

REPUBLIC OF SOUTH AFRICA



**SOUTH GAUTENG HIGH COURT
JOHANNESBURG**

CASE NO: 46782/13

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
DATE

.....
SIGNATURE

In the matter between:

HIGHVELD SUNDICATION NO. 16 (PTY) LTD

First Applicant

ORTHOTOUCH LTD

Second Applicant

ZEPHAN PROPERTIES (PTY) LTD

Third Applicant

MOXICORP INVESTMENTS (PTY) LTD

Fourth Applicant

and

JI AN IMPORT & EXPERT (PTY) LTD

First Respondent

WANG: JUN

Second Respondent

JUDGEMENT

CARSTENSEN AJ:

1. The Applicant seeks an order in terms of an amended notice of motion wherein the First Respondent is directed to vacate the premises of the shopping centre known as the Piazza Centre located on erf 522 to 544 and 605 to 612 Blairgowrie, situated on the corner of Jan Smuts Avenue and Republic Road, Randburg, alternatively that the First Respondent is evicted by the Sheriff and secondly, for payment of the arrear rental together with interest and costs.
2. The Applicants' cause of action arises out of a written commercial lease concluded between the First Applicant and the First Respondent.
3. The First Respondent fell into arrears with its rental obligations and in addition, did not pay municipal charges which it was obliged to do in terms of the agreement. The Applicants' founding affidavit attached a schedule showing that the First Respondent was in arrears in the amount of R7 395 699.87 and eventually after placing the First Respondent on terms on the 30th of August 2013, the First Applicant cancelled the lease with effect from the 30th of November 2013. This was done by instituting action in the High Court. The First Respondent refused to vacate the premises.
4. The First Respondent also did not itself occupy the entire premises, but let most of the premises to sub-tenants.

5. The First Applicant had instituted an action under case number 41945/13 claiming arrears and demanding return of the premises, but undertook in the founding affidavit to serve a notice of withdrawal and tender the wasted costs thereof.
6. In the answering affidavit the Second Respondent, representing the First Respondent, contends that there were misunderstandings due to the language barrier but admitted the conclusion of the written agreement of lease on the 7th of December 2012. However, he stated that he thought the lease was for 20 years and consequently, sought to rectify the lease agreement.
7. He also stated that he had signed a preliminary agreement with the First Applicant in terms of which he was obliged to pay R10 million if he did not sign the lease agreement. He also believed that the lease agreement would record that the First Applicant was responsible for remedying the defects. Consequently, he signed the lease agreement without the assistance of an attorney and attended to extensive renovation of the premises on which he spent his “own money”, apart from the deposit and other costs. He further states that the First Respondent spent an amount of R18 055 414.76 on the property to get the property back in a functional state and consequently that:
 - 7.1. not only does the lease agreement require to be rectified, but that the First Applicant is in breach of the agreement in

refusing to pay for the repair work;

7.2. he also raises an application launched in the North Gauteng High Court under case number 75421/13 and the interference by the First Applicant with the sub-tenants of the First Respondents.

8. He also states that the First Respondent has a counterclaim, but that he has been advised that it is impossible to adjudicate the counterclaim on motion proceedings and thus he will institute action proceedings in respect thereof, once this matter has been referred to oral evidence or trial.
9. Apart from the defences of "*lis pendens*", lien and rectification, he also contends that there is no proper description of the Applicant as the Applicant describes itself as a private company whereas the lease has been entered into with Highveld Syndication No. 16 Ltd, a public company. Consequently, the First Applicant, the Respondents contend, does not have *locus standi* to institute the application.
10. Although admitting that the property was built as a shopping centre and admitting the address, the Respondents also raise an issue regarding the property description which, on the Windeed reports, are not the same as those referred to by the Applicant.
11. There is also an issue which relates to the actual floor space, but this is not relevant as the rental does not relate to the floor space, but

rather is a fixed monthly amount. Consequently, any dispute regarding floor space is, in my view, for the purposes of this application, irrelevant.

12. During the hearing of the application Mr Pye, on behalf of the Applicants, withdrew the previous action and application and I made the following order:

12.1. it is noted that the Applicants withdraw

12.1.1. the application instituted under case number 2013/46782, filed under notice of motion dated the 19th March 2014, issued on the 17th March 2014 and contained in bundles 4 and 5;

12.1.2. the action under case number 41945/2013 in this division, by summons dated the 6th November 2013.

12.2. The Applicants are to pay the First Respondent's costs on the scale as between attorney and client.

13. During the address on behalf of the Respondents, represented by Mr Cassim SC and Mr Riley, the Respondents abandoned the defences in respect of the lien and advised me that they were not proceeding with the rectification.

14. Mr Cassim then advised that the only opposition to the application

would be based on the fact that the Applicants have not made out a case for the relief which it seeks in the founding papers.

15. Consequently, there is no longer any dispute in regards to the lien, counterclaim or the rectification.

16. It is also common cause that the Respondents are in arrears with the rental payments.

17. Mr Cassim also accepted that the principle set out in Mignoele Properties (Pty) Ltd v Kneebone, 1989 (4) SA 1042 (A) was applicable, in terms of which *“If a lessee remains in occupation subsequent to the sale of the premises, the seller falls out of the picture and in his place the purchaser steps in as the lessor. It is not necessary for a formal cession to take place, but the substitution takes place as a matter of law where the purchaser is substituted as lessor and as “a natural and logical commitant of that position, the purchaser acquires all rights which the lessor enjoyed, qua lessor in terms of the lease. Those rights include the right to claim monies owing in terms of the lease from the lessee’s surety, in the event of the lessee failing to pay”.*

18. Firstly, with regard to the distinction between the First Applicant as a private or public company, I am of the view that there is no merit in the Respondents’ contention that the lessor and the First Applicant are not the same person. It is quite clear that they are, despite the fact that the word “(Pty)” does not appear in the lease. What does

appear on the lease is the registration number of the First Respondent. This is a clear indication of the identity of the legal persona involved. In any event, a tenant who holds a property as a consequence of a lease agreement with a lessor and who has had free and undisturbed possession of that property as a consequence of that lease agreement, is in my view not entitled to question the *locus standi* of the lessor when the lessor seeks to enforce the lease agreement and the provisions thereof. (Case Ref Blackmore v Moodies GM and Exploration Co., 1917 AD 402 at 403; Broompret Investments v Paardekraal Concession, 1990 (1) SA 347 (A) 351; Grimbeek v Leonard, 1932 CPD 62 at 63)

19. The only other issue which requires determination relates to the description of the property. The issue arises because in the lease agreement, at clause 1.5, the property is referred to as erf 605 to 612 and erf 544 to 522 Blairgowrie. The Respondents argue that in the notice of motion the Applicants refer to erf 605 to 612 and erf 522 to 544, but the properties in the Windeeds report are not the same, rather, the Fourth Respondent is recorded as owning erf 605 to 612 and erf 544 to erf 604 and consequently, the Respondents argue, that on the Applicants' version the Applicants are not the owners of erf 522 to 543.
20. However, I am satisfied that there is a clear error on the lease agreement as it ought to refer to erf 544 to 552 and not to 522, this is

in accordance with the Windeed extracts.

21. In any event, I am of the view that it is not necessary to go that far. It is quite clear that the parties are arguing about leased premises which are occupied by the Respondents and which property the Respondents occupy as a consequence of the lease agreement. It is also clear that the leased property is the Piazza Centre, situate at corner Republic and Jan Smuts Ave, Randburg consisting of 14185m² excluding the 2467m² occupied by the College on the second and third floors.
22. The issue regarding the erven is also resolved in the replying affidavit where it is clear that the error which I have referred to above is being corrected and the erven in question is 544 to 552 and 605 to 612.
23. The Respondents could have dealt with this aspect by filing a further affidavit as the reply is dated February 2014, a number of months before the matter was heard. In addition the Applicants provide a satellite map printed off Google Earth. There is no dispute in respect of either the address or the description, but only the erven numbers.
24. Consequently, I am satisfied that the Applicants are entitled to the relief which they seek and accordingly I grant the following order:
 - 24.1. the First Respondent is ordered to vacate the premises situate at Piazza Centre located at erven 544 to 552 and 604 to 612 Blairgowrie, situated at the corner of Republic

Road and Jan Smuts Avenue, Randburg, within 5 (FIVE) days from date hereof;

24.2. the Sheriff of the Court is authorised to do all things necessary to give effect to the aforesaid order;

24.3. the First and Second Respondents are ordered, jointly and severally, to make payment to the Fourth Applicant of the sum of R6 845 906.44 together with interest thereon at the rate of 2% per month from the 6th of January 2014 to date of final payment;

24.4. the First and Second Respondents are ordered to pay the Applicants' costs of this application, jointly and severally, the one paying the other to be absolved.

**P L CARSTENSEN
ACTING JUDGE OF THE
HIGH COURT**

HEARD: 13 OCTOBER 2014
DELIVERED: 5 DECEMBER 2014

COUNSEL FOR APPLICANTS:
INSTRUCTED BY:

ADV. W PYE
KYRIACOU INC.

COUNSEL FOR RESPONDENTS:
INSTRUCTED BY:

ADV. N CASSIM SC
ADV. RILEY
BORMAN & MOSTERT INC.

(jmt.27.11.14)