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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 000183/2024

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: **30/01/2024**

SIGNATURE

In the matter between:

RIGHTPLAY BUSINESS REHABILITATION (PTY) LTD Applicant

and

TRANSNET SOC LTD Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 25 January 2024.

JUDGMENT

PHOOKO AJ

INTRODUCTION

[1] This case concerns the right of a landlord to exercise lien. The matter came before me sitting in an urgent court on 17 January 2024 wherein the Applicant sought relief to the effect that the Respondent is prevented from exercising lien over the goods of the third parties.

[2] After considering the written and oral submissions of the parties, I dismissed the application on 25 January 2023. These are the reasons for my order.

THE PARTIES

[3] The Applicant is Rightplay Business Rehabilitation (Pty) LTD, a private company that is registered and duly incorporated in terms of the company laws of the Republic of South Africa, with registration number 2015/276406/07 business address business is at 3[...] W[...] W[...], Silverwoods Country Estate, Silver Lakes Drive, Silver Lakes, Pretoria.

[4] The Respondent is Transnet SOC LTD, a State-owned company as contemplated in the Companies Act 71 of 2008 whose business address is on 5th Floor, Carlton Office Tower, 1[...] C[...] Street, Johannesburg.

BACKGROUND AND FACTS

[5] On or about October/November 2017 the Applicant and the Respondent entered into a lease agreement ("the agreement").

[6] In terms of the agreement, the Respondent leased the rooftop of the Carlton Centre to the Applicant. Further implied and/or tacit terms of the agreement included that:

(a) The lease would operate for a period of approximately 10 years;

(b) The applicant would be entitled to access the leased premises whenever it wished to do so;

(c) Whenever the Applicant needed to remove equipment (such as antennae, etc) from the rooftop, the respondent would provide the necessary confirmation in the form of an undersigned 'perm-mission slip)...

(d) The rooftop was leased by the applicant for the purposes of the applicant-sub-leasing portions thereof to third parties for the installation of radio and/or other antennae and equipment.

[7] According to the Applicant, the Respondent breached the agreement by not affording the Applicant proper access to the rooftop because of a non-functional lift to the rooftop. Consequently, the Applicant terminated the agreement with effect from 31 January 2024.

[8] The Respondent alleged that the Applicant owed certain arrear rental payments. This rental payment is disputed by the Applicant. An attempt by the parties to reach a solution has been unsuccessful.

[9] As a result, the Respondent withholds access by the Applicant to the rooftop to remove the signal batteries and demands that the Applicant make arrangements to pay arrear rentals. According to the Respondent, the right to take possession of the signal batteries accrues to them by virtue of the common law position of a lien that "Transnet has over goods of the lessee who has fallen behind on rental that is due and payable".

[10] Unsatisfied by the Respondent's exercise of the alleged lien, the Applicant instituted these proceedings on the ground that the Respondent is *mala fide* and that its conduct amounts to spoliation.

THE ISSUES

[11] The preliminary issues to be determined are whether the Applicant has *locus standi* to bring the current application and/or whether they can rely on *spoliation* to recover the goods of the third parties from the Respondent.

APPLICABLE LAW

Urgency

[12] Rule 6(12) of the Uniform Rules deals with urgent applications wherein a case for urgency has been made out, a court may condone non-compliance regarding the forms and service and hear the matter without delay if the applicant would not be afforded substantial redress at a later hearing. Rule 6(12) also confers a general judicial discretion on a court to hear a matter urgently.¹

[13] In *Luna Meubelvervaardigers (Edms) Bpk v Makin & Another t/a Makin Furniture Manufacturers*², it was held that:

‘The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6 (12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down.’

[14] The test for urgency was formulated in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*³ where Notshe AJ (as he was then) held that:

‘The import thereof is that the procedure set out in Rule 6(12) is not there for the taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course’.

¹ *Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo and others* (2014) JOL 32103 (GP) at para 63.

² 1977 (4) SA 135 (W) at 137E-F.

³ [2011] ZAGPJHC 196 at paras 6 and 7.

[15] Considering the above legal framework, I proceed to consider the Applicant's submissions to ascertain whether this matter ought to be heard on an urgent basis and whether the Applicant would not be afforded substantial redress if the matter were to be enrolled in the normal court roll.

Non-Joinder

[16] A party who has a direct and substantial interest in the subject matter must be joined in the proceedings to safeguard their interests.⁴ The test for non-joinder is "whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined".⁵

[17] Therefore, non-joinder is non-excusable where a party who has a direct and substantial interest has not been cited in the proceedings.

Lien

[18] A lien is a right of retention of property or a "*weapon of defence against an owner's rei vindication*."⁶ The law allows a creditor to retain a debtor's property until his/her debt has been paid.⁷ The person relying on the *lien* must be a creditor of the owner and he/she must be in control of the owner's thing. The lien holder is entitled to his or her payment as per the concluded contract.⁸

POINT IN LIMINE

[19] At the commencement of the oral hearing, the Respondent raised various points in *limine* ranging from the alleged Applicant's lack of *locus standi* and that the *spoliation* relief sought by the Applicant was not competent. I deal with the submissions of the parties below.

⁴ [2015] ZASCA 97 at para 12.

⁵ *Absa Bank Ltd v Naude NO* [2015] ZASCA 97 at para 12.

⁶ 2547.

⁷ *Ibid*.

⁸ *Standard Bank of South Africa Ltd v Mohlabafase Panelbeating & Spraying Painting CC and Another* [2023] ZALMPPHC 17 at para 18.

RESPONDENT'S SUBMISSIONS

[20] The Respondent's main contention was that the Applicant had become aware of the breach of the lease approximately 3 years ago when 50% of the alleged breach of the agreement through a dysfunctional lift occurred. Consequently, the Respondent argued that this matter was not urgent.

[21] The Respondent contended that the Applicant lacks legal standing to act on behalf of third parties because the Applicant has stated that the goods belong to its sub-tenants and not the Applicant. Consequently, the Respondent avers that the Applicant lacks standing because it *"has not been in possession, use and enjoyment of the goods but its subtenants have"*.

[22] To bolster its case, the Respondent submitted that the Applicant's sub-tenants have opted to directly embark on negotiations with the Respondent with a view of concluding new lease agreements.

[23] Relying on *Nino Bonino v De Lange*⁹, counsel contended that:

'Mandament van spolie is a remedy aimed at ensuring the restoration of possession in instances of unlawful possession, and that its requirements must be peaceful and undisturbed possession of the thing and unlawful dispossession or spoliation'.

[24] Based on the above, the Respondent averred that the Applicant has not met the second requirement in respect of unlawful possession because it stopped paying arrear rentals after it breached the agreement.

[25] In addition, counsel submitted that the Applicants have failed *"to plead that they themselves were in possession, use and enjoyment of the"* goods.

⁹ 1906 TS 120.

[26] Furthermore, and through reliance on various cases such as *Eskom Holdings SOC Limited v Masinda*, the Respondent submitted that the Supreme Court of Appeal has held that:

‘...her right to receive what she had bought flowed not from the possession of her property, but was a personal right flowing from the sale. Similar to the case in *Xsinet*, her claim was essentially no more than one for specific performance (and to the limited extent of a supply worth no more than the unused credit still due after her last purchase). This personal, purely contractual right, cannot be construed as an incident of possession of the property. As the mandament does not protect such a contractual right, for this reason too the claim ought to have been dismissed’.¹⁰

[27] The Respondent’s case is that the Applicant “*relied on an incorrect remedy in law*”.

[28] Ultimately, the Respondent contended that the non-joinder of the owner of batteries was fatal to the Applicant’s case as the Applicant had sought to remove the property for “*purposes of ensuring it is not sued by Liquid and other clients*”.

APPLICANT’S SUBMISSIONS

[29] The Applicant contended that the Respondent misunderstood its case because it stems from nothing else but “*the respondent’s unilateral re-vocation of the applicant’s right to remove goods as at 29 December 2023*”. According to the Applicant, the Respondent spoliated the right of the applicant to access to the rooftop.

[30] The Applicant further argued that it is them (the Applicant) who has been spoliated and not its tenants. Consequently, the right to remove goods has “*at all times fallen to the applicant*”.

¹⁰ 2019 (5) SA 386 (SCA) at para 25.

[31] The Applicant further contented that the property on the rooftop belongs to the third parties and that the Respondent has always been aware of this set-up.

[32] Relying on *Phoko and Others v Ekurhuleni Metropolitan Municipality*¹¹, the Applicant submitted that:

‘The test for joinder requires that a litigant has a direct and substantial interest in the subject matter of the litigation, that is, a legal interest in the subject matter of the litigation which may be affected by the decision of the Court. This view of what constitutes a direct and substantial interest has been explained and endorsed in a number of decisions by our courts’ (footnotes omitted).

[33] In light of the above, the Applicant contended *that “the interest at hand belongs to the applicant, and not to its tenants”*.

EVALUATION OF EVIDENCE AND SUBMISSIONS

[34] Regarding urgency, I am satisfied that the Applicant has made out a case for urgency. In my view, there can be no doubt that any matter that is related to income or business operations especially in these trying economic times deserves attention and speedy resolution so that business operations may continue uninterrupted.

[35] Concerning the late filing of the Applicant’s replying affidavit and the Respondent’s late filing of their answering affidavit, I am of the view that it is in the interest of justice in the context of this case to grant condonation given the fact that urgent applications are generally instituted within strict time frames that parties have to follow.¹² Furthermore, none of the parties will suffer prejudice if condonation is granted.

[36] Concerning *locus standi*, I find the proposition by the Applicant to the effect that the third parties have no direct and substantial interest in the subject matter

¹¹ 2015 (6) BCLR 711 at para 56.

¹² *Abrahams v EOH Mthombo (Pty) Ltd* [2021] ZALCJHB 313 at para 36. See also *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (C) at para 23.

difficult to comprehend. The Applicant in its papers unequivocally states that the property in possession of the Respondent belongs to the third parties. Notwithstanding this, the Applicant is inviting this Court to decide about a property belonging to third parties without them being joined in the proceedings. It cannot be said that third parties do not have a direct and substantial interest in the subject matter as the order sought could in one way or the other affect them.¹³

[37] To the contrary, the evidence before this Court reveals that the third parties are now in contact with the Respondent to try and find an amicable solution. This is a clear case of direct and substantial interest in the subject matter. Consequently, their non-joinder severely weakens the Applicant's case.

[38] Regarding the spoliation remedy, I need not say more save to refer to clause 14 of the lease agreement which inter alia provides that "*the lessee ... and may not sub-let the leased premises or any part thereof without the prior consent of the Lessor...*". In addition, Mr Vusi Magwentshu who is one of the Applicant's representatives when communicating with the Respondent about the release of property, never stated that the said property belongs to third parties. I am thus persuaded by the Respondent's submission in that they only became aware of the fact that the property belongs to third parties during the current proceedings.

[39] The provisions of the lease agreement, particularly clause 14 contradicts the Applicant's suggestion to the effect that "the rooftop was leased by the applicant for the purposes of the applicant-sub-leasing portions thereof to third parties for the installation of radio and/or other antennae and equipment". Accordingly, it has no merit.

[40] For these reasons, it is evident that the Applicants are purporting to act on behalf of the third parties without their consent in these proceedings. It has also become evident that the property under question was never in *the possession, use and enjoyment* by the Applicants but by third parties. Consequently, I agree with the Respondent's in that the Applicant "*relied on an incorrect remedy in law*". This is the

¹³ *Lebea v Menye and Another* 2023 (3) BCLR 257 (CC) at para 30.

end of their case. I do not need to venture into the aspects of a lien and/or the merits of the case.

COSTS

[41] The costs should follow the results on a party and party scale.¹⁴

ORDER

[42] I, therefore, make the following order:

- (a) The provisions of the Uniform Rules of Court relating to time and service are dispensed with and the matter is disposed of as one of urgency in accordance with the provisions of Uniform Rule 6(12).
- (b) The late filing of the Applicant's replying affidavit is condoned.
- (c) The late filing of the Respondent's answering affidavit is condoned.
- (d) The points *in limine* are upheld.
- (e) The application is dismissed with costs.

M R PHOOKO
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

APPEARANCES:

Counsel for the Applicant: Adv M Coetse

Instructed by: Elliott Attorneys

Counsel for the Respondent: Adv W Maodi

¹⁴ *Neuhoff v York Timbers Ltd* 1981 (1) SA 666 (T).

Instructed by: Majang Attorneys Inc

Date of Hearing: 17 January 2024

Date of Judgment: 30 January 2024