fide* defence or not.'

Discussion

[6] As indicated above, the parties are seemingly *ad idem* regarding the course of events and ancillary thereto. Therefore, for purposes of this ruling, I will only confine myself to the question as to whether the defendant's reliance on the alleged termination of the agreement constitutes a valid defence to the plaintiff's claim which appears to be the dividing line between the parties.

[7] It is common cause that the defendant notified the plaintiff in a letter indicating its economic hardships encountered as a result of the COVID-19 pandemic. In the letter the defendant further informed the plaintiff of its intention to terminate the agreement, resultantly serving a 30 days' notice on the plaintiff.

[8] The plaintiff disputes that such letter constitutes a notice of termination of the agreement. It argues that the termination of the agreement is circumscribed by clause 2.2 and that the Notice of termination falls outside the scope of the clause.

² *Kwikform Formwork and Scaffolding (Pty) Ltd T/A Abacus Modular Space Solutions v Highgate Private School (Incorporated Association Not For Gain)* (HC-MD-CIV-ACT-CON-2020/03208) [2021] NAHCMD 28 (05 February 2021),

³ *Slabert v Volkscas Bpk* 1985 (1) SA 141 (T).

[9] Clause 2.2 provides that:

'If the landlord is unable to give the Tenant occupation of the premises on the commencement date by reason of the premises, or for any other reason, the Tenant shall have no claim for damages or right of cancellation and shall accept cancellation on such later date on which the premises are available. In the event of such a delay the commencement date shall be the date on which the premises are ready for occupation within one (1) month of the commencement date, failing which the Tenant shall be entitled to terminate this Lease by at least one calendar month's written notice to the Landlord to that effect which termination may not come into effect until the expiry of the one (1) month period.'

[10] It would be worth noting that analysing the agreement as a whole, it makes no provisions for termination of the lease other than those outlined in clause 2 and 17, which in turn set certain conditions to be met before a termination is considered to be fully complied with, or breach of contract for that matter. Clause 17 allows the plaintiff to claim arrear rental when the lease expires or where the plaintiff cancels the lease and the defendant disputes the right to cancel and remain in occupation of the premises. None of the prerequisites referred to in clause 17 arose for plaintiff to claim arrear rental. It is difficult to determine at this stage how the defendant breached the agreement *per se* or activate a clause indicating a breach of agreement. Notwithstanding, I understand the plaintiff's contention to be that the defendant simply failed to pay the rentals for January to October 2020 while leasing the premises from the plaintiff.

[11] What is furthermore noteworthy is that the letter titled: TERMINATION OF LEASE AGREEMENT: 30 DAYS NOTICE marked as "MS1" as attached on the defendant's opposing affidavit and dated 01 October 2019, effectively indicated that the defendant gave notice of terminating the lease agreement. The letter further provides circumstances giving rise to the termination, and states further that the defendant will vacate the premises on 31 October 2019.

[12] The date 01 October 2019 is interesting to note due to the fact that all things being equal, one would expect the plaintiff to apply the remedies as provided for in the agreement or clearly indicate to the defendant that the termination notice is not accepted or declined and that further steps will be taken. Bearing in mind that this matter is in its infancy stage, it appears that what the plaintiff opted to do was to remain silent on the termination letter received from the defendant. The plaintiff further accepted the the keys to the premises.

[13] The letter of termination is supported by the return of the keys of the premises to the plaintiff in furtherance of the intention of the defendant to terminate the agreement. The return of the keys and thus surrendering the occupation of the premises by the tenant to the landlord and the landlord's acceptance thereof is important in determining the liability of the tenant for the period succeeding such surrender. This find support from Davis AJA in *Sapro v Schlinkman*⁴ where it was stated that:

'To sum up: the authorities show that the date that matters in regard to the termination of the lessee's liability to pay rent in terms of the lease is not the date of breach, or the date on which the lessee purported to cancel the lease, but the date on which he actually quitted the premises.'

[14] As it stands, I am satisfied that the defendant's affidavit sufficiently discloses the nature of the defence that it terminated the agreement by October 2019 and returned the premises to the plaintiff, therefore not liable for rentals of January to October 2020. I find that the defendant has set out clear facts that are triable on which a bona fide defence to the claim is based. Moreover, the plaintiff is resultantly better placed to appreciate the defence which it must meet in pursuing its claim against the defendant.

[15] In the result, I then make the following order:

⁴ *Sapro v Schlinkman* 1948 (2) SA 637 (AD) 644-645. See also: BV Investment Six Hundred and Nine CC v Kamati and Another (SA 48/2016) [2017] NASC 26 (19 July 2017); Marcuse v Cash Wholesalers (Pty) Ltd 1962 (1) SA 705 (FC).

1. Summary judgment application is dismissed.
2. The Applicant must pay the costs of this application, subject to rule 32 (11).
3. The matter is postponed to 18 May 2021 at 14h00 for status hearing.

O SIBEYA

Judge

APPEARANCES:

FOR THE APPLICANT:

J Diedericks

Instructed by Michelle Saaiman Incorporated

FOR THE RESPONENT:

M Ntinda

Sisa Namandje &

Co. Inc