

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Case No.: 1364/2022

Reportable: YES/NO

Of interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

MICHAEL NICOLAS GEORGIU N.O.

First Applicant

ANDRIANA GEORGIU N.O.

Second Applicant

JOSEPH REYNOLDS CHEMALY N.O.

Third Applicant

(In their capacities as the Trustees for the
Michael Family Trust, TMP [...])

and

BLACKTRADE (PTY) LTD t/a BOSS FABRICS

Respondent

(Registration Number: [...])

Coram: Opperman, J

Date of hearing: 30 May 2022

Order Delivered: 31 May 2022; Amended on 2 June 2022

The order was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 31 May 2022 at 15h00 and 2 June 2022 at 15h00.

Reasons for Judgment: 8 June 2022. The reasons for judgment were handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 8 June 2022 at 15h00.

JUDGMENT

INTRODUCTION

[1] The case is a glaring and distasteful reminder of the conduct of parties to a contract that culminated into a bitter feud. The feud caused them to lose sight of the reality of the Rule of Law, the Law of Contract, the Rules of Court and a basic standard of courtesy towards each other and the Court.

[2] These are the reasons for the order I made on 31 May 2022 and 2 June 2022. I ordered:

Coram: Opperman, J

Date of hearing: 30 May 2022

Order Delivered: 31 May 2022; Amended on 2 June 2022

The order was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 31 May 2022 at 15h00 and 2 June 2022 at 15h00.

Reasons for Judgment: Reasons for judgment will follow in due time

ORDER
IN TERMS OF RULE 42 OF THE UNIFORM RULES
2 JUNE 2022

Having heard Counsel for the parties, with due cognizance to the papers filed on record, the Heads of Argument and a letter from the applicants for clarification of the costs dated 31 May 2022; it is ordered that:

ORDER

1. The issue *in limine* that the applicants are not properly before Court, is dismissed;
2. The cancelation of the Rental Agreement is confirmed;
3. The respondent and all persons holding occupation through the respondent is evicted from the premises situated at Shop 15 known as Showgate Centre, Curie Avenue, Bloemfontein, also known as S-ROOM-01 & G-SPA1, Curie Avenue, Showgate Centre, Bloemfontein ("the premises") with effect from Monday: 6 June 2022 at 24h00.
4. The Sheriff or his/her Deputy are authorized and directed to take the necessary steps to evict the respondent and all persons holding occupation through the respondent from the premises in the event that the respondent or any others do not do so on 6 June 2022 at 24h00;
5. The costs of this application are to be paid as follows:
 - 5.1 Each party to carry their own costs for the hearing on the 19th of May 2022;

5.2 the respondent to pay the wasted costs for the 26th of May 2022 on an attorney-and-client scale; and

5.3 costs for the remainder of the application to be paid by the respondent.

[3] It is imperative to emphasize from the start that this case is about the alleged non-compliance by the respondent to the contract entered into between the parties freely and voluntarily and without any constitutional impediments. The breach lies in the withholding of monthly rental installments by the respondent of a business premises. This is common cause.

[4] On the basis of the non-compliance to the stipulations in the contract the applicants now applied for the eviction of the respondent. The application for the eviction to be on the terms of the contract as well. The issue is pure; did the respondent breach the contract and are the applicants allowed to enforce the remedies contracted to when the breach occurred?

[5] This case is not about the quantum of rental in arrears and any claim therefore, it is not to adjudicate alleged damages suffered by the respondent because the applicants allegedly did not maintain the rental property in accordance with acceptable standards, it is not to adjudicate whether the applicants acted lawfully when they disconnected the electricity supply to the business premises of the respondent or whether the electricity bills were exorbitant. Lastly is it not about the identification of the litigants to the dispute; they are clear. There is apparently separate concurrent litigation ongoing on some of the issues.

THE LAW

[6] On signing a contract, the parties become servants to the terms thereof and they acknowledge and concede to the Law of Contracts. (The principle of *pacta sunt servanda* decrees agreements, freely and voluntarily concluded, must be honoured.) They pledge themselves to the Rule of Law and an open and democratic society based

on human dignity, equality and freedom; constitutional integrity within the facts and circumstances of their case.

[7] Parties to a contract are barred from believing themselves to be above the law and the contract they committed to. Integrity is vital to ensure business efficacy and democratic commercial certainty and security. Lawlessness will have punitive repercussions. Anarchistic parties must accept the legal consequences of non-compliance to contracts; rogue arrogance towards law and contract shall not be tolerated by courts.

[8] That said; the courts must act with perspective restraint. Parties are servants to the contract, not slaves. If the facts are clear courts may stray from *pacta sunt servanda*. The principle of ubuntu forms the core of contracts. Ubuntu “provides a particularistic context in the law of contract when, for example, addressing the economic positions or bargaining powers of the contracting parties”.¹

[9] *In casu* the parties were represented by legal representatives throughout the process and feud that already started in 2021.

[10] I would add that aside from the idiosyncrasies contracting parties often commit and cause, the adjudication of a case must acknowledge a need for understanding not vengeance, ubuntu and not victimization of parties; a court should do simple justice between citizens. This is easier said than done. The above was decreed in the cases referred to hereunder.

[11] The Law of Contracts was stated through the years to be the following:

In *Basson v Chilwan and others* 1993 (3) SA 742 (A) at 762H Eksteen JA referred to: “The paramount importance of upholding the sanctity of contracts, without which all trade would be impossible ...” Further, “if there is one thing that is more

¹ *Beadica 231 CC and others v Trustees, Oregon Trust and others* 2020 (5) SA 247 (CC) at paragraph [208].

than public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract.”

[12] Justice Ackermann in *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) at paragraph 26 described it as “a central consideration in a constitutional state.” These statements aim for reasonable certainty, so that parties can go about their business knowing the rules of the game; constitutional economic integrity is vital.

[13] Moseneke J (as he then was) pointed out in his dissent in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at paragraph 98 that: “Public policy cannot be determined at the behest of the idiosyncrasies of individual contracting parties. If it were so, the determination of public policy would be held ransom by the infinite variations to be found in any set of contracting parties.”

[14] In *Beadica 231 CC and others v Trustees, Oregon Trust and others* 2020 (5) SA 247 (CC) (“Beadica 231 CC”) an intricate academic researched expose was given on the modern Constitutional Law of Contract in South Africa to guide courts in the adjudication of these matters. It was concluded that the impact of the Constitution on the enforcement of contractual terms through the determination of public policy was profound. As was stated in *Barkhuizen*, it required that courts employ (the Constitution and) its values to achieve a balance that strikes down the unacceptable excesses of freedom of contract, while seeking to permit individuals the dignity and autonomy of regulating their own lives. Public policy imported values of fairness, reasonableness, justice and ubuntu.

[15] *Pacta sunt servanda* (agreements must be kept) and “perceptive restraint” must be balanced on the facts of each case. Nonfulfillment of the *pacta sunt servanda* should only be in the clearest of cases and as Victor AJ stated:

[231] This approach leaves space for courts to scrutinize contractual autonomy whilst at the same time allowing courts to refuse enforcement of contractual terms that conflict with constitutional values, even though the parties may have consented to them. Public policy must take all these considerations into account and not implement contractual autonomy at the expense of transformative constitutionalism. The appropriate balance can readily be achieved upon a recognition of an 'underlying moral or value choice' in which the constitutional values of ubuntu feature in this constitutionally transformative space.

[16] The onus is on the party that claims a court must deviate from the *pacta sunt servanda* to proof that the facts of the case justify this grave divergence.

THE CONTRACT

[17] The respondent withheld rent payments of R34 782.61 per month in disregard of the unambiguous terms of the contract that rent may not be withheld or set off in any circumstances. Specifically, not when a dispute exists between the parties to the contract as to whether the leased premises can be beneficially occupied or due to alleged exorbitant electricity charges.

“8.17 NO WITHHOLDING PAYMENTS

(THE LESSEE) Shall not be entitled to withhold or delay payment of any amounts due to the LESSOR in terms of this LEASE AGREEMENT and the LESSEE hereby abandons all or any rights of set off.”

[18] Disputes must be dealt with in terms of clause 12.3:

“12.3 DISPUTES

Should any dispute arise between the parties:

12.3.1 as to whether the BUILDING or LEASED PREMISES can be beneficially occupied by the LESSEE at any time such dispute shall be referred to the LESSOR'S architect acting as an expert and not as an arbitrator, whose decision in regard to such dispute shall be final and binding on the parties and not open to challenge. Any expenses which may be incurred in referring such dispute to the LESSOR'S architect shall be borne by the LESSOR and the LESSEE in equal shares; and

12.3.2 in regard to the reduced amount of MONTHLY RENTAL payable at any time or from time to time by the LESSEE in terms of Clause 12.2.2 hereof, then such dispute shall be referred to the LESSOR'S architect, acting as experts and not as arbitrators and their decision in regard to such dispute shall be final and binding on the parties and not open to challenge; any expense which may be incurred in referring such dispute to the LESSOR'S architect shall be borne by the LESSOR and LESSEE in equal shares."

[19] "12.2 PARTIAL DESTRUCTION

Should any part (but not whole) of the LEASED PREMISES be destroyed or damaged by any cause whatsoever then:

12.2.2 the MONTHLY RENTAL payable by the LESSEE shall be reduced *pro rata* and to the extent to which the LESSEE is deprived of the beneficial occupation of that part of the LEASED PREMISES;"

[20] "21. PAYMENT OF RENTAL

The rental shall be paid in advance on the first day of each and every month, without deductions or demand ..."

[21] "15. BREACH

Should the LESSEE

15.1 fail to pay any amount owing by the LESSEE in terms of this lease on due date thereof and fail to remedy that breach within 3 (THREE) DAYS of receipt of written notice from the LESSOR calling on the LESSEE to rectify the breach;

15.2 commit any other breach of any terms of the LEASE AGREEMENT and fail to remedy that breach within a period of 7 (SEVEN) DAYS after receipt of written notice from the LESSOR calling on it to do so (provided that should that breach be one which cannot be reasonably be remedied within 7 (SEVEN) DAYS, then the LESSEE shall be allowed such additional time as is reasonably required therefor); or

15.3 should the LESSOR notify the LESSEE in terms of 15.1 or 15.2 to remedy any breach of this LEASE AGREEMENT more than twice during any year of this LEASE AGREEMENT, then in any of such events, the LESSOR shall be entitled but not obliged, notwithstanding any previous waiver or anything to the contrary herein contained, either –

15.3.1 forthwith and without notice cancel this LEASE AGREEMENT and to resume possession of the LEASED PREMISES, without prejudice to its claim for arrears rent and other amounts owing hereunder or for damages which it may have suffered by reason of the LESSEE'S breach of contract or of the said cancellation; or

15.3.2 to re-enter the LEASED PREMISES and to remove all persons and/or property from the LEASED PREMISES. Any property so removed shall be stored at the costs and risk of the LESSEE. The LESSEE hereby irrevocably constituted the LESSOR as its agent for effecting this sale of any such goods and for effecting of any of the foregoing purposes.”

[22] “16. HOLDING OVER

16.1 Should the LESSOR cancel this lease; and

16.2 The LESSEE disputes the LESSORS’ right to do so and remain in occupation of the LEASED PREMISES then –

16.2.1 the LESSEE shall continue to pay all amounts due by the LESSEE in terms of this LEASE AGREEMENT on the due dates of the same;

16.2.2 the LESSOR shall be entitled to recover and accept those payments;

16.2.3 the acceptance by the LESSOR of those payments shall be without prejudice to and shall not in any manner whatever affect the LESSORS’S claim to cancelation the in dispute.

16.3 Should the dispute be determined in favor of the LESSOR, the payments made and received in terms of Clause 16.2 hereof shall be deemed to be amounts paid by the LESSEE on account of damages suffered by the LESSOR by reason of the cancelation of the LEASE AGREEMENT and/or the unlawful holding over by the LESSEE.

16.4 The provisions of this Clause will apply should the LESSEE have vacated the LEASED PREMISES *mutatis mutandis* without prejudice to the LESSOR’S right to claim damages.”

[23] The lease agreement also stipulates that the respondent shall be liable for and shall pay for electricity, water and other utilities used on the leased premises for any cause whatsoever; (Clause 7.1) and the respondent shall not be entitled to withhold or delay payment of any amounts due to the applicants in terms of the lease agreement and the Lessee (respondent) abandons all or any rights to set off. (Clause 8.17)

THE FACTS THAT CAUSED THE LITIGATION

[24] The respondent was placed on terms by a Letter of Demand dated 23 February 2021 addressed and delivered to the respondent as well as Naazia Suliman in her capacity as Surety/Guarantee and co-principal debtor as well as the attorney of record, Hasina Bismilla. This was also done by way of further written demands as time progressed. This fact is common cause. The arrears continued to accumulate hereafter.

[25] The respondent adamantly refuses to pay the rent due. They claim to have paid it into a Bank Account and will only pay the applicants should their demands be met in regard to the alleged, but not proven, damages and electricity accounts. This might be tantamount to illegal blackmail during the non-compliance with the contract.

[26] The respondent took no steps to enforce specific performance. The respondent furthermore alleged that there has been a long-standing dispute between the parties, however, the respondent failed to take steps in terms of the lease agreement to refer the purported disputes for arbitration as provided for in the contract.

[27] The respondent acted outside the scope of the law and the contract to achieve their own sense of justice; they became “judge, jury and executioner”. The respondent did not revert to the dispute resolution prescribed in the contract nor did they obtain any court orders to condone their actions and adjudicate the unlawfulness of the conduct alleged to have been perpetrated by the applicants.

[28] Slotting in with the above is fact that in the constitutional epoch the judicial authority vests in courts. The Constitution, 1996:

Section 165. Judicial authority. —

(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

[29] On the 1st of February 2022 the applicants proceeded to disconnect the respondent's electricity. This was in terms of Clause 7.8 of the Lease Agreement. The clause also dictates referral of the issue to an electrical engineer.

"Should the LESSEE fail to pay the charges for the electricity or any other amounts (including but not limited to MONTHLY RENTAL) due in terms of this LEASE AGREEMENT within 3 (THREE) DAYS of the written demand, then, without prejudice to any other rights it may have, the LESSOR/ utility management company shall be entitled to terminate the supply of electric and or water current to the LEASED PREMISES."

"In the event of a dispute between the LESSEE and the utility management company, the same shall be determined by the LESSOR'S electrical engineer who shall decide the same as an expert and not as an arbitrator and whose decision in the absence of manifest error shall be final and binding on the parties. The costs of the electrical engineer shall be borne by the LESSEE."

[30] Upon disconnection of the electricity the respondent's attorney requested that it be restored, failing in which they will proceed with an urgent application to have the power supply restored. The respondent thereafter issued and served an urgent application upon

the Trust (applicants) on the 10th of February 2022 whereby they claimed that the electricity to the leased premises be restored immediately and whereby the Trust must be interdicted from further terminating the electricity supply to the premises. The application was to be on the 11th of February 2022.

[31] The respondent afforded the Trust (applicants) less than 24 hours to respond to the founding papers.

[32] After the urgent matter, under case number: 541/2022, was heard on the 11th of February 2022 it was ordered that the matter is not urgent and that the matter be struck from the roll with costs.

[33] On the 17th of February 2022 a final letter was addressed to the respondent's attorney. In the letter the attorney conveyed that cognizance was taken of the disputed amount in terms of electricity and interest. The applicants disputed the amounts. The respondent remained in arrears in terms of the rental which is not disputed and is currently due.

[34] The respondent was informed that they are indeed in breach of the terms of the Agreement of Lease, specifically clause 15.3.1 and that the applicants are thus lawfully entitled to cancel the agreement, which they did. Finally, the respondent was, in writing, awarded a period of 7 days to vacate the premises, failing which the applicants will bring an eviction application to the court. They noticeably did not want to take the law into their own hands and evict on the contract only.

[35] At the time the application was filed the respondent continued to occupy the premises without payment of any rental, which amount has accrued to R815 383.63.

THE PERIPHIRAL MISFORTUNES OF THE CASE

[36] The disregard for Rules and respect for the administration of justice hopefully ended on 2 June 2022 with a letter addressed to the Presiding Officer directly *via* email:

We refer to the abovementioned judgment for which purpose the Applicant Attorneys have requested you to amend for interpretation purposes.

We request that you kindly, simultaneously let us have reasons for your aforementioned judgment, as we hold instructions to take this matter on appeal. (Accentuation added)

[37] First of all was the order on the case issued and not the reasons for the order. This was to expedite a solution to the case and cause an end to the ongoing litigation. The heading of the order clearly pointed out that reasons for judgement will follow in due time. Secondly must an application for reasons not be addressed to the Presiding Officer directly *via* email; it must be done in terms of Rule 49 and properly so in terms of the Rule. I requested the Registrar of this Court to assist the attorneys to draft the correct papers for the application.

[38] I now turn to a description of the other instances wherein the rules were not followed by both parties and whereby the handling of the case was disrupted and contaminated by their conduct. This is an awkward case indeed.

1. The Notice of Motion was issued on 23 March 2022 for court appearance on 14 April 2022.
2. The Notice of Motion was served on 30 March 2022² with the appearance date noted to be 14 April 2022.
3. The Notice to Oppose was to be served within 5 days of the service of the application. There is not any record of a Notice to Oppose on the record/bundle supplied by the applicants. The respondent's answering affidavit was filed at Court on 20 April 2022³ but without proof of service on the applicants as is reflected on page 79 of the document.
4. It is not clear what happened on the 14th of April 2022.

² Page 1 of the Bundle dated 10 May 2022.

³ Supra at Page 78.

5. There is a Notice of Set Down filed on record dated 13 April 2022 for the 21st of April 2022 by the applicants but it was not served on the respondent. Pages A and B of the record are proof hereof.

6. On the 13th of April 2022 an Index to the papers were filed and served at Court by the applicants. There was no service on the respondent of this document.

7. The next document is a bizarre Notice of Removal from the Roll filed by the respondent with regard to the date of the 21st of April 2022. Again, with no proof of service on the applicants as per page 90. The applicants are *dominis litis*.

8. Hereafter followed the order of Snellenburg, AJ on 21 April 2022 from the unopposed motion court that the matter be postponed to the opposed roll of the 19th of May 2022. The respondent was ordered to pay the wasted costs because they were apparently at fault by not complying with the Rules of Court.

9. From the order it appears as if there was no appearance for the respondent on the 21st of April 2022. It is not known from the papers how the date of the 19th was decided upon and by whom.

10. Important is the fact that an Index was filed at Court on the 10th of May 2022 and on the corresponding attorneys in Bloemfontein on the 9th of May 2022 by the applicants. The respondent had to be aware that the matter was on the role and should have taken steps to inform themselves of the position of the case on the roll. The court rolls of this division are readily available for inspection on several platforms.

11. On the 19th of May 2022 the matter appeared before me on the opposed motion court roll. There was no appearance for the respondent. The Court Order dated the 21st of April 2022 was clearly not served on the respondent.

12. I refused for the matter to proceed without representation for the respondent as was demanded by the applicants and ordered that the matter stand down for the legal representatives of the respondent to be contacted telephonically to come to court. I deemed it my judicial responsibility to protect the right of the respondent to appear and present their case if their legal representatives would not do so.

13. The offices of the correspondent of Cassims Attorneys situated in Durban; RC Ismail Attorneys, in an honorable attempt to salvage the situation, send a clerk

that did not have right of appearance in the High Court. Mr. Ismail was out of town with prior engagements.

14. Patiently and to protect the respondent I requested Counsel for the applicants to consult with the clerk and endeavor to reach an agreement that will relieve the quagmire the case has landed in. I was informed that the respondent wants for the matter to be postponed to the 30th of June 2022. The request could not be granted because the Court is in recess then and the matter had to be expedited. Both parties realized very well that the litigation was ongoing, seemingly from the 23rd of February 2021 when the first Letter of Demand was issued by the applicants against Naazia Suliman and Hasina Bismilla for rental in arrears.

15. I ordered that the matter be postponed to the 26th of May 2022 for hearing of the matter on the opposed motion court roll. The respondent, again, was well aware of the litigation serving in Court. It was further ordered that the respondent must file their Heads of Argument on 23 May 2022. The costs of the day stood over for later adjudication to give the respondent the opportunity to address the Court on the issue. An order ignoring the *audi alteram partem* dictum would have been illegal.

16. The applicants unreasonably so, wanted for the Court to order punitive costs orders for the day against the respondent notwithstanding that the delay was caused by the applicants by not properly notifying the respondent of the date of the 19th of May 2022. The wayward instructions by the attorney for the applicants to his Counsel did not end here as the record will show.

17. The respondent gracefully filed their Heads of Argument on 23 May 2022. But, in the Practice Note, casually informed the Court that: "Counsel for the Respondent is Advocate NG Winfred who is not available on 26th May 2022 because of short notice." There was no indication whether the matter will proceed with alternatively appointed Counsel or whether there will serve an application for a postponement before Court on the 26th of May 2022.

18. The Court prepared the file just to be confronted by the correspondent attorney Mr. Ishmail, with an application for postponement of the case because the preferred Counsel is not available. The insolence of the instructing attorneys of the respondent clearly caused Mr. Ishmael grave embarrassment. The instructing

attorneys caused the Court to be held hostage by their conduct. Their “counsel of choice” was not available and the Court must abide by the situation that they caused. A whole court day and much preparation was wasted. Other cases could have been accommodated if only the respondent, in the least as an act of courtesy, informed the Court and the other parties involved that the matter will not proceed.

19. Mr. Ishmail and Advocate Sander are commended for the manner in which they endeavored to have sanity and the sanctity of the Rules of Court prevail. The attorneys for the applicants wanted for the matter to be heard there and then; Mr. Ishmail was not instructed and prepared to do so and it would have caused a grave injustice to the respondent to allow the application. The attorneys for the applicants indicated to the Court that their client already has a new tenant lined up from the beginning of June 2022 and that the postponements allowed by the Court costs their clients in revenue.

20. The haughtiness of the applicants to assume that the respondent would be evicted by the Court before both parties were given the opportunity to address the Court and the *audi alteram* rule complied with is of concern; they procured tenants whilst the matter is *sub judice* and for the 1st of June 2022 and want to blame the Court for any losses due to their conduct. If it was an attempt to intimidate the Court it was unsuccessful. Their opportunistic claim for a *de bonis propriis* costs order against the respondent for a situation that the applicants created by not properly having notified the respondent of the date of hearing of the 19th of May, was dismissed and the issue of costs was ordered to stand over to be properly addressed.

21. On the other hand, did the conduct of the attorneys for the respondent create their own predicament. They could have briefed many of the tens, if not hundreds, of Counsel available in the country. The law is clear on this issue and will I not burden the judgment with case law that must be known to the parties. I postponed the matter to the 30th of May 2022 to give the attorneys of the respondent opportunity to engage the service of Counsel. They did do so and the matter proceeded on the 30th of May 2022.

22. At long last were the real issues addressed and did the administration of justice prevail on 30 May 2022. I am indebted to the graceful conduct of Advocate Hendriks, Adv I Sander and Ms. Knipe on this day. Unfortunately did the attorneys for the respondent from Durban not ensure that their attorneys were available in Court to instruct their Counsel. Mr. Ishmail did inform them that he will be otherwise engaged and is not available.

23. It is noteworthy to mention that opposed motions are as a rule only heard on Thursdays but did I, slot this case in among other engagements and cases to be attended to on Monday 30 May; this to accommodate the parties to expedite the matter and hopefully bring an end to the feud.

THE ISSUE OF THE APPLICANTS NOT BEING PROPERLY BEFORE COURT, THE RULE 42-AMENDMENT AND COSTS

[39] The objection that the applicants are not properly before court in that they are not properly described in the founding affidavit is true. It is just many of the mishaps of the case that seemed to snowball from the applicants to the respondent to an erroneous order by the court on costs whilst trying to steer the case as best as possible to the most acceptable result.

[40] Rules are for the court not the other way round. It is, nonetheless, important to respect the purpose and sanctity of the Rules.

[41] In *Tusk Construction Support Services (Pty) Ltd and Another v Independent Development Trust* (364/2019) [2020] ZASCA 22 (25 March 2020) it was ruled that citation of a trust as a party to legal proceedings does not render the summons a nullity simply because the trust lacks juristic personality; such summons is capable of amendment to reflect the trustees as parties in their representative capacity. In this instance the applicants submitted that there is a resolution which authorized the institution

of the proceedings on behalf of the applicants. All the trustees are well aware of the litigation and the relief sought. This is correct. The trustees are indicated in the headings and the respondent knows exactly who the applicants are; the failure relied upon is over technical and not fatal to the case. The point *in limine* stands to be dismissed.

[42] On 31 May 2022 I erroneously ordered that: “5.3 costs for the remainder of the application, if any, to be in the cause.” The matter was finalized and the words: “to be in the cause”; wrong. The meaning remained substantive that the respondent that was the unsuccessful party, shall carry the costs. The applicants brought the mistake to my attention *via* a letter I requested and I amended the mistake *mero moto* in terms of Rule 42 of the Uniform Rules immediately.

[43] On the issue of costs; the wasted costs on the 19th of May 2022 were due to the actions of the applicants and the respondent alike as I described above. The 26th of May 2022 is for the account of the respondent. Their conduct was unacceptable; hence the costs orders.

[44] To reiterate; the order is as follows:

ORDER

1. The issue *in limine* that the applicants are not properly before Court, is dismissed;
2. The cancelation of the Rental Agreement is confirmed;
3. The respondent and all persons holding occupation through the respondent is evicted from the premises situated at Shop 15 known as Showgate Centre, Curie Avenue, Bloemfontein, also known as S-ROOM-01 & G-SPA1, Curie Avenue, Showgate Centre, Bloemfontein (“the premises”) with effect from Monday: 6 June 2022 at 24h00.
4. The Sheriff or his/her Deputy are authorized and directed to take the necessary steps to evict the respondent and all persons holding occupation through the respondent from the premises in the event that the respondent or any others do not do so on 6 June 2022 at 24h00;

5. The costs of this application are to be paid as follows:
- 5.1 Each party to carry their own costs for the hearing on the 19th of May 2022;
- 5.2 the respondent to pay the wasted costs for the 26th of May 2022 on an attorney-and-client scale; and
- 5.3 costs for the remainder of the application to be paid by the respondent.

M OPPERMAN, J

APPEARANCES

FOR THE APPLICANTS

ADVOCATE I SANDER
FREE STATE SOCIETY OF ADVOCATES
051 430 3567

R OOSTHUIZEN
EG Cooper Majiedt Incorporated
77 Kellner Street
Westdene
BLOEMFONTEIN
EMAIL: simone@egc.co.za
REF: RO/SK/MW5552

FOR THE RESPONDENT

ADVOCATE HENDRIKS
FREE STATE SOCIETY OF ADVOCATES
051 430 3567

HASINA BISMILLA t/a HB ATTORNEYS

c/o RC ISHMAIL ATTORNEYS

Unit 4 Reid Plaza

Westdene

BLOEMFONTEIN

TEL: 051 430 0187

EMAIL: Ryan@rcilaw.com

REF: RI-CIV-311-1

EMAIL: frontdesk@cassimlegal.com