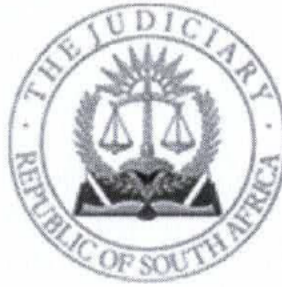


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 8856/2021

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

Date: 21 September 2023 E van der Schyff

In the matter between:

LISMER PROPERTIES CC
RENETTE LEATHERN N.O,
JERIFANOS MASHABA N.O.
WILLIAM LEATHERN N.O.

and

AHMED DAWOOD BHORAT
SHEHNAZ LIMBADA
YUSUF BHORAT
RIAZ BHORAT
RAIESA BHORAT

FIRST PLAINTIFF
SECOND PLAINTIFF
THIRD PLAINTIFF
FOURTH PLAINTIFF

FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT
FOURTH DEFENDANT
FIFTH DEFENDANT

JUDGMENT

Van der Schyff J

Background, Pleadings and Core Submissions

- [1] In these action proceedings, the plaintiff claims payment of R1 554 000.00 from the defendants in respect of damages suffered by the plaintiff for the wrongful holding over of the subject property for the period from 1 July 2020 to 31 July 2023, *mora* interest on the above amount, payment of R42 000.00 per month for each month from 1 August 2023 to the date on which the defendants vacate the subject property, and *mora* interest on this amount until the date of full payment.

- [2] The second to fourth plaintiffs (the Trustees) are the joint trustees of the first defendant's (Mr. Ahmed Borat's) insolvent estate. It is common cause that the second defendant (Ms. Limbada) was the sole member of the first plaintiff (Lismer Properties). Lismer Properties is the owner of an immovable property referred to herein as the subject property. This property is the primary residence of the Borat-Limbada family (the defendants). Whilst Ms. Limbada was the sole member of Lismer Properties, the Borat-Limbada family resided in the subject property, although no lease agreement was concluded. Ms. Limbada's membership in Lismer Properties was tendered as security for performance by the insolvent estate, which performance the insolvent estate of Mr. Ahmed Borat could not render. As a result, the second plaintiff (Ms. Leathern) replaced Ms. Limbada as the sole member of Lismer Properties in June 2020, on behalf of the Trustees of the insolvent estate.

- [3] Despite being requested to vacate the property on more than one occasion by the plaintiffs, the defendants remain in occupation of the property. Since June 2020, none of the defendants made any payment toward monthly rentals. The plaintiffs lodged an eviction application under case number 45028/2020 for the ejectment of the defendants from the property in 2021. The judgment on the eviction application is still awaited. The parties agreed at the hearing that a market-related rental is R40,000.00 per month, although the plaintiffs initially calculated their damages on the basis that a market-related rental equates R42 000.00 per month.

[4] The main dispute between the parties revolves around the question of whether the Bhorat-Limbada family is in unlawful occupation of the subject property or whether a lease agreement was concluded between the parties.

[5] It is the plaintiffs' case that no lease agreement was concluded between the parties after the transfer of the sole membership in Lismer Properties to Ms. Leathern. They contend that the defendants are in unlawful occupation of the subject property. The defendants, on the other hand, plead that they occupy the subject property by virtue of a lawful and extant oral lease agreement, entered into on or about 8 July 2020 at Johannesburg, alternatively Pretoria, between Lismer Properties, represented by Ms. Leathern and the fourth plaintiff (Mr. William Leathern), and Ms. Limbada and the third defendant (Mr. Yusuf Bhorat) acting personally and on behalf of the first, fourth and fifth defendants. The alleged material terms of the lease were that:

- i. The defendants were granted a right of lease over the property until the date of registration of the transfer of the property in favour of any future purchaser of the property;
- ii. The second and third defendants would make payment of a monthly rental of R42,000.00 per month.

The defendants further contend that it was agreed that a written lease embodying these terms was to be prepared by Lismer Properties and provided to them. This never eventuated. The defendants tendered to pay the rentals to the plaintiffs against the plaintiffs abiding by the terms of the lease.

[6] The defendants plead that the steps the plaintiffs took to evict them from the subject property constitute a repudiation of the lease agreement, which repudiation they do not accept. They instituted a counterclaim. They plead that the plaintiffs failed to provide a written agreement of lease to Ms. Limbada and Mr. Yusuf Bhorat and failed to recognise and give heed to the lease and its terms. This conduct, they again aver in the counterclaim, amounts to a repudiation of the agreed lease, which repudiation they don't accept. They seek to enforce the terms of the lease and seek a declarator that there is an extant oral lease agreement in force between the parties on the terms referred to above.

- [7] In sum, the defendants' version, as I confirmed with the defendants' counsel when oral argument was heard, is that there was an oral lease agreement concluded between them and Lismer Properties, but because they were not provided with a written copy of this agreement, they have not been paying rent since the agreement was concluded in July 2020, and refuse to do so until provided with the written document. They hold the plaintiffs to this oral agreement and do not accept the repudiation of the lease contract.
- [8] Counsel for the plaintiffs submitted with reference to *Hyprop Investments Ltd and Another v NCS Carriers and Forwarding CC and Another*,¹ that the term 'holding over is no more than a convenient label attached to the conduct or act which affords a remedy in damages'. Plaintiffs' counsel submitted with reference to *Hyprop Investments*, and *Sandown Park, supra*, that in order to succeed with its damages claim, it is incumbent on the plaintiffs to prove that the defendants are in unlawful occupation of the subject property, the period thereof, the market rental value of the subject property for that period and that, *prima facie*, the premises were lettable.
- [9] Counsel for the defendants, on the other hand, submitted also with reference to *Hyprop Investments*,² that the matter at hand needs to be considered keeping in mind the principle that the fundamental basis of a claim for holding over is the termination of a lease agreement that permitted the occupants to occupy or possess property and the failure of those occupants to return the property on termination. This, he submitted, is important if regard is had to the relief the plaintiffs seek in that they do not claim arrear rentals and the fact that they do not seek an order that the lease agreement between the parties is cancelled.

Holding over

- [10] It is probably accurate to state that the majority of holding over claims originates from situations where the occupancy of immovable property commenced in terms of

¹ 2013 (4) SA 607 (GSJ) para [50].

² *Hyprop Investments, supra*, para [42].

a valid lease agreement that came to an end, for whatever reason, and the lessee refused to vacate the property. It has, however, been acknowledged that damages are claimable for wrongful holding over, whether *ex contractu* or *ex delicto*.³ Where a lessor can decide whether to base a claim on contract or delict, a property owner who does not stand in a contractual relationship or, to be more precise, an erstwhile contractual relationship with an unlawful occupant, does not have the choice, since there is no *lis* based on the contract between the parties. Such a plaintiff must make out a case based on delict or unjustified enrichment.

- [11] It is accepted, as expressed by Wessels J in *Davy v W. Walker and Sons*,⁴ that where there has been beneficial occupation, there must be some remuneration for this beneficial occupation. In *Hefer v Van Greuning*,⁵ the then Appellate Division held that an owner of land, even if he is not in possession thereof, is entitled to institute the *actio legis Aquiliae* against the unlawful occupier if he has suffered patrimonial loss. It was affirmed by the Supreme Court of Appeal in *Mkangeli and Others v Joubert and Others*,⁶ that a delictual claim for patrimonial loss caused by the unlawful occupation of his land is still available to an owner, even though the right to claim eviction has been curtailed by legislation.
- [12] Although a claim for holding over can thus be founded on a breach of the contractual obligation to give vacant possession to an owner on termination of a lease agreement,⁷ a plaintiff who establishes a cause of action in delict, cannot be deprived of a remedy based in delict, solely because there was no pre-existing lease contract between the parties. In those cases where there was a right to occupy in terms of the lease agreement, it is the failure to vacate and resultant continued occupation, that constitutes the holding over. In cases where the occupancy of the

³ *Hyprop Investments, supra*, para [52]; *Sandown Park (Pty) Ltd v Hunter Your Wine and Spirit Merchant (Pty) Ltd and Another* 1985 (1) SA 248 (W). See also Hawthorne, L. 'The Nature of The Claim For Holding Over: South African Law' *Fundamina* 16(2) 2010, 52-63.

⁴ 1902 TH 114.

⁵ 1979 (4) SA 952 (A) (A) at 958B-D.

⁶ 2002 (4) SA 36 (SCA) at para [12].

⁷ *Hyprop Investments, supra*, para [42].

property does not flow from a pre-existing lease agreement, the holding over is constituted by the act of the occupier being and remaining in unlawful occupation of the property. Spilg J, correctly in my view, stated that:

'The term '*holding over*' is no more than a convenient label attached to the conduct or act which affords a remedy in damages.'

[13] In *Matthews v Douglasdale Dairy (Pty) Ltd*,⁸ the plaintiff instituted an action against Douglasdale Dairy (Pty) Ltd. The claim is formulated as a claim for damages for unlawful holding over. Douglasdale Dairy excepted on the basis that the plaintiff does not have a claim for 'damages for unlawful holding over' in circumstances where the plaintiff was a subsequent owner of the property, is not a party to a terminated lease agreement, and does not otherwise enjoy any contractual right to claim the damages acquired via cession, assignment or other transfer. Douglasdale Dairies contended that the claim for damages for holding over is, in law, premised on a breach of the contractual right to vacant possession at the termination of a lease.⁹ Cowen AJ, as she then was, explained that the term 'holding over' as used in the context of the particulars of claim should be understood to refer to the defendant's act of continuing in unlawful possession of the property.¹⁰ Cowen AJ, stated with reference to *Hyprop Investments, supra*, that it is now established that a claim for damages for holding over can be formulated in contract, delict or unjustified enrichment.

[14] A claim for holding over is not a claim for rent, it is a claim for damages. For a plaintiff to be successful in a claim for damages based in delict, it must establish that the defendant who holds over causes patrimonial loss and fulfills the requirements of Aquilian liability. In *Hefer*, Jansen JA held that in cases of unlawful occupation, the requirements of wrongfulness, fault and damages, are tacitly implied and included.¹¹

⁸ (31670/19) [2021] ZAGPJHC 712 (25 February 2021).

⁹ *Matthews, supra*, at para [3].

¹⁰ *Matthews, supra*, at para [13].

¹¹ *Hefer, supra*, at 958D-G 'Soos reeds geblyk het, word die onregmatigheid stilswyend deur "trespass" behels. Wat die skuld en skade betref, word dit klaarblyklik deur para 4 van die gestelde saak aanvaar dat dit aanwesig is - vandaar die bepaling dat as die regspraak ten gunste van die

Spilg J stated in *Hyprop Investments*¹² that the simple fact that the occupier has no lawful right to be [remain] in occupation is *per se* a wrongful act under delict. The damages flowing from the unlawful occupancy are reasonably foreseeable as a consequence of the wrongful act.

Lease

[15] It is trite that a party relying on a lease contract must allege and prove at least the following essential terms:

- i. An undertaking by the lessor to deliver a thing to the lessee;
- ii. An agreement that the lessee will have temporary use and enjoyment of the thing; and
- iii. An undertaking to pay rent.¹³

The evidence

[16] Mr. William Leathern testified on behalf of the plaintiffs. His evidence was that although the possibility of concluding a lease agreement was canvassed with Mr. Ahmed Borat via a number of WhatsApp messages, no lease agreement was concluded with Mr. Ahmed Borat or any member of the Borat-Limbada family. The

eiseres uitgewys word, sy vonnis ten bedrae van R1568 met koste moet verkry. Dit moet onthou word dat selfs as die verweerder gelyk gegee sou word dat "trespass", soos in die gestelde saak gebruik, slegs op 'n inbreuk op besit slaan, daar tog nie sprake van verhaal sonder skuld en skade sou kon gewees het nie, aangesien "trespass" in hierdie sin ook aanleiding gee tot die *actio legis Aquiliae*. Hier sou dit ook weinig sin gehad het om soos in para 4 van die gestelde saak ooreen te kom as die genoemde elemente nie stilswyend ingesluit was nie.' [As has already appeared, the wrongfulness is tacitly implied by "trespass". As regards the debt and damage, it is evidently assumed by para 4 of the stated case that it is present - hence the stipulation that if the legal question is decided in favour of the plaintiff, he must obtain judgment amounting to R1568 with costs. It must be remembered that even if the defendant were to be told that "trespass", as used in the stated case, refers only to an infringement of possession, there would still be no question of recovery without fault and damage, since "trespass" in this sense also gives rise to the *actio legis Aquiliae*. Here too it would have made little sense to agree as in para 4 of the stated case if the mentioned elements were not tacitly included.]

¹² *Hyprop Investments, supra*, para [48].

¹³ Harms, L.T.C. *Ambler's Precedents of Pleadings* 8th ed. Lexis Nexis, 231 and the authority referred to.

defendants were repeatedly informed that there was no lease agreement and requested to vacate the property, but they refused to do so.

- [17] Mr. Ahmed Borat testified that a lease agreement was concluded between himself, on behalf of all the defendants, and Mr. William Leathern acting on behalf of the plaintiffs. He claims that he and Mr. William Leathern agreed on the monthly rental, and that it was common cause that the subject property was the property concerned. While Mr. Ahmed Borat initially testified the agreement was reached during the WhatsApp conversations, he later, during cross-examination, said that there were also telephonic discussions between himself and Mr. William Leathern regarding the lease of the property. Mr. Ahmed Borat, in addition, testified that this lease agreement was never cancelled. He did not regard any of the letters sent to him by the plaintiffs' attorneys of record informing him that no lease agreement was concluded, that he and his family are unlawfully occupying the property, and that they will be held liable for damages for holding over, as a cancellation of the lease agreement.

Discussion

- [18] It is, at the outset, necessary to highlight that the evidence presented by Mr. Ahmed Borat, does not support the averments made in either the plea or counterclaim (the pleadings) filed by the defendants. It also contradicts the defendants' version as presented in the answering affidavit filed in the eviction application.
- [19] It is pleaded in the pleadings that:
- i. An oral agreement was concluded;
 - ii. The plaintiffs were represented by Ms. Leathern and Mr. William Leathern;
 - iii. The defendants were represented by Ms. Limbada and Mr. Yusuf Borat.
- [20] In the answering affidavit filed under case number 45028/2020, Mr. Ahmed Borat, in no uncertain terms, stated the following under oath:

‘... on or about 8 July 2020, at Johannesburg, alternatively Pretoria, the first applicant [Lismer Properties], duly represented by the second and fourth applicants [Ms. Leathern and Mr. William Leathern] and the second and third respondents [Ms. Limbada and Mr. Yusuf Bhorat] acting on their own behalf **and on my behalf** as well as for the fourth to sixth respondents, entered into an oral agreement of lease...

...

I did not enter in the lease agreement personally since the agreement was concluded between the first applicant and the second and third respondents.’

This version was confirmed in confirmatory affidavits filed by Mr. Yusuf Bhorat and Ms. Limbada.

- [21] Mr. William Leathern was cross-examined on the basis that he negotiated, or had discussions with Mr. Ahmed Bhorat and talked to Mr. Ahmed Bhorat about entering into a lease agreement. It was put to Mr. William Leathern that Mr. Ahmed Bhorat would testify that he operated under the belief that Mr. Leathern had the authority to make offers to him, and to conclude agreements **with** him on behalf of the trustees. As stated, the version that an agreement was concluded with Mr. Ahmed Bhorat, is not the version that was pleaded. Mr. William Leathern stated that he had no authority, on his own, to conclude any agreement since he did not have the authority to conclude any agreement on behalf of the trustees.
- [22] At the trial, Mr. Ahmed Bhorat testified that **he** represented the defendants and that an oral lease agreement was concluded between **himself**, and Mr. William Leathern on behalf of the plaintiffs. The contradiction between the pleaded case and the *viva voce* evidence speaks for itself.
- [23] Mr. Ahmed Bhorat relies on the WhatsApp communication between himself and Mr. William Leathern as evidence that the alleged agreement was concluded.

- [24] Mr. Ahmed Borat, in evidence in chief, testified that all his 'interactions, conversations and discussions', were '99.9 percent' with Mr. William Leathern. He confirmed that no lease agreement was concluded with Lismer Properties while his wife, Ms. Limbada, was the sole member of Lismer Properties CC. Mr. Ahmed Borat testified that the lease agreement was concluded via WhatsApp with him. Not only would the conclusion of an agreement via WhatsApp amount to a written agreement, but his evidence in chief did not correspond with the case pleaded by the defendants that they were represented by Ms. Limbada and Mr. Yusuf Borat when the oral agreement was concluded. In addition, no evidence points to Ms. Leathern's involvement during the conclusion of the alleged agreement, whilst it was pleaded that she, together with Mr. William Leathern, represented Lismer Properties when the lease agreement was concluded.
- [25] It was put to Mr. Ahmed Borat during cross-examination that it was never put to Mr. William Leathern that there were:
- i. additional oral discussions between himself and Mr. Leathern, and not only the WhatsApp communication;
 - ii. any discussions with Ms. Leathern regarding the lease agreement as pleaded.
- [26] The discrepancy between the case pleaded and Mr. Borat's evidence in this case, and the content of the answering affidavit filed in the eviction application was also pointed out to Mr. Ahmed Borat. Mr. Borat answered that the agreement was concluded with Mr. Yusuf Borat and Ms. Limbada on 8 July 2020 'with my Whatsapp chats. ... William was talking to me on their behalf'. He continued to say 'and I think they were acting on my behalf as well.' When it was pointed out to him that 'it cannot be both' and that he was the one interacting with Mr. Leathern he agreed, but when it was put to him that it was incorrect that a lease agreement was concluded with Mr. Yusuf Borat and Ms. Limbada – he disagreed.
- [27] I found Mr. Ahmed Borat to have been an evasive witness, who attempted to change his evidence when it was pointed out to him that his evidence was not consistent with the case pleaded. I do not view him as a credible witness.

[28] For the sake of completeness, it is necessary to have regard to the content of the WhatsApp communication between Mr. William Leathern and Mr. Ahmed Borat. At every instance where the issue of a lease agreement came up, Mr. William Leathern indicated that an agreement '**will be sent through for entry** between Lismar and Shenaz and Yusuf jointly and severally liable at 42 000pm – calculated as 1% of forced sale value'; and '**We are going to** enter into the lease with Yusuf and Shenaz jointly and severally since the movables situated at the premises belong to Shenaz'. (My emphasis).

[29] The messages communicated do not support a finding that a lease agreement was indeed concluded between the Trustees of Lismar Properties and Ms. Limbada and Mr. Yusuf Borat. The fact that Mr. Ahmed Borat reacted to these messages by sending 'thumbs up' and 'prayer hands' emojis is not exclusively indicative of an acceptance of an offer, it can also be interpreted as an indication of gratitude for the possibility that a lease agreement may be concluded. Even if there was an offer, which notion is not supported by the evidence, it was not for Mr. Ahmed Borat to accept. No offer was made to Mr. Ahmed Borat. The phrase 'are going to' denotes the intention to do something in future. Mr. Ahmed Borat was merely informed that an offer 'may' or will in the future be presented to Ms. Limbada and Mr. Yusuf Borat. There is no indication in the WhatsApp communication between Mr. Ahmed Borat and Mr. William Leathern of any intention, to conclude a lease agreement with Mr. Ahmed Borat.

[30] I also find it difficult to accept that Mr. Ahmed Borat was of the view that a valid lease agreement was agreed to, in light of the defendants' failure to pay any rental to Lismar Properties. Mr. Ahmed Borat testified that had a written lease agreement been received –

'We would have signed the lease and started paying the lease as the lease would stipulate.'

[31] I am not of the view, as counsel for the defendants suggested, that the court is faced with two mutually destructive versions. Mr. William Leathern's evidence is supported

by the gist of the WhatsApp conversations. I found Mr. William Leathern to have been a truthful witness. His evidence was clear, to the point, and consistent.

- [32] Mr. Ahmed Bhorat's evidence is not only contradictory to the case made out in the pleadings and the answering affidavit filed in the eviction application, but it is also improbable in its inconsistency. The only witnesses who could credibly have presented first-hand evidence regarding the conclusion of an oral lease agreement in line with the case pleaded, were Ms. Limbada and Mr. Yusuf Bhorat. Neither Ms. Limbada nor Mr. Yusuf Bhorat were called to testify regarding the conclusion of the oral agreement. Their absence and silence leave a resounding void in the defendant's case.

Miscellaneous

- [33] When the trial commenced, the defendants raised *lis alibi pendens* as a special plea. I dismissed the special plea and indicated that I would include the reasons for that order in the judgment.
- [34] The point of *lis pendens* was premised on the fact that an eviction application was heard in July 2021 and judgment was reserved. To date, there is no indication that a judgment has been handed down in the eviction application. Counsel for the defendants submitted that the same principal question needs to be answered in both this trial and the eviction application, namely whether a valid lease agreement was concluded between the parties.
- [35] It is common cause that *lis alibi pendens*, even when it is found to be the position, is not an absolute bar. It is a matter within the discretion of the court to decide whether an action brought before it should be stayed pending the decision of the first action, or whether it is more just and equitable that it should be allowed to proceed.¹⁴
- [36] In the circumstances caused by the delay in awaiting the judgment in the eviction application, and having regard to the difference between the nature of an eviction

¹⁴ *Les Marquis (Pty) Ltd v Marchand* 1989 (2) SA 651 (T) at 658D;

application and the relief sought in the current trial, I deemed it to be just and equitable for the matter to proceed. I pause to reiterate that the evidence presented by the defendants in the eviction application substantially differs from the evidence presented at trial. Even if it will be found in the eviction application that a lease agreement was indeed concluded, that finding would have been made on evidence that differs from the *viva voce* evidence presented in this court.

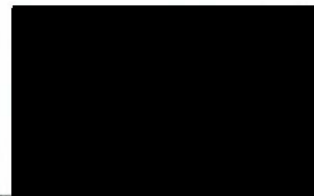
Costs

[37] I am of the view that no reasons exist, in both the trial and as far as the *point in limine* is concerned, for costs not to follow the result.

ORDER

In the result, the following order is granted:

- 1. The first to fifth defendants, jointly and severally the one paying the other to be absolved, are liable for:**
 - 1.1.** Payment of R320 000.00 (THREE HUNDRED AND TWENTY THOUSAND RAND) for the period from 1 July 2020 to 28 February 2021;
 - 1.2.** *Mora* interest on the above amount at the rate of *mora* interest per annum to date of payment;
 - 1.3.** Payment of R40 000.00 per month for each month from March 2021 to date of the defendants vacating the subject property;
 - 1.4.** Interest on the above amount at the rate of *mora* interest per annum to date of payment;
 - 1.5.** Costs of suit, and the costs of the special plea.
- 2. The counterclaim is dismissed with costs.**



E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the plaintiffs:	Adv. C.M. Rip
Instructed by:	Tintingers Inc.
For the defendants:	Adv. R. Bhima
Instructed by:	FASKEN Inc.
Date of the hearing:	16 and 17 August 2023
Oral argument:	12 September 2023
Date of judgment:	21 September 2023