

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: **AR 306/2022**

In the matter between:

NATALIE TANIA CAMPBELL

APPELLANT

and

RUBEN VENTER

FIRST RESPONDENT

KAREN ELS

SECOND RESPONDENT

SCOTT CAMPBELL

THIRD RESPONDENT

Coram: Mossop J, Hlatshwayo AJ

Heard: 4 August 2023

Delivered: 18 August 2023

ORDER

On appeal from: Pinetown Magistrates' Court (sitting as the court of first instance):

1. Save to the extent set out in paragraph 2 below, the appeal is dismissed with costs.
2. The order of the court a quo:
 - (a) That the application is dismissed, is corrected to read that the action is dismissed; and
 - (b) Awarding costs to the first and second respondents on the scale as between attorney and client, is set aside and replaced with an order that costs shall be on the party and party scale.

JUDGMENT

Mossop J (Hlatshwayo AJ concurring):

[1] ‘*Communio est mater rixarum.*’ This maxim, namely that co-ownership is the mother of disputes, appears to apply to the facts of this case although why there is such a dispute is not entirely clear.

[2] The appellant and the third respondent are married to each other out of community of property but are in the process of divorcing. They jointly own an immovable property situated at 5[...] C[...] Avenue, Westville (the property). The first and second respondents currently occupy the property by virtue of a lease agreement (the disputed agreement) concluded with the third respondent. The appellant contends that she did not agree to the conclusion of the disputed agreement or its terms and launched action proceedings in the Pinetown Magistrates’ Court seeking an order that it be declared void. Additional relief aimed at evicting the first and second respondents from the property was also sought by the appellant in the action but in terms of the prayer to the particulars of claim, this relief was to be adjourned sine die by virtue of the applicability of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. The appellant was unsuccessful in the court a quo and appeals to this court.

[3] On appeal, the appellant was represented by Ms Beket and the first and second respondents were represented by Mr Grunder. The third respondent did not participate in the action in the court a quo as no relief was sought against him, he was joined merely as an interested party, and, logically, he has also played no part in this appeal. Both Ms Beket and Mr Grunder are thanked for their excellent heads of argument and for their assistance to the court.

[4] The appellant pleaded in her particulars of claim in the court a quo that by virtue of her lack of consent to the conclusion of the disputed agreement, it was void ab initio. To this, the first and second respondents pleaded that the appellant gave the third respondent express written authority to conclude the agreement. They

pleaded further that the third respondent acted upon that authority and created the impression in the eyes of the first and second respondents that he had the necessary authority. The first and second respondents acted upon such impression to their detriment and therefore pleaded that the appellant was estopped from alleging that the third respondent lacked authority.

[5] The parties decided, for reasons best known to them, to place an agreed set of facts before the presiding magistrate (the statement of agreed facts) in terms of the provisions of rule 29(5) of the Magistrates' Court rules. That rule reads as follows:

'If the question in dispute is a question of law and the parties are agreed upon the facts, the facts may be admitted in court, either *viva voce* or by written statement, by the parties and recorded by the court and judgment may be given thereon without further evidence.'

[6] Rule 29(5), which is similar to rule 33 of the Uniform rules, is intended to assist in shortening legal proceedings where the facts are not in dispute and the only dispute is the legal consequences that flow from those admitted facts. In dealing with such a matter, the court is required to accept the facts disclosed in the written statement as being the true facts and may not take cognisance of any other facts beyond the admitted facts.¹ The court and the parties may refer to the entire contents of the statement of agreed facts and any documents appended thereto and 'the court may draw any inference of fact or of law from the facts and documents as if they were proved at a trial'.² Tacit provisions that flow from the agreed facts may be read into the stated case.³

[7] The facts agreed upon by the parties were the following:

- '1. Plaintiff is married to Third Defendant.
2. Plaintiff and Third Defendant are in process of divorce.
3. On 26 March 2022 the Defendants purportedly entered into an Agreement of Lease for 5[...] C[...] Avenue, Westville.

¹ It is equally true that an appeal court will not consider anything not contained in the statement of agreed facts: *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and another* [2015] ZACC 34; 2016 (1) SA 621 (CC) para 63.

² A C Cilliers *et al* *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009) at ch42-p1414. See also *Plit v Imperial Bank Ltd* [2006] ZASCA 161; 2007 (1) SA 315 (SCA) at 318-319.

³ *Naboomspruit Munisipaliteit v Malati Park (Edms) Bpk* 1982 (2) SA 127 (T) at 131D.

4. A copy of the Lease Agreement is attached, marked "A1 – A9".
5. Plaintiff realised that the First Defendant was moving in on 31 March 2021.
6. Plaintiff caused a letter to be served on the First Defendant on 31 March 2021 to advise that she did not consent to such occupation.
7. A copy of the Sheriff's Return of Service and a copy of the letter are attached marked "B" and "C" respectively.
8. First Defendant contacted Plaintiff's Attorney to advise that he and his wife were taking occupation in terms of an Agreement of Lease.
9. Plaintiff (sic) Attorney took instructions and wrote to First Defendant on 1 April 2021 per email. A copy of the proof of transmission is attached marked "D1" and a copy of the email is attached marked "D2".
10. First Defendant proposed that he and the Second Defendant pay half of the rent to Plaintiff. A copy of the email confirmation is attached marked "E".
11. Plaintiff (sic) attorney wrote to First Defendant as appears from the letter sent per email on 1 April 2021. A copy of the proof of transmission is attached marked "F1". A copy of the email is attached marked "F2".
12. On 1 April 2021 the First Defendant forwarded to Plaintiff (sic) Attorney an email from the Third Defendant. A copy of the email is attached marked "G".
13. Plaintiff (sic) Attorney responded. A copy of the proof of transmission is attached marked "H1".
14. A copy of the email is attached marked "H2".
15. Third Defendant previously concluded an Agreement of Lease with Des and Taryn Hughes on 1 August 2015. A copy of the Agreement is attached marked "I1 – 19".
16. The Third Defendant concluded an Agreement of Lease with S Allen and E Barocsi on 1 September 2016. A copy is attached marked "J1 - J9".
17. Third Defendant concluded an Agreement of Lease with M Sibeko on 1 October 2017. A copy of the Agreement is attached marked "K1 - K18".
18. Plaintiff wrote to Third Defendant per email on 4 February 2021. A copy of the email is attached marked "L1 - L2".
19. The Third Defendant wrote to the Plaintiff per email on 13 February 2021. Plaintiff replied to the Third Defendant on 16 February 2021. A copy of these emails are attached marked as "M1 - M3".

[8] After considering those facts, the pleadings and argument from the respective legal representatives, the presiding magistrate delivered a written judgment, dated 1 July 2022. The order reads as follows:

- '1. The application is dismissed;

2. Costs of suit on the attorney and client scale, to be taxed.'

[9] There was, in truth, no application for the magistrate to determine. The magistrate was required to determine the action, based upon the admitted facts, and the order ought therefore to have referenced the dismissal of the action and not an application.

[10] The magistrate found that the appellant and the third respondent owned the property in a relationship of free co-ownership. It was found that the exercise of a co-owner's use rights of the commonly owned property was governed by the principle of reasonableness. In arriving at his decision, the magistrate relied heavily on *Pretorius v Nefdt and Glas*⁴ and concluded that all the requirements of a valid lease agreement were met and therefore the disputed agreement was not void *ab initio*.

[11] Before us, Mr Grunder properly made several concessions. He conceded that the magistrate's finding regarding reasonableness was not supportable. He also conceded that the respondents could not rely on estoppel as the appellant had not herself made any representation to the first and second respondents. He conceded that the magistrate ought not to have relied upon *Pretorius v Nefdt and Glas*. Finally, Mr Grunder also properly conceded that the issue of the co-owner's rights was wrongly decided in the court a quo and that the commonly owned property could not be leased to a third party without the unanimous consent of all the co-owners.⁵

[12] The only issue thus remaining was whether consent had been given by the appellant to the third respondent to enter into the agreement. The appeal turns on this issue.

[13] Mr Grunder argued that consent had, in fact, been given. That consent, according to the particulars of claim, was express written consent and it was to be found in an email sent by the appellant to the third respondent. This is a document

⁴ *Pretorius v Nefdt and Glas* 1908 TS 854.

⁵ *Pretorius v Botha* 1961 (4) SA 722 (T).

referred to in the statement of agreed facts and is appended thereto.⁶ The email is dated 16 February 2021 and is the appellant's response to an earlier email sent to her by the third respondent on 13 February 2021. The third respondent's email is also attached to the statement of agreed facts.⁷ In the third respondent's email of 13 February 2021, he had made certain proposals as to what he believed should occur with the property. In her response, the appellant copied and pasted the third respondent's proposals into her email and responded by typing her comments on each proposal below the pasted proposal. In the extract below, the appellant's comments are in italics to distinguish them from the proposals. The three most important proposals upon which she commented were the following:

'A new tenant should be found asap to avoid costs associated with the house being vacant

- *I agree we need to get a tenant for at least 6 months to rent the main house.*

We suggested a 6-month lease with a month-to-month after that

- *Yes, I agree with this. But a new lease needs to be signed and I feel that the money should be paid into another bank account, we can then pay your dad his share and the balance will remain in the account to pay any other maintenance extra*

To continue to market the house for sale (agents to be agreed). We both agreed that it is a burden for all parties

- *Yes, as long as we get the price we think the house is worth.'*

[14] Just over a month later, on 26 March 2021, the disputed agreement was concluded between the third respondent and the first and second respondents. The third respondent identified himself as being the lessor in that document. The disputed agreement provided, inter alia, that it would comprise of an initial period of 12 months with a right of renewal. The total cost to the tenant would be the amount of R12 850 per month, of which R12 000 was to be paid in respect of rent and the balance would be paid, on behalf of the third respondent, to third parties who rendered services at the property.

[15] It is difficult to understand what the appellant objects to in this arrangement. She stated in her email of 16 February 2021 to the third respondent that the contemplated lease should be for 'at least 6 months'. 'At least' in its ordinary

⁶ It is annexure 'M1' to the statement of agreed facts.

⁷ It is annexure 'M2' to the statement of agreed facts.

meaning means 'not less than' or 'at the minimum'.⁸ A lease with an initial rental period of 12 months meets that requirement in that it is in place for at least 6 months. She also required that a new lease agreement be signed. It was.

[16] We inquired of Ms Beket whether the appellant was dissatisfied with the amount of the monthly rental agreed to by the third respondent. After taking instructions, the answer received was that there was no such dissatisfaction. What the basis of the objection to the disputed agreement by the appellant is, is therefore not clear.

[17] Ms Beket submitted that the appellant had regarded her email correspondence with the third respondent as being the opening discussions on an eventual journey to consensus over how the property was to be dealt with and that the appellant only wanted the rental period to be for a maximum period of 6 months because of her marital difficulties with the third respondent. This submission would ordinarily have been made based upon the oral evidence of a witness or witnesses. There was no such oral evidence called because of the statement of agreed facts. Whether the appellant held that view and whether she really favoured a shorter lease, despite the wording in her email of 16 February 2021, are not questions of law but are questions of fact. They are, however, not facts agreed to and are not included in the statement of agreed facts. They must therefore be disregarded.

[18] Attached to the statement of agreed facts were three lease agreements that preceded the disputed agreement.⁹ All three lease agreements pertained to the property and bear only the name of the third respondent as the lessor. The first lease agreement covered a period of 36 months with a commencement rental fixed at R11 500 per month; the second lease agreement covered a period of 12 months with a monthly rental fixed at R13 200; and the third lease agreement covered a period of 12 months at a monthly rental amount of R16 275 (the third lease agreement). The disputed agreement largely conforms with the terms of these prior lease agreements. The rental amount due in respect of the disputed agreement may have diminished

⁸ *Tonyela and others v National Union of Metalworkers of SA* [2022] ZALCJHB 67; (2022) 43 ILJ 1895 (LC) para 17.

⁹ They were marked as annexures 'I', 'J' and 'K' respectively.

slightly relative to the third lease agreement, but as the appellant points out in her email of 16 February 2021, the property had not been well maintained and that may explain the reduction in rental in this instance. In any event, the quantum of the rental amount was not an issue to the appellant, so this cannot be the reason why she objected to the disputed agreement.

[19] The wording of the appellant's email dated 16 February 2021 unequivocally demonstrates a willingness to rent out the property. There can be no doubt that the appellant embraced that course of conduct. That she ultimately did consent, both to the leasing of the property to the first and second respondents and the terms on which such lease was to occur, appears from what next occurred.

[20] After writing to the first and second respondents on 31 March 2021 advising them that the appellant did not consent to their occupation of the property, the appellant's attorney wrote a letter to them again on 1 April 2021. That letter forms part of the statement of agreed facts.¹⁰ In his letter, the appellant's attorney stated, *inter alia*, the following:

'Unfortunately, you do not have a lease from the "Landlord". The property is owned by our client as well as the party that signed the lease. He signed the lease without our client's authority or consent. In fact, she expressly prohibited him from agreeing to any lease. Therefore the agreement does not bind our client.

The only basis upon which our client may re-consider her position is if you provide a copy of the lease and agree to pay half the deposit and rent to our client.'

[21] Upon being informed by the first respondent by email on the same day that he and the second respondent were quite willing to pay half of the rental to each co-owner each month, the appellant's attorney responded in writing as follows:

'We confirm that you will furnish to us a copy of the lease either per email or to the writer by "Whatsapp" on mobile number ...

We confirm that you have agreed to pay 50% of the rent to our client. This is acceptable to her. Her banking details are as follows:

... '.

¹⁰ It is annexure 'D2' to the statement of agreed facts.

[22] Two issues arise out of this letter. Firstly, there was no evidence that the appellant expressly prohibited the third respondent from agreeing to a lease in respect of the property. No such allegation appears in the statement of agreed facts. Secondly, the statement of agreed facts appears to misstate the true position regarding the splitting of the monthly rental payments between the appellant and the third respondent by the first and second respondents. The statement of agreed facts stipulates that:

‘First Defendant proposed that he and the Second Defendant pay half of the rent to Plaintiff.’ That is not borne out by the attorney’s letter of 1 April 2021: the appellant proposed that the payments be split between her and the third respondent, to which the first and second respondents acceded.

[23] The appellant indicated in this correspondence that she would reconsider her opposition to the disputed agreement if she was provided with a copy of that document and if the first and second respondents agreed to pay her half of the rental income. This they agreed to do. Even if the appellant was dissatisfied with the conclusion of the disputed agreement, it appears to me therefore that the appellant reconciled herself with its existence and acquiesced in its implementation. She cannot now claim that she did not agree to it. The appeal must consequently fail.

[24] A further issue, namely whether the matter is rendered moot by the fact that the initial term and the renewal period of the disputed agreement have run their course was also raised by Mr Grunder. By virtue of the finding to which I have come, it is not necessary to consider this point.

[25] Finally, something must be said about the order of costs granted in the court a quo. Those costs were awarded against the appellant on the scale as between attorney and client scale. The papers make it clear that the first and second respondents did not seek an order for costs on that scale. In my view, there is no basis for the awarding of a punitive order for costs. In *Plastic Converters Association of South Africa on behalf of members v National Union of Metalworkers of SA*:

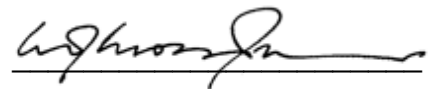
‘[t]he scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and

reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.’¹¹

There was no reprehensible or disgraceful conduct on the part of the appellant that would have merited such an order.¹² While the order granted by the court a quo must be set aside, the appellant has largely been unsuccessful in this appeal and must therefore bear the costs of the appeal.

[20] In the result, I would propose the following order:

1. Save to the extent set out in paragraph 2 below, the appeal is dismissed with costs.
2. The order of the court a quo:
 - (a) That the application is dismissed, is corrected to read that the action is dismissed; and
 - (b) Awarding costs to the first and second respondents on the scale as between attorney and client, is set aside and replaced with an order that costs shall be on the party and party scale.



MOSSOP J

I agree:

¹¹ *Plastics Convertors Association of SA on behalf of members v National Union of Metalworkers of SA and others* [2016] ZALAC 39; (2016) 37 ILJ 2815 (LAC) para 46.

¹² *Tjiroze v Appeal Board of the Financial Services Board and others* [2020] ZACC 18; 2021 (1) BCLR 59 (CC) paras 23-24.

HLATSHWAYO AJ

APPEARANCES

Counsel for the appellant	:	Ms N S Beket
Instructed by:	:	Browne Brodie Attorneys Ground Floor 5 Sinembe Sinembe Office Park La Lucia Ridge
Counsel for the first and second respondents	:	Mr R W Grunder
Instructed by	:	DMH Attorneys 30 Kenilworth Road Musgrave Durban
Date of argument:	:	4 August 2023
Date of Judgment	:	18 August 2023