



**IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

Case No: 3823/09

In the matter between

11/8/2010

**THE DIRECTOR-GENERAL OF THE DEPARTMENT
OF PUBLIC WORKS**

Excipient

and

KOVAC INVESTMENTS 289 (PTY) LTD

Plaintiff

In re:

KOVAC INVESTMENTS 289 (PTY) LTD

Plaintiff

and

**THE DIRECTOR-GENERAL OF THE DEPARTMENT
OF PUBLIC WORKS**

Defendant

JUDGMENT

HASSIM AJ

[1] On 13 April 2006 the Director-General of Public Works¹ (or his delegate) entered into a written lease agreement with African Alliance (Pty) Ltd/Kovacs Investments 289 (Pty) Ltd. For sake of completeness I add that the plaintiff pleads that after the conclusion

¹ The parties are referred to as in the action.

of the written lease agreement the parties entered into a further lease. This lease was an oral lease. Nothing turns on this. Both these lease agreements are referred to collectively as “the lease” or “lease agreement”.

[2] The defendant took occupation of the leased premises on or about 26 September 2006. The plaintiff alleges that the defendant breached the lease agreement by failing to pay rental and other charges² for the period 1 October 2006 to 4 May 2007. The plaintiff claims payment of R1 112 173.46.

[3] The defendant raises two exceptions to the plaintiff’s claim. The first is that in the absence of the defendant having consented to the plaintiff instituting this action without notifying it in terms of section 3 (1) (a) of the Institution of Legal Proceedings Against Certain Organs of State Act, No 40 of 2002 (“the Act”) of its intention to do so, this court does not have jurisdiction over the claim. The second is exception is that the plaintiff does not have *locus standi* to institute this action. I deal with these exceptions in turn.

[4] Whether the plaintiff is obliged to notify the defendant of its intention to institute legal proceedings in satisfaction of a debt depends on whether the plaintiff’s claim constitutes a “debt” as defined in the Act.

[5] In his written submissions amplified by oral submissions at the hearing, Mr Mphahlele, who appeared for the defendant argued that the plaintiff’s claim constitutes a “debt” as

² Operating costs, parking rental, electricity, rates, refuse, sewerage and water charges.

defined in the Act. Relying on the decision in **Legal Aid Board and Others v Singh**³ he argued that a plaintiff's failure to notify an organ of state prior to the institution of proceedings of its intention to do renders the proceedings a nullity and therefore a court does not have jurisdiction over the claim.

[6] Mr Mphahlele's argument disregards section (b) of the definition of "debt" in the Act. "Debt" is defined in the Act as follows:

"debt" means any debt arising from any cause of action-

- (a) which arises from delictual, contractual or any other liability, including a cause of action which relates to or arises from any-**
 - (i) act performed under or in terms of any law; or**
 - (ii) omission to do anything which should have been done under or in terms of any law; and**
- (b) for which an organ of state is liable for the payment of damages".**
[emphasis added]

[7] The plaintiff's claim against the defendant for arrear rental, for damages for breach of contract or any other claim for damages would for purposes of the Prescription Act 68 of 1969 ("the Prescription Act") constitute a "debt". However for a "debt" to constitute a debt in terms of the Act there is a further requirement. That is the requirement set out in section (b) of the definition of "debt" in the Act. Sections (a) and (b) of the definition of "debt" cannot be read independently of each other. In fact reading

³ 2009(1) SA 184 (N)

them disjunctively is misleading. All that section (a) establishes is that all contractual and delictual claims give rise to a debt. The fact that the claim may be characterized as a claim for specific performance makes no difference to this. In the context of the Prescription Act a claim for specific performance constitutes a debt.⁴

[8] The enquiry does not stop at section (a) of the definition of “debt” in the Act. Section (b) of the definition lists in addition to the features mentioned in section (a) another feature that the contractual, delictual or other claim must possess; it must be a claim for which an organ of state is liable for the payment of damages. There are therefore two legs to the enquiry whether a claim is a debt in terms of the Act. First it must arise from a contract, a delict “or any other liability”. Second it must render the organ of state liable for damages.

[9] For purposes of the second leg of the enquiry the claim needs to be characterized. If the claim is for specific performance, then the claim while it would amount to a debt in the context of the Prescription Act, it does not qualify as a debt for purposes of the Act.

[10] Mr Mphalele argued that the plaintiff’s claim is one for contractual damages. Mr Wesley argued that the claim is for specific performance. I cannot agree with Mr Mphalele. The plaintiff seeks an order that the defendant pays to it money in pursuance of a contractual obligation. Such a claim would be a claim for specific performance.⁵ In terms of the lease agreement the defendant was obliged to pay to the plaintiff rent and

⁴ Cf Desai NO v Desai and Others 1996(1) SA 141 (A) at 146G-147A

⁵ Cf RH Christie -The Law of Contract (5ed) p 522

other charges for its right to occupy. It occupied the leased premises in pursuance of that right and became obliged to pay money in terms of the contract. The fact that the plaintiff pleads that the defendant breached the lease agreement by not paying the rent and other charges due does not result in the claim for payment becoming a claim for damages arising out of the breach.

[11] The plaintiff seeks an order that the defendant pay to it that which it undertook to pay in terms of the contract. The plaintiff's claim is therefore a claim for specific performance and not for damages.

[12] Having found that the plaintiff's claim against the defendant is not for damages, I find that the plaintiff's claim is not a "debt" as defined in the Act and therefore the provisions of section 3 of the Act do not apply to the plaintiff's claim. I therefore find that the exception based on the absence of jurisdiction must fail with costs.

[13] I now turn to consider whether the plaintiff has *locus standi* to institute an action based on the lease agreement. The defendant labels the exception as absence of *locus standi*.⁶ I raised with Mr Mphahlele whether the appropriate label for the exception was an objection of non-joinder. He readily conceded, correctly so,⁷ that this was so. Nothing turns on the label that is attached to the exception.

⁶ Had the exception been formulated on the basis that that the plaintiff had no right to sue for rent then an exception on the ground of absence of *locus standi* would have been properly taken. This in any event only if the contract provided that it was not competent for the joint lessors to independently sue for rent. Cf *Glen v Bickel supra* at p.192

⁷ *Glen v Bickel* 1928 TPD 186 at p 192

[14] The written lease agreement identifies the lessor as “African Alliance (Pty) Ltd / Kovacs Investments 289 (Pty) Ltd”. The plaintiff in the action is Kovacs Investments 289 (Pty) Ltd. Not only is African Alliance (Pty) Ltd not cited as a party, there no mention of African Alliance (Pty) Ltd in the particulars of claim. The defendant objects to the particulars of claim on the basis African Alliance (Pty) Ltd ought to have been a party to the action and therefore plaintiff lacks *locus standi* to institute the action. The exception is formulated as follows:

“THE PLAINTIFF LACKS THE LOCUS STANDI

The Plaintiff's claim is based on the written lease concluded on the 13th April 2006 between the Plaintiff's [sic] and a joint venture consisting of the Defendant and AFRICAN ALLIANCE (PTY) LTD.

- 2.1 *The joint venture of the Defendant⁸ and AFRICAN ALLIANCE (PTY) LTD was duly represented by Mr Wayne Arendse during the negotiation and conclusion of the written lease agreement.*
- 2.2 *The plaintiff can only institute an action against the Defendant jointly with the [sic] AFRICAN ALLIANCE (Pty) Ltd*
- 2.3 *The action by the Plaintiff has been instituted by the plaintiff only without the AFRICAN ALLIANCE (PTY) LTD.*
- 2.4 *There are allegations by the Plaintiff that it is also acting for or on behalf of AFRICAN ALLIANCE (PTY) LTD.*

⁸ It seems that this was an inadvertent reference to the defendant and ought to have been a reference to the plaintiff. The difference is irrelevant.

2.5 *The Plaintiff, therefore, lacks the necessary locus standi to institute this action. As a result, the Plaintiff's claim lacks the averments necessary to sustain a cause of action and is accordingly bad in law."*

[15] Before I deal with substance of the exception a few preliminary remarks are called for. The defendant refers to a joint venture between the plaintiff and African Alliance (Pty) Ltd. This is not apparent from the plaintiff's particulars of claim. I assume in favour of the defendant that the reference to the lessor in the written lease agreement as "African Alliance (Pty) Ltd / Kovacs Investments 289 (Pty) Ltd" leads it to conclusion that the plaintiff and "African Alliance (Pty) Ltd / Kovacs Investments 289 (Pty) Ltd" were parties in a joint venture. I have already remarked that the plaintiff's particulars make no reference to "African Alliance (Pty) Ltd / Kovacs Investments 289 (Pty) Ltd" at all. It therefore follows that the allegation paragraph 2.4 of the exception is not correct.

[16] Turning now to the merits of the exception. The lessor of the premises appears to be two persons. The plaintiff and African Alliance (Pty) Ltd are therefore joint lessors⁹

[17] The answer to whether African Alliance (Pty) Ltd ought to be a party to the action is found in the legal principles dealing with indivisible causes of action and the rights and

⁹ It matters not whether the lessor is described as a partnership or a joint venture. If the defendant pays the plaintiff the full rental due by its, African Alliance will have no claim against the defendant. African Alliance will have the right to claim its pro rata share of the rental from the plaintiff.

obligations of joint creditors and joint lessors. The question received the attention of *Voet*¹⁰ as well as *Pothier*¹¹.

(a) *Voet* states that:

“If two or more persons have let, each has a *actio locatio* for his share against the hirer.”

(b) In similar terms *Pothier* in the context of general principles of contract states:

“regularly, when a person contracts the obligation of one and the same thing in favour of several others, each of them is only a creditor for his own share.”

[18] Greenberg J (as he then was) considered a similar question in *Glen v Bickel* 1928 TPD 186 and there gave attention to the texts of *Voet* and *Pothier* quoted above. He held as follows:

“... It seems to me therefore that the answer to the question under consideration depends on whether the contract set out in the particulars creates one indivisible cause of action in favour of respondent and Van Niekerk jointly or whether each of them can sue for his *pro rata* share. [The court proceeds to quote the passage from *Voet* quoted above]. This passage is quoted with approval by DE VILLIERS C.J., in *de Pas v Colonial Government and Others* (4 S.C. 383, at p. 391) and *Colonial Government v Wasserman* (5 S.C. 187). Professor Wille in his book on *Landlord and Tenant* (at p. 321) suggests that it is only the right to claim the rent which can be

¹⁰ 19.2.21

¹¹ *Obligations*, Vol. I, s. 258

separated into proportionate shares. In *Jacobson v Norton* (2 M. 218, at p.223) the Court held that if a promise is made to two persons jointly, each of them is entitled without the concurrence of the other to sue in his own name for the share of the debt due to him. In the latter case, the court was referred in argument to *Pothier*, who says that “regularly, when a person contracts the obligation of one and the same thing in favour of several others, each of them is only a creditor for his own share.” (*Obligations*, Vol I, s.258). (See also vol II, appendix No.11, s 1.) These authorities therefore support the view that, in the absence of anything to the contrary in the contract between appellant and respondent and van Niekerk, the two last-mentioned would each have a right of action independently of the other, for his *pro rata* share of the monies payable under the contract. Paragraph 5 of the particulars suggests that it was only by virtue of the dissolution that respondent and van Niekerk acquired the right each to claim his half share, but there is nothing in the terms of the contract as set out to take it out of the general rule laid down by *Voet* and *Pothier*,...”

[19] It is therefore clear that in the absence of contractual provisions to the contrary, a joint lessor has a claim against the lessee for his *pro rata* share of the rent received (or due).

[20] I can state it no better than Greenberg J, that there is nothing in the lease agreement in this case to take it out of the general rule laid down by *Voet* and *Pothier*.

[21] Accordingly the plaintiff is not precluded from claiming from the defendant rent due by it in terms of the lease (albeit that the claim is limited to its *pro rata* share).

[22] I therefore find the plaintiff is not obliged to join African Alliance (Pty) Ltd as a party to this action.

[23] This exception suffers the same fate as the first.

[24] Mr Wesley attempted to persuade me that if I were minded to dismiss the exceptions I should order the defendant to pay attorney-client costs. I find no reason for mulcting the defendant with punitive costs.

[25] I therefore make the following order:

1. Both exceptions raised by the defendant are dismissed.
2. The defendant is to pay the costs of the exception.



S K HASSIM
ACTING-JUDGE:
NORTH GAUTENG HIGH COURT, PRETORIA
10 August 2010

Date heard:	16 March 2010
Counsel for Excipient:	Adv M S Mphahlele
Counsel for Respondent:	Adv C P Wesley