IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISON, JOHANNESBURG

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

16/3/2018
DATE

SIGNATURE

CASE NUMBER: 0001018/2017

& 1019/2017

In the matter between:

ACACIA LEASING (PTY) LTD Applicant

And

JP KRUGERRAND DEALS CC Respondent

JUDGMENT

SARDIWALLA J:

[1] This is an application brought on notice of motion. The applicant seeks leave to terminate the water and electricity supply to the respondent.

[2] The Respondent opposes the application on the following grounds; that there are legal proceedings pending between the parties, it is in business rescue and invokes Section 136(2) of the Companies Act 71 of 2008 to suspend performance of its obligations in terms of the Lease Agreement.

[3] The issues before me raised by the applicant are the following:

5.1 The status of pending legal proceedings;

5.2 The respondent's breach of contract in terms of the Lease Agreement;

5.3 The applicant's right to cancel the Lease Agreement;

5.4 The respondent's unlawful occupation of the premises;

5.5 The effect of business rescue on the Applicant's claim;

5.6 The Section 136(2) of the Act;

5.7 Applicant's right to terminate water and electricity supply to the premises;

5.8 The summary judgment proceedings in the Magistrate's Court;

5.9 Conflicting versions by the respondent.[1]

PENDING LITIGATION

[4] The applicant instituted an action in the in Regional Magistrates Court for the region of Gauteng, held at Kempton Park, under case number GP/KP/RC 999/16, seeking an order for payment of arrear rental and additional charges in the sum of R339, 545.23. The summons was served on respondent on 30 August 2016. The applicant avers that the lease agreement entitles the applicant to cancel the lease

[1] Applicants Heads of Argument, paragraph 1.3

agreement for material breach of non-payment and that the cancellation of the lease agreement has not been disputed by the respondent or that it remains in occupation of the leased premises. The applicant is seeking the termination of water and electricity in the current application and is therefore not the same as the relief sought in the regional court proceedings. It accordingly cannot be considered to be vextatious[2].

[5] The respondent opposes the current application and raises the defence of *Lis Alibi Pendens* in that the causes of action in both applications are of the same subject matter. It further alleges that the applicant's right to cancel the agreement on grounds of a material breach is still in dispute. The onus to prove the above rests on the respondent. In **Keyter NO v Van Der Meulen and Another NNO**[3] Plasket J held the following relevant principles were applied when the defence of *lis pendens* was raised:

> *"[10] The defence of lis alibi pendens arises when four requirements are met. They are that: (a) there is litigation pending (b) between the same parties (c) based on the same cause of action and (d) in respect of the same subject-matter. Lis alibi pendens does not, if successfully invoked, put an end to the plaintiff's or applicant's case. Rather, it allows for the staying of the latter matter pending the final determination of the earlier matter. Once the earlier proceedings have been finalised, however, the later proceedings will be struck by, and terminated by, the defence of res judicata."*

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[2] Applicant's Heads of Argument, paragraph 2
[3] 2014 (5) SA 215 (ECG) at 217 F – 220 B

[6] It is common cause that there is pending litigation between the same parties. What is therefore left to be determined is whether the cause of action and subject matter are the same. The respondent submits that the underlying cause of action is arrear rental payment which has resulted in the applicant's alleged right to cancel the lease agreement and ejectment of the respondent. In matters were some of the requirements to the defence have been met the Court still has the discretion to determine on what is just and equitable on balance of convenience as held in Roper J *Ltd* dealt with this aspect when he said: ***Loader v Dursot Bros (Pty)Ltd***[4]

> *'It is clear on the authorities that a plea of lis alibi pendens does not have the effect of an absolute bar to the proceedings in which the defence is raised. The Court intervenes to stay one or other of the proceedings, because it is prima facie vexatious to bring two actions in respect of the same subject-matter. The Court has a discretion which it will exercise in a proper case, but it is not bound to exercise it in every case in which a lis alibi pendens is proved to exist . . . .'*

[7] In applying the discretion granted to the Court to determine what is just and equitable it is important to determine whether the proceedings are *prima facie* vexatious while also taking into consideration the rights afforded to a litigant in terms of Section 34 of the Constitution[5]. In **Trevor B GiddeyNO v J C Barnard and Partners [2006] ZACC 13**; **2007 (5) SA 525** (CC), the Constitutional Court held as follows:-

> "*[15] Section 34 of the Constitution provides that everyone has the right to have a dispute that can be resolved by the application of law decided by a*

[4] 1948 (3) SA 136 T
[5] Act 200 of 1993

alleged gross negligence it alleges. I am of the opinion that the respondent cannot place the burden of its existence and continued operations at the feet of the applicant by suggesting that terminating the electricity and water supply would place the respondent in a position of incurring unnecessary expenditure during business rescue proceedings. The applicant cannot be expected to finance the respondent without mitigating the risks and costs to itself. The respondents version is therefore contradictory and I am of the view that to afford the respondent the continued right to receive supply of water and electricity which is an expense necessary to conduct business in the ordinary scope of any business at the applicants cost, pending the litigation in the Magistrate's Court cannot be deemed to be just and equitable in terms of the above law. I am also not persuaded that the applicant's intention is to harass, annoy or abuse the court process and no proof hereof has been presented before this Court. Therefore in the absence of proof to the contrary, to stay the proceedings would be infringing on the applicant's right in terms of Section 34.

<u>*BREACH OF CONTRACT AND RIGHT TO CANCEL AGREEMENT*</u>

[11] The applicant contends that failure to pay the arrear rental and additional charges is a material breach of the contract as set out in terms of *clause 30* which states that:

> *"30.1 If*
>
> *30.2 The [Respondent] fails to pay any amount due by the [Respondent] in terms of this Agreement;*
>
> ...

30.13 Then the [Applicant] may, without prejudice to any other rights and remedies it may have:

30.13.1 cancel this Agreement by written notice given to the [Respondent] and may retake possession and occupation of the Premises' and/or

30.13.2 claim any damages which it suffered from the [Respondent]

30.13.3 A ***certificate****, signed by any manager of the [Applicant] or of the [Applicant's] agent, whose appointment need not be proved, hall be first instance proof of any amounts owed to the [Applicant] by the [Respondent] in respect of this Agreement, as may be amended from time to time."* [emphasis added][8]

[12] On 16 April 2013 the applicant and the respondent concluded a written agreement of lease of the premises which commenced on 1 November 2012 and terminated on 31 October 2017. The respondent was indebted to applicant in the amount of R331 271.77 including and up to December 2016 in respect of its utility consumption and municipality charges in terms of the agreement of lease.

[8] Founding Affidavit, paragraph 7.9

[13] On 17 November 2017 applicant's attorneys addressed a letter to respondent informing it that it was in breach of the agreement of lease, by failing to make payment of the rental and additional charges due to applicant as set out in *clause 6 and 30* of the lease agreement respectively. Respondent was informed in this letter that respondent was indebted to it in the amount of in respect of rental and additional charges and that applicant reserved the right to cancel the agreement.

[14] The applicant instituted an action in the Regional Magistrates Court for the region of Gauteng, held at Kempton Park, under case number GP/KP/RC 999/16[9] in which it claimed an order ejecting respondent from the property and payment of the sum of R R339'545.23 for arrear rental and additional charges up to and including August 2016[10]. The summons was served on respondent and the proceedings at the regional court are currently pending.

[15] The Applicant further relies on *clause 7.1*[11] of the Lease Agreement which provides that the Respondent must pay

> "*...the rental and all other amounts due in terms of the Agreement on or before the first day of each month, <u>without deduction or set off for any reason whatsoever</u> and free of bank commission or charges during office hours...*"

[16] The respondents defence is that there is a counter-claim for gross negligence and consequently has an action for the breach of contract. Further, the respondent challenges the validity and lawfulness of the cancellation of lease agreement. The respondent contends that *Clause 17.1* takes precedence over *clause 7.1 and clause 30. Clause 17.1* states that;

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[9] Founding Affidavit, paragraph 19
[10] Founding Affidavit, paragraph 16 and 17
[11] Founding Affidavit, paragraph 3.4

"Notwithstanding any provision in this Agreement, same shall not limit or exempt liability attributable to gross negligence";

[17] In the matter of **Arbour Town (Pty) Ltd v Sunny Skies Investments CC t/a Chimney & Sabah Collection (aka Pearl of India) and Another**[12] the plaintiff's claim against the defendants was for an amount due in terms of a written lease agreement. The plaintiff alleged that the first defendant breached the lease agreement by failing to pay an amount equivalent to the sum of rental and other charges. The respondents averred in an affidavit that the parties had a compromise agreement which was entered into after entering into the lease agreement and that the compromise agreement as such altered the terms and conditions of the lease agreement entered into. Shishi J Held that;

" [36] The respondents alleged that the applicant committed a material breach of the agreement in that it failed to effect repairs to the ceiling of the shop when the roof of the building leaked so badly that the rain poured into the restaurant and onto the customers food on many occasions, causing customers to become disillusioned with the restaurant and thereby causing harm to first respondents reputation. Eventually the ceiling became so sadden with rain water that the entire ceiling fell down during the Easter holiday season of 2012, resulting in huge loss of income for the respondents.

[37] The applicant, despite numerous requests refused to effect the necessary repairs for many weeks. The respondents eventually effected the repairs in terms of clause 21.1.2 of the written lease agreement in the amount of R18 900.00 which amount the applicant is liable. But despite demand the applicant

[12] (5066/2012) [2012] ZAKZDHC 97

has failed or neglected to pay. No invoice has, however, been annexed to the affidavit in support of this claim.

[38] The respondents contended that there is nothing preventing the respondents from using defences of "set-off" and "breach" of the agreement as the parties are governed by the compromise agreement which does not exclude same."

[18] The Court held further, at para 32, that;

"*The defendant must consequently put up a defence honestly, disclose fully the nature and grounds of it and in so far as he relies upon facts lay before the Court, facts which if proved will be a good defence."*

[19] Applying the principles of the case *supra* to this application, the respondent in its affidavit states that its defence to the breach of the agreement is a counter claim. The respondent alleges that clause 17.1 overrides clause 7.1 which makes provision for a set-off or deduction and therefore makes the respondent's claim liquid[13]. The applicant contends, and correctly so in my view that such defence was not raised in its plea and has not provided proof of a valid liquid claim against the applicant for gross negligence. It is clear that the intention of the parties was that no set-off or deduction would operate between them. In the absence of a compromise agreement or valid liquid counter claim the defence raised is not *bona fide*, and is no defence at all. In circumstances where there is no agreement varying the terms of the agreement, the parties are governed by the terms of the written lease agreement the applicant is entitled to cancel the lease agreement. It was held in ***Win Twice***

[13] Respondent's Heads of Argument, paragraph 5, 6 and 7

Properties (Pty) LTd v Binos and Another[14] that a party may terminate an agreement by delivery of a summons or an application. The right to cancel the lease agreement was accordingly lawful.

UNLAWFUL OCCUPATION

[20] I have already found as dealt with above that the applicant's right to cancel the lease agreement was lawful. In the absence of a valid defence the respondent is accordingly in unlawful occupation of the leased premises.

EFFECTS OF BUSINESS RESCUE

[21] The business rescue practitioner opposed the application on behalf of respondent. Mr Johan Louis Klopper deposed to the main answering affidavit on behalf of respondent. The respondent commenced business rescue proceedings on 20 January 2017 and contends that such action is stayed in terms of the moratorium provided for in terms of Section 133(1) of the Companies Act, No 71 of 2008 (the Act).[15]

[22] In their answering affidavit and in argument the business rescue practitioner raised a number of defences in *limine*. They are as follows:

> *"(**a**), that there are pending legal proceedings, where the Applicant's rights to cancel the Lease Agreement, to seek an Eviction Order resulting therefrom and to seek relief as per the Notice of Motion in the present Application, are in issue (**b**), the Respondent is in Business Rescue;*

[14] 2004 (4) SA 436 (WLD)
[15] Answering Affidavit, paragraph 4.4

the third ground of opposition, is that I have elected to invoke the rights conferred upon me in terms of Section 136(2) of the Act, which I hereby do, to suspend the Respondent's performance in respect of the Lease Agreement (being an Agreement contemplated in Section 136(2)(a)(i)), for the duration of the Business Rescue Proceedings."[16]

[23] The respondent's defence is that the applicant is precluded by the provisions of sections 133(1) and 134(1)(c) of the Companies Act[17] to bring the present proceedings. The relevant provisions read as follows:

"133 General moratorium on legal proceedings against company

(1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum…

"134 Protection of property interests

(1) Subject to subsections (2) and (3), during a company's business rescue proceedings

… …

(c) despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property in the lawful possession of the company, irrespective of whether the

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16 Answering Affidavit, paragraph 4.5 and 4.6
17 Act 71 of 2008

property is owned by the company, except to the extent that the practitioner consents in writing."

[24] The Act clearly infers that the property in question must be within the lawful possession of the person or entity wanting to seek refuge under these provisions. In my view the Applicant has correctly averred to in its heads of argument that the respondent can only rely on such moratorium provided for in terms of the Act where it is proven that the cancellation of the lease was invalid. I have already found that the cancellation of the lease agreement was valid and was terminated prior to the institution of the business rescue proceedings. The respondent cannot rely on the provisions of the Act as the cancellation of the lease agreement is valid and the respondent is in unlawful possession of the premises. The applicant is therefore not precluded from pursuing the present application.

SECTION 136(2) OF THE ACT

[25] As indicated in my finding above the sections of the Act do not apply to the respondent and therefore the respondent's performances in terms of its obligations under the lease agreement are accordingly not suspended.

SUMMARY JUDGMENT PROCEEDINGS IN THE MAGISTRATES COURT

[26] I do not find it necessary to deal with this aspect in light of the above findings and it is therefore irrelevant.

TERMINATION OF SERVICES

[27] I have already found that the right to cancel the lease agreement was valid and therefore the respondent is unlawfully occupying the premises. I accordingly agree

with the decision ***in Anva Properties CC v End Street Entertainment Enterprises***[18] and find that there is no legal basis on which the respondents should have the use and enjoyment of the supply of water and electricity at the expense of the applicant.

CONFLICTING VERSIONS

[28] The respondent has not provided this Court with proof of a valid liquid claim against the applicant nor proof that such defence was raised in the regional court proceedings or that the applicant is indeed the actual debtor.

CONCLUSION

[29] The respondent cannot invoke section 133(1) and 134(1)(c) of the Companies Act as the concept is the *lawful possession* of the company. After the cancellation of the lease agreement the respondent is no longer in lawful possession of the property. The applicant *in casu* cannot be deprived of its power to exercise its ownership whilst respondent *in casu* would be unable to use it as such use would be unlawful.

[30] In my view it could not have been the legislature's intention that the company in business rescue invoke Section 136 (2) of the Act to suspend its obligations in terms of a lease agreement by utilising assets to which it has no lawful claim.

[18] CC (22109/2014) [2015] ZAWCHC 66 (14 April 2015)

[31] I accordingly find that applicant is not precluded by the provisions of sections 133(1), 134(1)(c) and 136 (2) of the Companies Act from asserting its right of ownership in the property and terminating the water and electricity to the respondent.

<u>COSTS</u>

[32] In light of finding that the written lease agreement is valid and that the respondent is in unlawful occupation of the property, the terms of the agreement arising out of breach of the agreement is clear and is set out in *Clause 32.2*[19] which provides that the defaulting party shall be liable for all legal costs on an attorney and own client scale.

<u>ORDER</u>

I hereby order that:

<u>Claim A:</u>

1. *The Applicant is hereby authorised terminate the supply of electricity to the premises which the Respondent occupies, situated at CS 011, Modderfontein Industrial Complex, Modderfontein, measuring approximately 2035 square metres ("the premises"), unless the Respondent makes payment of the full arrear electricity figure in the amount of R322'012.03;*
2. *In the event of the electricity being reconnected as a result of payment in terms of paragraph 1 above: the Applicant is authorised to terminate the supply of electricity to the premises which the Respondent occupies, in the event of the*

[19] Founding Affidavit, paragraph 7.1

Respondent falling in arrears with its subsequently electricity payments, unless the Respondent makes payment of the full arrears of such subsequent electricity figures in respect of the premises;

3. That the occupant(s) of the premises grant an electrician, appointed by the Applicant, access to it in order to disconnect the electricity supply to the premises;

4. The Sheriff of the Honourable Court is authorised to grant an electrician, appointed by the Applicant, access to the premises in order to disconnect the electricity supply to the premises;

5. That the Respondent is prohibited from tampering with anything installed or removed by the electrician, so as to reconnect the power supply to the premises;

Claim B:

6. The Applicant is authorised to terminate the supply of water to the premises, unless the Respondent makes payment of the full arrear water figure in the amount of R9'259.74;

7. In the event of the electricity being reconnected as a result of payment in terms of paragraph 1 above: The Applicant is authorised to terminate the supply of water to the premises which the Respondent occupies, in the event of the Respondent falling in arrears with its subsequently water payments, unless the Respondent makes payment of the full arrears of such subsequent water figures in respect of the premises;

8. That the occupant(s) of the premises grant an plumber, appointed by the Applicant, access to it in order to disconnect the water supply to the premises;

9. *The Sheriff of the Honourable Court is authorised to grant a plumber, appointed by the Applicant, access to the premises in order to disconnect the water supply to the premises;*

10. *That the Respondent is prohibited from tampering with anything installed or removed by the plumber, so as to reconnect the water supply to the premises;*

Claim C:

11. *That the Respondent is ordered to pay the costs of this application on the scale as between Attorney and Client;*

Order : Case number 1019/2017

1. The Respondent and all persons occupying by, through or under the Respondent be immediately evicted from the immovable property situated at **CS 011, MODDERFONTEIN INDUSTRIAL COMPLEX, MODDERFONTEIN ("the Premises.").**
2. Authorizing, mandating and directing the Sheriff of the above Honourable Court, alternatively his deputy, to do and take all necessary steps to give effect to the order in paragraph 1 hereinabove, in the event of the Respondent not forthwith vacating the Premises.
3. That the Respondent pay the costs of this application on the scale as between Attorney and Client.

C M SARDIWALLA
JUDGE OF THE GAUTENG LOCAL DIVISION,
JOHANNESBURG

APPEARANCES

Date of Hearing	:	28 November 2017
Date of Judgment	:	16 March 2018
Counsel for the Plaintiff	:	ADV RJ BOUWER
Applicant's Attorneys	:	CRAIG BERG INC
Counsel for the Respondent	:	ADV M NOWITZ
Respondent's Attorneys	:	HIRSCHOWITZ FLIONIS ATTORNEYS