



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

REPUBLIC OF SOUTH AFRICA

CASE NO: 16137/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
(4)	DATE: 15 MAY 2023
(5)	SIGNATURE: <i>ML SENYATSE</i>

In the matter between:

SETHABA-THABA LAND INVESTMENT CC

Applicant

And

MNOMANE INVESTMENTS CC

First Respondent

BP SOUTHERN AFRICA (PTY) LTD

Second Respondent

CONTROLLER OF PETROLEUM PRODUCTS

Third Respondent

Neutral Citation: *Sethaba -Thaba Land Investment CC v Mnomane Investment CC & Others* (Case No: 16137/2021) [2023] ZAGPJHC 486 (15 May 2023)

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered.*

JUDGMENT

SENYATSI J:

A. INTRODUCTION

- [1] The dispute around commercial eviction is a common feature in the Judicial turf. This is so especially, in cases involved in the supply of petroleum and related products at a retail point. This is an opposed application to evict the first respondent from an immovable property that was used to sell petroleum and related products.

B. BACKGROUND

- [2] The applicant seeks the eviction of the first respondent from the immovable property with the description Erf 182 Devland Extension 1 Township, Registration Division I.Q, Transvaal and Erf 183 Devland Extension 1 Township, Registration Division I.Q, Transvaal and Erf 184 Devland Extension 1 Township, Registration Division I.Q. Transvaal ("the property").

- [3] The applicant concluded a lease agreement with BP Southern Africa (Pty) Limited, the second respondent in this matter during 1993, which was notarialy registered against the titles of the property by the Registrar of Deeds in favour of the second respondent. The lease was for the development of a filling station to sell petroleum and related products on the property. The second respondent in turn, concluded a sublease agreement in 2010 with the first respondent to sell those products from the property. The sublease was for a period of five years.
- [4] The first respondent opposes the eviction application. The second respondent has filed a notice to abide the decision of the court.
- [5] The first respondent has instituted a counter application. It seeks an interdict restraining the applicant and the second respondent from interfering with its business on the property pending the finalisation of a referral for arbitration in terms of section 12B of the Petroleum Products Act 170 of 1977. The counter application is opposed by the applicant and the second respondent but the latter has not filed any opposing affidavit to the counter application.
- [6] The sublease agreement concluded between the applicant and the first respondent terminated in 2015 and the second respondent continued to sub lease the property to the first respondent on a month-to-month basis thereafter. The second respondent concluded a further written lease with the first respondent in September 2018. The lease was for a period of seven years and would terminate in 2025. The sublease was dependent on the existence of the headlease concluded by the applicant and the second respondent.

- [7] As stated herein before, the headlease which was concluded in 1993 was for a period of 22 years and registered at the Deeds Office. This was to secure the interest of the second respondent who invested capital and installed the necessary equipment including tanks and pumps at the property. During the period of the long lease, the second respondent was able to conclude the sublease agreement with the retailers to sell its products from the property. This was permitted by the headlease concluded and the second respondent. For the duration of the long lease, the second respondent sold petrol and diesel to the sub tenant who in turn sold same to the public.
- [8] The sublease agreement was concluded by the second respondent with the first respondent from June 2010 for a period of five years and came to an end in 2015 and was subsequently replaced by a month-to-month lease.
- [9] Clause 44 of the head lease concluded between the applicant and the second respondent states as follows:
- "Insofar as the Lessor has tenure in respect of the property or the leased premises under the headlease and if such headlease is cancelled or terminated for any reason whatsoever, the lease *ipso facto* likewise terminate".
- [10] The headlease terminated by effluxion of time on 30th June 2015. It appears from the papers that the first and second respondents continued to act in terms thereof. During June 2020, the applicant advised the second respondent that it no longer wished to continue to lease the property. A formal termination notice was sent to the second respondent on the 15th of March 2021 by the applicant's attorney.

[11] The contents of the formal termination notice to the second respondent read as follows:

"3. Pursuant to the headlease which was concluded between our client and yourselves and which has now expired due to the efflux of time as well as the volume obligation in terms of sales, we do advise that our client hereby provides a formal notice of termination of the headlease.

4. In line with the discussions between our client and yourselves, we confirmed that there shall be no further renewal of the current month to month basis of the lease and determination is effective immediately.

5. We further confirm that BP has waived its rights in terms of the notice. For the termination in terms of the head lease, and search termination is again effective immediately".

[12] The applicant contends that as a result of the termination of the headlease, and in accordance with clause 44 thereof, the sublease and the subsequent month to month agreements automatically terminated. The applicant furthermore contends that it is not certain what transpired between the first and the second respondent but nevertheless the second respondent has accepted that determination of the headlease gave rise to the termination of the sublease between itself and the first respondent.

[13] The first respondent was advised by the second respondent of the termination of the sublease by way of a final notice which was sent to the first respondent on the 1st of December 2020. The second respondent in its letter to the first respondent stated that it acknowledged section 12B of the arbitration process

initiated by the first respondent with the Controller of Petroleum Products. The notice stated that the applicant was not a party to such proceedings in that it was entitled to have its property back as it gave adequate notice of termination which was filtered on time to the respondent.

- [14] The first respondent contends as the occupier of the property it was entitled not to be evicted because it concluded a sublease agreement with the second respondent that expires in 2025. It argues therefore that it is not in unlawful occupation of the property and that the applicant is not entitled to evict it. It also wants by way of a counter application for these proceedings on eviction to be stayed pending the determination of the section 12B arbitration process.

C. ISSUES FOR DETERMINATION

- [15] The issues for determination in this litigation can be summarised as follows:

- (a) Whether the applicant is entitled to evict the first respondent from its property following the termination of head lease agreement it concluded with the second respondent; and
- (b) Whether the first respondent is entitled to have the eviction proceedings stayed pending the determination of the section 12B arbitration process.

D. THE LEGAL PRINCIPLES AND REASONS FOR THE JUDGMENT

Owner's right in common law and the requirements to succeed in eviction.

[16] All evictions, other than in respect of commercial property, are regulated by either the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act¹ ("PIE Act") and the Extension of Security of Tenure Act² ("ESTA"). The two pieces of legislation do not apply where the eviction does not fall within the ambit of the two Acts. In such cases as in the instant case, the common law principles apply and more importantly the owner of the property receives his recourse through *rei vindicatio*.

[17] For the applicant as the owner to succeed in eviction, he must prove his ownership of the property and that the respondent is in possession thereof. When the owner acknowledges that the occupier of his property had a right of occupation that has terminated such through the lease, the owner must prove that the lease has come to an end.³ In explaining this approach, Jones JA⁴ stated the following:

"If he concedes in his particulars of claim that the defendant has an existing right to hold (e.g. by conceding a lease or hire-purchase agreement, without also alleging that it been terminated: Boshoff v Union Government, 1932 T.P.D. 345 at p 412) His statement of claim obviously discloses no cause of action. If he does not concede an existing right to hold, but, nevertheless, says that a right to hold now would have existed but for a termination which has taken place, then *ex facie* the statement of claim he must at least prove the termination, which might, in the case of a contract, also entail proof of the terms

¹ No: 19 of 1998.

² No: 62 of 1997.

³ See Chetty v Naidoo 1974 (3) SA 13

⁴ Chetty v Naidoo above at pg 20

of the contract. This is dealt with by Greenberg, J, in *Boshoff v Union Govern* 1932 T.P.D. 345 at p 412:

'I do not think that any court would be entitled to decree an order for ejectment, when a plaintiff comes to court and says: I am the owner of ground I let that ground to the defendant on a lease which covers the present period, without some allegation that the lease is no longer enforce or no longer gives the defendant the right of occupation. It may be that the cause of action in such a case, is the ownership of the ground, but where the plaintiff's own allegations it is declaration, or what is equivalent to his declaration, show that he is not entitled to ejectment, it does not appear to me that any Court would be entitled to decree ejectment in his favour. The code would require something to show that notwithstanding the right that he has given to the defendant, the defendant no longer has a right to remain in possession'."

[18] It is the principle of our law that provided that neither party is in default, performance of all obligations under leases which were entered into for a fixed period is complete when that period ends. The lease terminates automatically.⁵

[19] Periodical leases continue in being until terminated by notice. Under common law, the period of notice still quietly differs according to the nature of the lease, that is if the lease is weekly, monthly, yearly, et cetera.⁶

⁵ See Glover: *Kerr's Law of Sale and Lease* 4th Edition, pg 570, para 23.3.1.

⁶ See Glover, above at page 572 para 23.4.2.

The rights of the sub-tenant at common law under sub-lease agreement

- [20] A lease and a sublease are distinct contracts.⁷ The first one is a contract between the lessor and the lessee (head lease) whereas the second one is a contract between the lessee and the sublessee (sublease).
- [21] There is no contractual relationship between the lessor and the sublessee. The sublessee cannot acquire from the lessee greater rights than the lessee has in terms of the headlease because the sublessee's rights are subservient to the head lease. The lessee must discharge his full obligations under the head lease to the lessor. If the head lease is cancelled for any reason, then the sublessee's right to possession and occupation of the property and any other rights to use and enjoy the fruits of the property are extinguished.
- [22] In affirming the common law position, Malan J⁸ stated the following:
- "The second applicant (sublessee) stands in no contractual relationship to the first respondent (lessor). There is no privity of contract between a sublessee and the landlord and a subtenant has no legal interest in the contract of lease between the landlord and the tenant despite the subtenant's financial interest in it (*Wistyn Enterprises (Pty) Ltd v Levi Strauss & Co and Another*⁹). The second applicant occupies the premises with the consent of the first respondent by virtue of the franchise agreement between the two applicants. It follows that any breach of the obligation to give *commodus usus* can be vindicated only by the first applicant, who is entitled to the right flowing from the agreement of lease between it and the first respondent".

⁷ See *Floral Displays (Pty)Ltd v Bassa Land and Estate Co (Pty) Ltd* 1965(4) SA 99 (D) 100-1

⁸ *Sweets from Heaven (Pty) Ltd and Another v Ster Kinekor Films (Pty) Ltd and Another* 1999 (1) SA 796 (W) at page 800E-F

⁹ 1986(4) SA 796 (T) at 802B.

[23] In *Metcash Trading Africa Ltd v Clothing City Trading Plastics (Pty) Ltd t/a Crazy Plastics*¹⁰ the court also considered the interdependent nature of the headlease and the sublease and held as follows:

"The Commercial context in this matter is that the respondent, as stated previously, could and did only derive each title to occupy the premises from the applicant, as anchor tenant. This is so because the only contractual nexus which bound the respondent was that between it and the applicant its sub-landlord. Once the main lease between the owner of the building and the applicant came to an end, there would be no basis upon which the respondent's occupation of the sub-leased premises could continue, unless it concluded a fresh contract with a new anchor tenant or perhaps with the landlord. It is obviously for this reason, in my view, that there were so many references in the agreement of sublease to the main agreement of lease and its terms where specifically incorporated therein."

[24] The facts of the present case have a peculiar similarity to the authorities quoted above. In a nutshell, the first respondent does not deny title of the applicant as the owner of the property. He simply contends that the applicant and the second respondent have somewhat connived to interfere with its commercial operation out of the property. The purported sublease concluded between the first and the second respondent that was to terminate during 2025 is not supported by a conclusion of the new headlease between the applicant and the second respondent. It follows therefore, in my view, that the first respondent has failed to establish the right to occupy the property the result of which is that it is in an unlawful occupation thereof. Accordingly, I hold the view that the applicant is

¹⁰ [2014] JOL 31829(GSJ)

entitled to vindicate its right to the property and the order of eviction would under the circumstances be appropriate. There is no justification whatsoever, why the first respondent should continue to be in occupation of the property in the absence of a valid headlease between the applicant and the second respondent.

Counter application

- [25] I now deal with the counter application by the first respondent that relates to the relief in terms of which the current eviction application should be stayed pending the determination of the s52B of the Petroleum Products Act ("the Act").¹¹ It claims that the applicant colluded with the second respondent to terminate the sublease agreement relies on what it call "an understanding" between itself and the second respondent. I fail to understand how the absence of the existence of a new headlease in this argument can be sustained.
- [26] The first respondent claims that since there is a pending arbitration to determine the dispute between itself and the second respondent, this litigation should be stayed. It is important to consider what the purpose of the Act is so as to see if the counter application can be sustained.
- [27] The express purpose of the Act is:

"To provide for measures in the saving of petroleum products and an economy in the cost of distribution thereof, and for the maintenance and control of a price therefor, for the furnishing of certain information regarding petroleum products,

¹¹ No: 120 of 1977.

and for the rendering of services of a particular kind, or services of a particular standard, in connection with petroleum products; to provide for the licensing of persons involved in the manufacturing and sale of certain petroleum products; to promote the transformation of the South African petroleum and liquid fuels industry; to provide for the promulgation of regulations relating to such licences; and to provide for matters incidental thereto.”

[28] The Act provides for three distinct licencing regimes.¹² The term licence is defined in the Act to mean¹³ a manufacturing, wholesale, site or retail licence. A “site licence” is defined as a licence issued to a person who holds the land or has permission from the owner of the land to develop a site for the retailing of the petroleum products. A “retail licence” means “a licence to conduct the business of a retailer”. Once the retail licences issued, the holder thereof is permitted to sell the petroleum products to the end user for own consumption. In the instant case, the second respondent is the licenced wholesaler.

[29] To succeed with its counter application, the first respondent bears the *onus* to allege and prove that the applicant is a retailer or a wholesaler for the purposes s12B of the Act. S12B of the Act provides as follows:

“12B. Arbitration

(1) The Controller of Petroleum Products may on request by a licensed retailer alleging an unfair or unreasonable contractual practice by a licensed

¹² See s2B

¹³ See s1 Definitions

wholesaler, or vice versa, require, by notice in writing to the parties concerned, that the parties submit the matter to arbitration.

(2) An arbitration contemplated in subsection (1) shall be heard—

(a) by an arbitrator chosen by the parties concerned; and

(b) in accordance with the rules agreed between the parties.

(3) If the parties fail to reach an agreement regarding the arbitrator, or the applicable rules, within 14 days of receipt of the notice contemplated in subsection (1)—

(a) the Controller of Petroleum Products must upon notification of such failure, appoint a suitable person to act as arbitrator; and

(b) the arbitrator must determine the applicable rules.

(4) An arbitrator contemplated in subsection (2) or (3)—

(a) shall determine whether the alleged contractual practices concerned are unfair or unreasonable and, if so, shall make such award as he or she deems necessary to correct such practice; and

(b) shall determine whether the allegations giving rise to the arbitration were frivolous or capricious and, if so, shall make such award as he or she deems necessary to compensate any party affected by such allegations.

(5) Any award made by an arbitrator contemplated in this section shall be final and binding upon the parties concerned and may, at the arbitrator's discretion, include any order as to costs to be borne by one or more of the parties concerned."

[29] The provisions of section 12B are intended to regulate the dispute between the licensed wholesalers and the licenced retailers of the petroleum products. There is no evidence before me that the applicant in this litigation is either a wholesaler or a licenced retailer of the petroleum product. As I understand it, the applicant granted the permission to the second respondent in terms of the head lease to develop this site for the sale of petroleum products because of the significant investment the second respondent was expected to make on the site that did not belong to it, it required the registration of its long head lease between the applicant and itself to protect its tenancy.

[30] The first respondent also claims that the cancellation of the head lease is simulated, meaning that it is not real. The first respondent contends that the notice to terminate the head lease is a sham because the second respondent continues to occupy the property. It bases its arguments on the previous number of notices of termination of the sublease by the second respondent. It contends that all the previous notices of termination on the basis that the head

lease was terminated was false. The first respondent fails, however, to provide the evidence of the new headlease agreement between the applicant and the second respondent. It further claims that the second applicant enjoys an undisclosed influence over the applicant because of the deed of servitude that has been concluded between the applicant and the second respondent. I am not persuaded that the contentions by the first respondent takes the argument anywhere for the purpose of the s12B arbitration. The dispute the first respondent has with the second respondent should be ventilated in terms of the s12B arbitration process, but the owner of the property should, in my view, be allowed to vindicate its rights. It follows in that the first respondent has not persuaded me that it is entitled to the relief sought in the counter application. I say so because the third respondent, as a regulatory authority, cannot have its functions usurped by this court without justification.

- [31] Having considered the papers before me, I am of the view that the applicant is entitled to the eviction order and that the applicant has not succeed in staying the eviction application.

E. ORDER

- [32] As a result the following order is made:

(a) That the first respondent and all persons holding under it, be declared to be in unlawful occupation of Erf **182** Devland Extension 1 Township, Registration Division I.Q., Transvaal; Erf **183** Devland Extension 1 Township, Registration Division I.Q., Transvaal and Erf **184** Devland Extension 1 Township, Registration Division I.Q., Transvaal.

- (b) That the first respondent be directed to vacate the aforesaid property within 30 (Thirty) days from the Honourable Court granting an order in terms of this application, failing which, the Sheriff for the area within which the property is situated be authorised to evict the first respondent and all persons holding under it.
- (c) The first respondent is to pay the costs of the application on a scale as between attorney and client.
- (d) The first respondent's counter-claim is dismissed, with the first respondent to pay the costs on a scale as between attorney and client.

A handwritten signature in blue ink, appearing to be 'ML Senyatsi', written over a horizontal line.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE JUDGMENT RESERVED: 9 November 2022

DATE JUDGMENT DELIVERED: 15 May 2023

APPEARANCES

Counsel for the Applicant: Adv E Van As

Instructed by: Koor Attorneys

Counsel for the Respondent: Adv W Strobl

Instructed by: Metcalfe Attorneys