



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Appeal no: A129/2023

Case no: 6458/2022

In the appeal between:

EMOYA PROP MED (PTY) LTD

APPELLANT

and

X-PHARM (PTY) LTD

RESPONDENT

In re:

X-PHARM (PTY) LTD

APPLICANT

and

EMOYA MED HOSPITAL (PTY) LTD

FIRST RESPONDENT

EMOYA PROP MED (PTY) LTD

SECOND RESPONDENT

Neutral citation: *Emoya Prop (Pty) Ltd v X-Pharm (Pty) Ltd* (A129/2023) [2024]
ZAFSHC (__ October 2024)

Coram: Daniso J et Nemavhidi AJ, Greyling-Coetzer AJ

Heard: 11 October 2024

Delivered: 21 October 2024

Summary: Motion proceedings – No case made out in founding affidavit.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein:

1. The appeal is upheld with costs.
2. The order of the court *a quo* in respect of the Appellant (Second Respondent in court *a quo*) is set aside and replaced with the following:
'That the application against the Second Respondent is dismissed with costs.'

JUDGMENT

Greyling-Coetzer AJ (Daniso, J and Nemavhidi AJ concurring)

[1] This is an appeal against the order made by the court *a quo* in terms of which the Appellant, EMOYA PROP MED (PTY) LTD (Emoya Prop) together with the First Respondent in the court *a quo*, EMOYA MED HOSPITAL (PTY) LTD (Emoya Med), was ordered to restore X-PHARM (PTY) LTD's (X-Pharm) full access and its undisturbed possession of the premises situated at Suite 14, Emoya Hospital, 7 Frans Kleynhans Avenue, Groenvlei, Bloemfontein.

[2] Emoya Prop and Emoya Med were further ordered to pay the cost of the application, the cost associated by the application for condonation and the cost associated by the application for leave to appeal the rule *nisi* of 2 February 2023, on a party-and-party scale, the one paying the other to be absolved.

[3] In the court *a quo* X-Pharm, applied on an urgent basis for the restoration of control and possession of the premises which X-Pharm leased from Emoya Med. It was common cause that Emoya Prop is the owner of the immovable property on

which Emoya Hospital is constructed, and that it leased the hospital to Emoya Med.

[4] X-Pharm leased a certain premises situated within the hospital from Emoya Med, from where a pharmacy was being conducted. X-Pharm alleged that it was locked out of the leased premises on 24 December 2022, and that it was in peaceful possession of the leased premises until such time as it was deprived of its undisturbed possession by Emoya Med.

[5] The application was opposed by both Emoya Med and Emoya Prop. It was contended on behalf of Emoya Prop that X-Pharm failed to make out a case in its founding affidavit for the relief which the court a quo ultimately granted. The court a quo in dealing with aforesaid contention, held that there was a clear nexus between Emoya Med and Emoya Prop. Founded on aforementioned nexus, the court a quo found that the most plausible inference was that Emoya Med and Emoya Prop are co-spoliators.

[6] In examining the content of the founding affidavit, it discloses:

- a) that Emoya Prop is the owner of the building known as Phase 3A of Emoya Estate and leased the building to Emoya Med;
- b) that Emoya Med sub-leased the premises to X-Pharm;
- c) that the oral agreement pertaining to the lease was reached between X-Pharm and Emoya Med;
- d) that a dispute regarding the provision of pharmaceutical products arose between X-Pharm and Emoya Med;
- e) that Emoya Med disputed the validity of the lease agreement of X-Pharm;
- f) that Emoya Med threatened X-Pharm with High Court litigation;
- g) that the locks were changed by either Emoya Med or Emoya Prop; and
- h) that X-Pharm further stated in its founding affidavit that both Emoya Med and Emoya Prop were cited in an abundance of caution '*due to the ignorance of their identity*'.

[7] It is trite that in motion proceedings, such as which served before the court a quo, the affidavits serve not only as pleadings but should also contain the essential

evidence which would ordinarily be led at trial.¹ Thus, the facts and conclusions that stand to be drawn from said facts need to be set out in the founding affidavit.²

[8] In adjudicating upon such motion proceedings, a court stands to apply the trite principle of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,³ simply put, that final relief may only be granted if the facts averred by an applicant, which have been admitted by a respondent, justify such an order, unless the allegations and denial by the respondent are so far-fetched or untenable that a court is entitled to reject the respondent's version merely on the paper.

[9] A respondent in motion proceedings is only called upon to meet specific allegations made by the applicant in the founding paper, and the court is not enjoined to consider the respondent's answering affidavit in isolation and divorced from the context of the case which the respondent was called upon to meet.⁴

[10] There were simply no facts or evidence presented to court a quo justifying a finding that Emoya Med locked X-Pharm out from the leased premises. Emoya Med fortified same by contentions in the opposing affidavit. It was thus not open to the court a quo to conclude that because there is a 'nexus' between property owner and lessee (i.e., between Emoya Prop and Emoya Med) that Emoya Prop was a co-spoliator.

[11] As held in *Director of Hospital Services v Mistry*,⁵ a court is confined to resolve the dispute on the issues raised in the founding affidavit and should not have regard to extraneous issues and unproven facts.

[12] For the reasons set out above, the appeal should succeed. Consequently, the following order is made:

1. The appeal is upheld.
2. The order of the court a quo in respect of the Appellant (Second Respondent in court a quo) is set aside and replaced with the following:

'That the application against the Second Respondent is dismissed with costs.'

¹ *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) at 600G-H.

² *Swissborough Diamond Mine (Pty) Ltd and Other v Government of Republic of South Africa and Others* 1999 (2) SA 279 (T) at 324F-G.

³ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

⁴ *Administrator, Transvaal and Others v Theletsane and Others* 1991 (2) SA 192 (A) at 196C-E and H-I.

⁵ *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 645H.

Appearances:

For the Appellant:

ADV. J.S. RAUTENBACH

Instructed by:

Symington De Kock

For the Respondent:

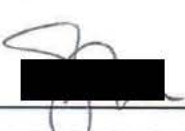
No appearance


GREYLING-COETZER AJ

I concur and it is so ordered

The Honourable Justice
2024-10-21-01
N.S. Daniso DANISO J

I concur


NEMAVHIDI AJ