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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 1694/2020

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

05 JULY 2021 DJP SEMENYA M.V
DATE:

- (4) REPORTABLE: YES/NO
- (5) OF INTEREST TO THE JUDGES: YES/NO

In the matter between:

ACCELARATE PROPERTY FUND LIMITED : APPLICANT

And

GERHARDUS COETZEE t/a IMPALA VLEISMARK : 1ST RESPONDENT

IMPALA VLEISMARK (PTY) LIMITED : 2ND RESPONDENT

JUDGMENT

SEMENYA DJP:

[1] The applicant in this application is the owner of the property known as G8-2 Bosveld Shopping Centre situated on [.....], Bosveld, Bela Bela, Limpopo (the property). The applicant is seeking the order in terms of which the 1st and/or 2nd respondents and anyone who is occupying the property through them are ejected therefrom.

[2] The applicant alleges that on the **24 June 2015**, the applicant and the 1st respondent entered into a lease agreement in terms of which the applicant leased the property to the 1st respondent. The applicant was duly represented by Grainger whilst the 1st respondent acted in person. The lease agreement was for a period of five years, *i.e* from the **1 August 2015** and ending on the **31 July 2020**. The terms of the agreement are embodied in a written contract annexed to the founding affidavit as Annexure “LL2”. It is an undisputed fact that the 1st respondent signed on page 19 of Annexure “LL2” and initialed each page thereof on the 19 June 2015. The applicant alleges that the agreement has been cancelled on account of breach on the part of the 1st respondent.

[3] It is common cause that there is action proceedings and joinder of 2nd respondent application in case No. 6801/2017 which is pending between the applicant and the 1st respondent. In the action proceedings, the applicant is suing the 1st respondent for arrear rental, ejectment and other ancillary orders. The 1st respondent pleaded that it is the 2nd respondent and not him who is occupying the property. This defence led to the launching of an interlocutory application in which the applicant seeks to join the 2nd respondent as a third

party, alternatively as a co-defendant. This application is opposed on the basis that no lease agreement was ever concluded between the applicant and the 2nd respondent.

[4] The respondents aver that apart from the litigation in the action proceedings and the interlocutory application, the applicant has previously launched an urgent application against the 1st respondent for the attachment of the immovable property upon the leased property which will be sufficient to satisfy arrear rental. The parties agreed to postpone the application to the **6 March 2018** during the hearing of the urgent application on the **2 March 2018**. The reason thereof was to enable the parties to file the answering and, if necessary, replying affidavits. The applicant was in the meantime ordered not to lock the property so as to prevent the respondent from trading. The 1st respondent on the other hand was ordered not to remove the assets from the property pending the hearing of the application. On the **6 March 2018** the court ordered the sheriff to attach the immovable assets on the property. The 1st respondent was in the interim interdicted from removing or causing the removal of the movables pending finalization of the pending action proceedings. The order in terms of which the applicant was prohibited from locking the property was not included in the order dated the **6 March 2018**. It is the respondents' contention that a proper interpretation of the order dated the **6 March 2018** is that it has not done away with that order and that they are therefore permitted to trade from the property without the applicant's pending finalization of the action proceedings.

[5] The applicant does not deny that its representative has expressed the desire to enter into the agreement with a registered company instead of the 1st respondent in person. It was for this reason that the applicant and the 1st respondent agreed that the 1st respondent will register a company and the parties will pursuant to that draw an addendum to the

original agreement. It is common cause that although the 1st respondent had indeed registered a company as agreed, the addendum was never drawn and signed.

[6] The applicant alleges that it had to lock the property on the **28 January 2020** in order to establish who of the two respondents is in actual occupation of the property. The 1st respondents regarded this conduct as harassment on the basis that he had already deposed to a number of affidavits in which he had stated that it is the 2nd respondent who was in occupation. However, on the same date, the 1st respondent's attorney addressed a letter to the applicant complaining about the action taken by the applicant. The said letter is annexed to the founding affidavit as Annexure "LL9". The heading of the latter reads as follows:

**"ACCELERATE PROPERTY FUND LIMITED // GERHARDUS COETZEE t/a
IMPALA VLEISMARK".**

It is stated in the letter that the client, being the 1st respondent, is aware that the shop has been locked with a chain and lock and that a security guard has been placed at the entrance to prevent the 1st respondent from entering the property. It is further stated that the locking of the gate constitutes spoliation and that the 1st respondent will approach the court should possession not be restored by **9:00** on the date of the letter.

[7] The respondents raised two points *in limine* in opposition to the present application. The first point is that of *lis alibi pendens*. The respondents allege that the relief claimed in the action proceedings is similar to that claimed in this application. It is further alleged that the parties in this application are the same as in the action proceedings and the interlocutory (joinder) application. The cause of action as well as the subject matter of the litigation are

also the same. It is the respondents' submission that this application should be stayed until the final determination is made with regard to the issues raised in the action proceedings. The second point is that of misjoinder of the 1st respondent in that the applicant is fully aware that the premises are occupied by the 2nd respondent.

[8] The applicant contended that the point of law of misjoinder is misplaced in that, firstly, it is the 1st respondent who has signed the lease agreement. Secondly, that it is the 1st respondent who instructed his attorneys to write a letter in which the restoration of the property to the 1st respondent was demanded. The respondents contended that Annexure "LL2" does not constitute a lease agreement. It is their contention that it is a proposed lease agreement. The respondents aver that it appears clearly from paragraph 1, 2 and 13 that the lease was to be concluded between the applicant and a legal person with the 1st respondent binding himself jointly and severally as surety and co-principal debtor and in *solidum* with the debtor. The respondents aver that a separate lease agreement was supposed to be entered into with the legal person. As already stated elsewhere above, such addendum was for some reasons never drawn.

[9] The applicant stated in reply that it is evident from the respondents' answering affidavit that they do not have a defence to the merit of the applicant's claim. I am in agreement with the applicant's contention that the respondents' reliance on the court order dated the 2nd and **6th March 2018** to claim the right to occupy the property is misplaced. The issues in that case concerned the attachment of the respondent's immovable properties that are in the applicant's property. The order of the **2 March 2018** was granted pending the filing of the answering and replying affidavit affidavits. The matter was eventually argued on the **6 March 2018** and the court did not include the order that interdicted the applicant from

locking the doors to the property in the order made on the 6th. The 1st respondent denies that he has entered into a lease agreement with the applicant. It follows from this denial that if that was the case, he, on his own version could not claim the right to occupy the property. The 2nd respondent cannot, on the respondents' version, claim the right to occupy the property in that an addendum was never drawn.

[10] The 1st respondent contended that the property is occupied by the 2nd respondent and that joining him to the proceedings therefore constitute misjoinder. It was held in *YB v SB*¹ that different principles govern a non-joinder dispute where the court must determine the right of a defendant to demand the joinder of another party or the court's duty to order such joinder as opposed to a misjoinder dispute, involving a plaintiff's right to join parties as co-defendants in an action. The applicant contended that this point *in limine* must be dismissed on the following grounds. Firstly, that it has already been shown that Annexure "LL2" was signed by the 1st respondent in his personal capacity. Secondly, it is the 1st respondent who instructed an attorney to write a letter to complain about the locking of the property and to threaten legal action if possession of the property is not restored to him. Thirdly, the application for attachment of properties was granted against the 1st respondent only. The name Impala Vleismark appear in both Annexures "LL2" and "LL9". It is not denied that the 1st respondent is the 'client' referred in Annexure "LL2". The 1st respondent contended that he is trading as Impala Vleismark (Pty) Ltd and not Impala Vleismark. It is however common cause that Impala Vleismark was not yet registered as a company on the date on which Annexure "LL2" was signed. His denial is without merit. The 1st respondent is the sole director of a company which according to his version is in occupation of the

¹ 2016 (1) SA 47 (WCC) at 53H

property. He therefore has substantial interest in the matter. This point *in limine* of misjoinder is dismissed.

[11] With regard to the point *in limine of lis alibi pendens*, the applicant argued that there is no pending action based on *rei vindication* and cancellation of the lease agreement between the parties. The applicant submitted that this court should exercise its discretion to hear the application despite the alleged pending action on the basis of the consideration of fairness and convenience. It was submitted that the court should prevent the respondents, who do not have a *bona fide* defence to the applicant's claim, from continuing to occupy the premises and to conduct business therefrom without paying rent. The applicant argues that there can be no *lis alibi pendens* with regard to the 2nd respondent as there is no action pending between it and the applicant. I shall return to this issue later on in this judgment.

[12] The 1st respondent alleges that his lawyers have written letters to the applicant and has further deposed to affidavits in which the applicant was informed that it is the 2nd respondent who is occupying the property. He regards this application as vexatious for that reason. The 1st respondent fails to state the reasons and circumstances under which the 2nd respondent came to occupy the applicant's property. He further does not state the reasons why the applicant is not entitled to eject him and the 2nd respondent from the property in the face of his denial of the existence of a lease agreement. The 1st respondent seems to be claiming that he and the 2nd respondent are in occupation of the on the basis of the court order date the **6 March 2018**. I am of the view that this defence is unfounded. This view has already been rejected.

[13] The 1st respondent relies on the email dated the **25 June 2015** and the **29 June 2015** in support of the argument that it has always been the intention of the parties that the lease

agreement be entered into with a legal person and not with him. However, it is stated in the email of the 25th that a lease agreement will be entered into with him in his personal capacity with a company to be formed. I am of the view that the absence of the addendum does not in any way affect the terms of the existing agreement.

[14] Returning to the defence of *lis alibi pendens*, in **Ceasarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 (CC) and Others**² (Ceasarstone) it was held that:

“As its name indicate, a plea of lis alibi pendens is based on the proposition that the disputes (lis) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach different conclusions. It is the plea that has been recognized for many years.”

The applicant seeks ejectment of the 1st respondent in the main action. It is contended that the action at this stage has been instituted against the 1st respondent as the 2nd respondent has not yet been joined to the action proceedings. The applicant argued on this basis that the parties in the action proceedings are not the same as in this application. This argument is fallacious in that the applicant has launched an interlocutory application to join the 2nd respondent and that application is still pending.

² 2013 (6) SA 499 SCA at par [2] and [3]

[15] On the cause of action, the applicant contended that there can be no danger that the issues to be decided in this application will overlap with those in the pending action. It was argued that the validity or otherwise of the lease agreement and payment or non- payment of rent is not relevant where *rei vindicatio* is claimed. On paragraph [12] of Ceasarstone it was stated that:

“[12] ... In addition, the cause of action, whilst revolving around the same issue, is necessarily different – in the one case based on a lawful cancellation of the agency action, whilst revolving in the other on a repudiation of that agreement – as the relief sought. If the statement by Zulman AJ is definitive of the scope of the plea of it is fatal to Ceasarstone’s case.”

[16] The above paragraph supports the applicant’s contention. The cause of action in this case, as in Ceasarstone, revolves around the same issue. However, the applicant is seeking the ejectment of the respondents on the basis of its ownership of the property and not on any agreement that the parties may have entered into. The applicant is also not seeking payment of arrear rental. The respondents on the other hand are not raising any valid entitlement to occupy the property. I agree that the cause of action is not the same as the issue in this application.

[17] The absence of a lawful entitlement to occupy the property brings this court to another argument raised by the applicant, being the discretion of the court to decide to proceed with this application while the action is still pending. The applicant relies on the decision in **Geldenuys v Kotze**³ as referred to in **Nordbak (Pty) Ltd- v Wearcon and Others**⁴ (Norbak). The court in Norbak found that both convenience and equity required that the

³ 1964 (2) SA 167 (O)

⁴ 2009 (6) SA 106 (W)

application be dealt with and that the defence of *lis pendens alibi* not be acceded to. The court relied on the following in the exercise of its discretion:

1. *Firstly, as to convenience I am in as good a position to decide this matter at this stage as the trial court will be in the action. I have reviewed numerous amounts of paper, heard lengthy argument. The facts set out in the founding affidavit are not contested. It is therefore convenient for the court to dispose of this matter at this stage.*
2. *Secondly, as to equity the equity scream out in favour of the applicant in this case. The applicant is the victim of a delict, perhaps a fraud. So far the applicant has recovered no compensation by way of damages. The applicant has had to chase after its rights in more than one proceeding in more than one court. There is no reason why the applicant's remedy should not be withheld from it at this stage.*
3. *Thirdly, the facts of this case are very unusual. At this stage there is no dispute that the applicant is entitled to the relief that it seeks in prayer 1.1. I specifically asked counsel for the respondent and he conceded that he did not contest the applicant's right to relief under prayer 1.1 and that it accorded exactly with the intent of the with prejudice offer made in the prior proceedings.*
4. *Fourthly, there is accordingly in the present situation no dispute about the applicant's right to the main relief it seeks in this application. A postponement will only keep the applicant out of its rights that much longer.*
5. *The respondents have not offered up any defence or even a summary of a defence, either in this application or in the main action. In fact, the with*

prejudice tender amounts to a concession of the applicant's claim on this particular issue in the main action.

- 6. The applicant was not in a position to move for a final interdict on undisputed facts until after it had initiated the action. This is because it did not have at its disposal the evidence and the with prejudice offer that the applicant now relies upon. These new developments entitle the applicant to come to court.*
- 7. The determination of this issue at this stage will relieve the parties as well as the court of the obligation to hear extensive evidence traversing the same subject matter as was traversed in this application. I note again that notwithstanding that the respondents conceded with prejudice the applicant was entitled to interdictory relief, they did not amend their plea to make the necessary admissions and put the issue beyond doubt for the purposes of trial.*
- 8. I am convinced given the history of mendacity by the respondents as enumerated at length in the founding affidavit it is essential that the applicant obtain final relief to protect its rights as soon as possible.*

[18] The respondents in this matter have not offered up any defence or even a summary of a defence on the merits of the application. The applicant is entitled to an ejectment order in the absence of a lawful right to the respondents' occupation of the property. I will therefore exercise my discretion and grant the relief sought in this application.

[19] In the result I make the following order:

- i. The 1st and 2nd respondents and anyone occupying property known as G8- 2 Bosveld Shopping Centre, situated at Erf 1[...], Bosveld, Bela Bela, Limpopo (the property), through the 1st and 2nd respondents are ejected from the property;

- ii. The 1st and 2nd respondents are to pay the costs of this application jointly and severally, the one paying the other to be absolved.

M V SEMENYA

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION

APPEARANCES

FOR THE APPLICANT : MR.J GROBBLER

INSTRUCTED BY : REAAN SWANEPOEL ATTORNEYS

FOR THE RESPONDANTS : ADV. J STROEBEL

INSTRUCTED BY : LOMBARD & PARTNERS

DATE OF HEARING : 26 MAY 2021

DATE OF JUDGEMENT : 05 JULY 2021