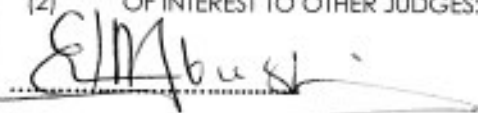




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number: 32500/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
	
E.M. KUBUSHI	DATE: 28-05- 2021

In the matter between:

WESTHILLS 379 DEVELOPMENT (PTY) LIMITED

APPLICANT

(REG. NO.: 2017/155033/07)

and

BUNTU FOODS (PTY) LTD

RESPONDENT

(REG. NO: 2017/479535/07)

JUDGMENT

KUBUSHI J,

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 28 May 2021.

INTRODUCTION

[1] In this application the applicant, Westhills 379 Developments (Pty) Limited, seeks an order for the eviction of the respondent, Buntu Foods (Pty) Ltd, from the commercial premises it leased to the respondent, with costs. The principal issues being whether the respondent materially breached the lease agreement and if so, whether the lease agreement require rectification in respect of the obligation to pay the second deposit required in terms of the lease agreement.

BACKGROUND

[2] The common cause facts are that on 14 December 2018, the parties concluded a written lease agreement. The lease agreement applies to premises comprising two parts, Unit 2 and Unit 3. The lease agreement provides for the respondent to pay a deposit, which was to be paid in two tranches, and for the respondent to pay rental for Unit 2 and Unit 3. The respondent paid rental in respect of Unit 2 and the first tranche of the deposit. The respondent has not paid any rental in respect of Unit 3, and has not paid the second tranche of the deposit. The respondent remains in possession of Units 2 and 3. After giving the respondent an opportunity to remedy its breaches, the applicant is alleged to have validly terminated the lease agreement, and, as a result, it is averred on

behalf of the applicant that the respondent, remains in unlawful possession of the premises. The applicant has as such approached court for the relief to have the respondent evicted from the premises.

[3] The respondent is opposing the application and raises various defences. In answer to the applicant's claim, the respondent seeks to establish that it did not breach the lease agreement by failing to pay the second deposit payment and by failing to make any payments in respect of Unit 3, which is the unit in contestation. The respondent's defence, in essence is that:

3.1 Firstly, it has not breached the obligation to make the second deposit payment because the lease agreement falls to be rectified on the basis of a mutual mistake between the parties.

3.2 Secondly, it has not breached the obligation to pay any amounts in respect of Unit 3. In that regard, the respondent contends, that it was not afforded full beneficial occupation of the premises since there are various defects at the premises (Unit 3 in particular) and it has not been provided with occupation certificates for Unit 2 and Unit 3.

[4] In addition, the respondent has raised two preliminary points, namely, the application to strike out in terms of Uniform Rule 16 (5) and a material

dispute of fact. I have to deal, first, with the preliminary points before considering the merits of the main application.

PRELIMINARY POINTS

Rule 6 (15) Application

[5] As earlier stated, the respondent has launched an application for an order in terms of Uniform Rule 6 (15) as a preliminary issue. The purpose of the application is to have certain paragraphs, words and annexures contained in the applicants' replying affidavit struck out as it is contended that they constitute a new cause of action not pleaded in the founding affidavit and which is prejudicial to the respondent.

[6] Uniform Rule 6 (15) provides as follows:

"The Court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious, or irrelevant with an appropriate order as to costs, including costs as between attorney and client. The Court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it is not granted."

Grounds for Striking-Out

[7] The legal grounds upon which the respondent relies are that the impugned words, paragraphs, and annexures stand to be struck out because they constitute a new cause of action which the applicant is attempting to introduce in the replying affidavit and that the respondent is prejudiced thereby. The paragraphs, words and annexures that the respondent seeks to strike out are stated in the application to strike out as follows:

- 7.1 The following words in paragraph 4 of the applicant's replying affidavit "*or other charges whatsoever for Unit 3*" be struck out.
- 7.2 The following words in paragraph 8.2 of the applicant's replying affidavit "*and utility charges relating to Unit 3 including water, electricity and the like*" be struck out.
- 7.3 Paragraphs 8.5 and 8.6 of the applicant's replying affidavit be struck out.
- 7.4 Paragraphs 39 to 55 and annexure RA7 of the applicant's replying affidavit be struck out.
- 7.5 Paragraph 64 of the applicant's replying affidavit be struck out.

7.6 Paragraph 234 and annexure RA29 of the applicant's replying affidavit be struck out.

[8] The argument by the respondent's counsel, in this regard, is that in terms of the founding affidavit, the breach relied on by the applicant was that the respondent had allegedly failed to pay the 'second portion' of the deposit and the rental which were due. Counsel argued, further, that in terms of the applicant's notices of breach, the only breach relied upon by the applicant was the respondent's alleged failure to pay the rental and the 'second portion' of the deposit. The issue of consumption charges (electricity, water, and sanitation), according to the respondent's counsel, was never raised by the applicant in the founding affidavit. Therefore, the contention is that by introducing the consumption charges in the replying affidavit, the applicant is attempting to introduce a new cause of action in reply. All the applicant's causes of action should have been contained in the founding affidavit, so it is argued.

[9] In support of this argument, the respondent's counsel referred to the decision in *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others*,¹ wherein Viljoen J stated the following:

¹ 1974 (4) SA 362 (T).

"It has always been the practice of the Courts in South Africa to strike out matter in replying affidavits which should have appeared in petitions or founding affidavits, including facts to establish *locus standi* or the jurisdiction of the Court. See *Herbstein and Van Winsen, The Civil Practice of the Superior Courts in South Africa*, 2nd ed., pp. 75, 94. In my view this practice still prevails. In submitting that an applicant may in the replying affidavit supplement a case he has made out in the founding affidavit Mr. Van der Spuy has referred me to the decision in the matter of *Reiter v Bierberg and Others*, 1938 S.W.A. 13, in which the headnote reads:

"A petitioner for an interdict against spoliation is entitled to embody in his petition only sufficient allegations to establish his right, and in his replying affidavit he may supplement the information in the petition by anything further to enable him to refute the case put up by respondent."

It lies, of course, in the discretion of the Court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit. In the present case, the applicant has not made out even a skeleton of a case in so far as his *locus standi* rests on a *stipulatio alteri*. *Reiter's* case, *supra*, does not assist the applicant."

[10] Continuing with the analogy used in *Titty's Bar and Bottle Store* case, the respondent's counsel submits that the applicant has not even made out a 'skeleton of a case' insofar as consumption charges in the founding affidavit, are concerned. Accordingly, the respondent is contending for the words,

paragraphs and annexures pertaining thereto in the replying affidavit and as identified in its application to strike out, to be struck out.

[11] The question that ought to be determined is whether the impugned words, paragraphs, and annexures that the respondent seeks to be struck out constitute a new cause of action which the applicant is attempting to introduce in the replying affidavit, and if so, whether the respondent is prejudiced thereby. If this question is answered in the positive, it will follow that the words ought to be struck out as prayed for by the applicant.

[12] For the reasons that follow hereunder, I am in agreement with the applicant that the words and/or paragraphs and/or annexures the respondent is complaining about do not introduce a new cause of action that was not included in the founding affidavit, and should, therefore, not be struck out.

[13] As already stated the respondent's application to strike out is based on the failure by the applicant to allege one of its causes of action, the failure to pay consumption charges, in the notices of breach and in the founding affidavit and alleging same in the replying affidavit.

[14] The applicant's counsel, correctly so, contends that the consumption charges, though not raised in the notices of breach, as a cause of the breach,

they have been raised in paragraph 9.9 of the founding affidavit. The said paragraph reads as follows:

"9.9. The Respondent would pay to the Applicant all electricity and water charges in respect of the premises including charges payable in terms of the relevant City Council's local electricity tariffs and by-laws as amended from time to time (clause 5);"

[15] Moreover, when paragraph 9.9 and paragraph 9.10 of the founding affidavit are read together it becomes quite clear that the applicant did raise the consumption charges in the founding affidavit. Paragraph 9.10 reads that -

"9.10 The Respondent would be liable for and shall pay for all fees levied by or payable to the relevant City Council for sanitary refuse rubbish removal, sewerage and vacuum tank services and/or removals connected therewith and for all increases in respect of these items from time to time (clause 5);"

[16] From the perusal of the abovementioned paragraphs it is evident that electricity and water charges, charges payable in terms of the relevant City Council's local electricity tariffs and all fees levied by or payable to the relevant City Council for sanitary refuse rubbish removal, sewerage and vacuum tank services and/or removals are consumption charges.

[17] A further paragraph that should be read together with the aforementioned paragraphs, is paragraph 9.11 which states that

"9.11 If the Respondent failed to pay any rent or other amount payable in terms of the Lease Agreement on due date. . . In such event the Applicant shall without prejudice to its rights to damages or to its rights to eject the Respondent from the leased premises or to have any other claim of any nature whatever that the Applicant may have against the Respondent as a result thereof be entitled to cancel the Lease Agreement (clause 21)." (my emphasis)

[18] When all the aforementioned paragraphs of the founding affidavit are read together it becomes quite clear that the applicant did raise the failure by the respondent to pay consumption charges as a breach of the agreement of lease. The phrase "other amount payable in terms of the Lease Agreement" contained in paragraph 9.11 of the founding affidavit, is inclusive of all the consumption charges as stated in paragraph [17] of this judgment.

[19] Furthermore, the question in paragraph [12] of this judgment, can be answered by considering what the relief the applicant is seeking in this application. It is common cause that the relief sought by the applicant is the eviction of the respondent from the leased premises. In order to succeed in such a claim, the applicant must allege and prove that the respondent has

breached the terms of the lease agreement, thus, entitling it (the applicant) to cancel the agreement and evict the respondent from the premises.

[20] The applicant submits that it was entitled to terminate the lease on the basis of three breaches by the respondent:

20.1 The respondent has failed to pay the second deposit payment due under the lease;

20.2 The respondent has not paid any rent in respect of Unit 3 to date, despite being in occupation of the premises; and

20.3 The respondent has not paid any amounts in respect of water, electricity, sanitary refuse rubbish removal, sewerage and vacuum tank services and/or removals (Consumption Charges) that it has consumed in respect of Unit 3.

[21] As already stated, the argument by the respondent's counsel is that the applicant did not raise the issue of the consumption charges in the termination notice as well as in the founding affidavit and on that basis counsel contends that the applicant is not entitled to raise same in the replying affidavit. I have, already, dealt with the argument relating to the founding affidavit. As far as the argument relating to the termination letters is concerned, it is trite that the

respondent is entitled to rely upon any breach to support its termination of the agreement — even breaches it did not initially rely upon. The decision in *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd*,² to which the respondent's counsel referred in the heads of argument is apposite in this regard. The court in that case said as follows:

"Where a party seeks to terminate an agreement and relies upon a wrong reason to do so he is not bound thereby, but is entitled to take advantage of the existence of a justifiable reason for termination, notwithstanding the wrong reason he may have given."

[22] The applicant's submission that the consumption charges are validly raised even if they were not the basis for the cancellation, is well taken. Whether or not the applicant relied in its termination notices on the respondent's failure to pay Consumption Charges is immaterial — it may rely on those breaches now.

[23] The question that follows is whether the said paragraphs, words and annexures if left in the replying affidavit will be prejudicial to the respondent. It is my view that the respondent would not be prejudiced if the said words, paragraphs and annexures in the replying affidavit are not removed.

² 1985 (4) SA 809 (A) at 832C-D.

[24] In terms of Uniform Rule 6 (15), a court shall not grant the application unless it is satisfied that the applicant will be prejudiced in its case if the application is not granted.

[25] The court in *Vaatz*,³ dealing with prejudice, in relation to Uniform Rule 6 (15), remarked as follows:

"The phrase 'prejudice to the applicant's case' clearly does not mean that, if the offending allegations remain, the innocent party's chances of success will be reduced. It is substantially less than that. How much less depends on all the circumstances; . . . "

[26] In this, instance, the respondent would not be prejudiced as the relief sought by the applicant is not *per se* for payment of the consumption charges, but the relief is for eviction.

[27] I am, as such, satisfied that the paragraphs, words and annexures should not be struck out.

Material Disputes of Fact

[28] The respondent has, as earlier stated, raised a point *in limine re* material disputes of fact. Relying on the decision of the Supreme Court of Appeal in

³ *Vaatz v Law Society of Namibia* 1991 (3) SA 563 at 566J.

National Director of Public Prosecutions v Zuma,⁵ the respondent's counsel contends that when regard is had to the affidavits filed of record, the papers reveal several extensive and material disputes of fact, incapable of being resolved in these proceedings.

[29] The proposition presented on behalf of the applicant is that the respondent's defence should be rejected out of hand in terms of the second exception to the *Plascon-Evans*⁶ rule and the applicant's version be accepted as the truth.

[30] According to the applicant's counsel, the proper approach to disputes of fact in motion proceedings has been articulated by the Supreme Court of Appeal in the following terms:

"an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers."

⁵ 2009 (2) SA 277 (SCA) at para [26].

⁶ See *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A).

[31] Therefore, as the argument runs, the rule, that the respondent's version of the facts must form the basis for the court's adjudication of an application for final relief, is subject to two exceptions.

31.1 The first exception applies where a denial by the respondent of a fact which has been alleged by the applicant may be insufficient to raise a real, genuine or *bona fide* dispute regarding this alleged fact. If, in such a case, the respondent has not availed itself of the right to apply for the deponent concerned to be called to be cross-examined in terms of Rule 6(5)(g) of the Uniform Rules of Court, and the Court is satisfied as to the inherent credibility of the factual averment of applicant, it may proceed on the basis of the correctness of this averment and include it within the factual matrix upon which it determines whether the applicant is entitled to the relief sought.

31.2 The second exception applies where a respondent's answer contains a denial of allegations which were so far-fetched and untenable that a court is justified in rejecting them on the papers. The second exception is designed to deal with a case in which a respondent makes certain bald allegations or far-fetched denials which are manifestly untenable, not supported by any evidence

or reason and which have been designed simply to exploit the ordinary *Plascon-Evans* rule to the latter's advantage and to the detriment of applicant whose factual averments cannot be attacked on any plausible basis.

[32] In other words, in terms of the second exception to the *Plascon-Evans* rule, a court is entitled to reject on the papers a positive defence put up by a respondent, so it is argued. To strengthen this argument, the applicant's counsel referred to decisions in *Da Mata v Otto, NO*⁷ and *Siffman v Kriel*,⁸ wherein the court confirmed that even uncontradicted evidence may be rejected by a court in motion proceedings.

Discussion

[33] It is trite that motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is, also, well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the

⁷ 1972 (3) SA 858 (A) at 868B-F.

⁸ 1909 TS 538 at 543.

respondent, together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.

[34] The parties seem to agree that the applicant cannot escape the fact that there exists a fundamental factual dispute, save where the *dictum* in the *Plascon-Evans* case can be successfully applied.

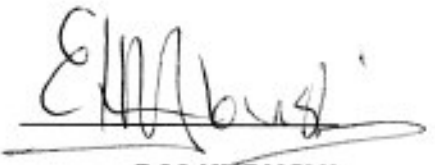
[35] On the papers before me the allegations of the respondent cannot be said to be "far-fetched or clearly untenable" justifying this court in rejecting them merely on the papers. The defences raised by the respondent are not bald allegations or far-fetched denials which are manifestly untenable, or not supported by any evidence or reason and does not appear to have been designed simply to exploit the ordinary *Plascon-Evans* rule.

[36] It is evident from the papers that there is a material dispute of fact which cannot be decided on the papers as they stand. In the exercise of my discretion I do not think that the issues pertaining to the dispute of fact can be resolved by *viva voce* evidence but must be referred to trial.

[37] The parties seem not to be agreed as to the issues that requires determination by the court. In order to limit the issues for determination at the trial, I, in that regard, have to rule that the parties hold a pre-trial conference to jointly compile the issues for the determination of the court before the matter can be set down for hearing.

[38] In the premises I have to make the following order:

1. The application to strike out is dismissed with costs.
2. The matter is referred to trial.
3. The parties are to hold a pre-trial conference to jointly compile the issues for determination by the court at the trial, before the matter is set down for hearing.
4. The pleadings filed on record are to serve as the pleadings at the trial and the parties are given leave to file any pleadings which may be considered necessary to take the process to the conclusion of the trial.
5. Costs of the main application are reserved for determination at the trial.


E.M. KUBUSHI

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Appearance:

Applicant's Counsel	: Adv. DW Watson
Applicant's Attorneys	: Christelis & Artemides Attorneys
Respondent's Counsel	: Adv A Lamprecht
Respondent's Attorneys	: Millers Attorneys
Date of hearing	: 20 April 2021
Date of judgment	: 28 May 2021