Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: **3/2025**

In the matter between:

MABHEKANE TRADING CC — Applicant

and

KOOPMANSFONTEIN COMMUNAL PROPERTY ASSOCIATION — First Respondent

UNIDENTIFIED MEMBERS OF THE KOOPMANSFONTEIN COMMUNAL PROPERTY ASSOCIATION — Second Respondent

Heard: 07/02/2025

Delivered: 16/05/2025

Summary: Return day – rule *nisi* – Authority of attorney challenged. It is the institution of the proceedings and the prosecution thereof that must be authorised – *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA). Requisites final interdict all to be present– (i) clear right; (ii) injury actually committed or reasonably apprehended; (iii) absence of any other satisfactory remedy.

ORDER

In the result, the following order is made:

The rule *nisi* is discharged with costs.

JUDGMENT

MAMOSEBO, ADJP

[1] On 07 January 2025 the applicant, Mabhekane Trading CC, brought an urgent application seeking an order restraining and interdicting the respondents, Koopmansfontein Communal Property Association (K/CPA), and the unidentified members of K/CPA from unlawfully evicting the applicant and threatening, intimidating and disturbing the operations of the applicant at Portion 9 (a portion of Portion 7) of the farm Koopmansfontein-Barkly West Rd, Koopmansfontein Sentrum/Filling Station/ (Farmhouse 1, Koopmansfontein, Northern Cape).

[2] This Court issued a rule nisi calling upon K/CPA to show cause on 07 February 2025 why the interdict should not be made final. A further order was made that the rule was to operate as interim interdictory relief pending the final determination of the application, which came before me on the anticipated date of 23 January 2025 but was extended to the return day of 07 February 2025. The applicant is represented by Adv J Mongala and Mr C Kgotlagomang, who initially represented both respondents, withdrew his representation of the second respondent, as none emerged.

[3] The applicant has challenged Mr Kgotlagomang's authority to act on behalf of the remaining respondent. In *Ganes and Another v Telecom Namibia Ltd*[1] Streicher JA explained that it is the institution of the proceedings and prosecution thereof which must be authorised. When the applicant applied for the *rule nisi ex parte,* the court was informed that Towell & Groenewaldt Attorneys were the respondents' attorneys of record, and that the application was served on them. Applicant further repeated reference to the respondents' firm of attorneys in several paragraphs in its replying affidavit, giving credence

[1] 2004 (3) SA 615 (SCA)

to its recognition of the firm's authority to act. It now, belatedly and spuriously, wants to renege after the granting of the interim relief sought. The minutes dated 11 January 2025 reinforced Towell & Groenewaldt's authority to act. Mr Kgotlagomang is attached to the firm. Based on the aforesaid, the K/CPA application to regard the matter as unopposed and to confirm the rule has to fail.

[4] The applicant concluded a 20-year lease agreement with the respondent on 15 October 2020 commencing on 01 November 2020 terminating on 01 August 2040. On 21 December 2024 Mr Bheki Jeremiah Ngwane, deponent to the founding affidavit and director of the applicant, received a letter addressed to the applicant terminating the agreement citing breach of contract.

[5] The requirements for a final interdict as confirmed by Innes JA in *Setlogelo*[2] are trite, namely, a clear right, an injury actually committed or reasonably apprehended, and the absence of any other satisfactory remedy to the applicant. This kind of relief is a drastic measure, and the courts will generally not grant it, particularly, if there exists alternative relief. The granting of a final interdict is within the court's discretion. The discretion is limited in circumstances where all the requirements are met. See also *Hotz and Others v University of Cape Town.*[3]

[6] The fact that the applicant was granted interim relief does not necessarily follow that final relief will follow without more. The Constitutional Court per Du Plessis AJ said the following in *The National Gambling Board*[4]

> 'An interim interdict is by definition
>
> 'a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.'

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[2] Setlogelo v Setlogelo 1914 AD 221
[3] 2017 (2) SA 485 (SCA) para 29
[4] The National Gambling Board v Premier of Kwazulu-Natal and Others 2002 JDR 0067 (CC)

[7] Friedman AJP enunciated in *Minister of Law and Order v Committee of the Church Summit of Bophuthatswana and Others*[5]:

> 'Whether the applicant has a right is a matter of substantive law. The onus is on the applicant applying for a final interdict to establish on a balance of probability the facts and evidence which prove that he has a clear or definite right in terms of substantive law. See *Nienaber v Stuckey* 1946 AD 1049 at 1053-4; *Mosii v Motseoakhumo* 1954 (3) SA 919 (A); *De Villiers v Soetsane* 1975 (1) SA 360 (E) at 362. See also Law of South Africa (at paras 317-8). The right which the applicant must prove is also a right which can be protected. This is a right which exists only in law, be it at common law or statutory law.'

[8] In his founding affidavit the said Ngwane averred that despite the lease agreement setting out the terms for a breach at Clause 11, the respondents' legal representative, Towell & Groenewaldt, directed a letter to the applicant dated 17 December 2024 terminating the lease agreement based on a breach but did not specify the impugned breach. Neither did the respondents serve it with a notice requiring the applicant to remedy the breach within the stipulated period of 14 days. The applicant contends that the agreed premium of R60 000 per month were paid and attached the payment history annexed to the papers as "BN6", to demonstrate its purported compliance with Clause 3 of the Agreement. This, according to the applicant establishes a clear right which can be protected.

[9] The lease agreement in relevant part, stipulates:

> '3 **Conditions of the Lease**
>
> The parties agree that the Lease Agreement shall commence on the effective date 01 November 2020 and ends on 31 August 2040, and shall be valid for a period of 20 years from the effective date.
>
> 3.1 The Lease Agreement is granted in exchange for a monthly rental payment of R60 000.00 (Sixty Thousand Rand Only) payable from

[5] 1994 (3) SA 89 (BG) at p98 D – E

01 November 2020 by Mabhekane Trading CC to Koopmansfontein Communal Properties Association in pursuit of the project contemplated in clause 2.3 above.

3.2 Annual escalation of monthly rental – 8% (eight percent) per annum compounded with effect from the second year (01 November 2021) of the commencement date.

3.9 The Lessee shall be liable for the usage of their own water and electricity costs.

11 Breach

11.1 In the event of any of the parties committing a breach of any of the provisions of terms of this Agreement and remaining in breach for a period of more than fourteen (14) business days after receipt of a notice in terms of which the party aggrieved by such breach requires the party concerned to remedy such breach;

11.2 Then, and in that event, the aggrieved party shall be entitled without further notice, as its option and without derogating from any of the rights which it may have in terms of this Agreement or at law, to:

11.2.1 Cancel this Agreement and claim and recover from the defaulting party such damages as the aggrieved party may have suffered as a result of such breach; or

11.2.2 Claim specific performance of the terms of this Agreement without prejudice to any claim for damages against the defaulting party as a result of such breach.'

[10] In the respondent's letter of 17 December 2024, annexure "BN4" the following is written:

'It is our instructions that you have breached the agreement between the parties in that you failed to effect payment of the rental as per Clause 3 of the Agreement.

Your attention is brought to the provisions of Clause 11 of the Agreement. In terms of Clause 11 of the Agreement, in the event that you fail to remedy the breach, our client would be entitled without further notice to cancel the agreement and recover from you any damages that it may have suffered as a result of your breach.

Kindly take note that our client forthwith terminates the contract between the parties and our clients' rights are fully reserved.'

[11] The averment by the applicant that it was not afforded a notice period of 14 days is not correct. This is so because the respondent's letter dated 22 July 2024 the following is stated:

'It is our instructions that you have breached the agreement between the parties in that you failed to effect payment of the rental as per Clause 3 of the Agreement.

It is our instructions to demand from you as we hereby do, that you remedy the breach as afore-stated within 14 days of receipt of this letter.'

[12] In its response to the notice, the applicant undertook to purge its default and adhere to the payments of R60 000.00 per month. The applicant raised the issue of the Eskom electricity account which it must settle, which is not a component of the monthly R60 000 rental. It must be noted that the letter of termination issued on 21 December 2024 came about after the notice letter of July 2024. Despite the two letters directed to the applicant in July and December, there was no response thereto.

[13] Evidently, the respondent has afforded the applicant sufficient time as stipulated in Clause 11 to remedy the breach within the 14-day period. Whether the right the applicant claims to have is clear is a matter of evidence. A close scrutiny of "BN6" (the payment history) under the column CPA rent payment shows the converse:

- 25 January 2024 – no payment
- 01 February 2024 – R 5 000
- 03 March 2024 – R20 000

• 26 March 2024	–	R30 000
• 26 April 2024	–	R60 000
• 25 May 2024	–	R60 000
• 13 June 2024	–	no payment
• 25 June 2024	–	no payment
• 27 June 2024	–	R35 000
• 25 July 2024	–	R50 000
• 23 August 2024	–	R10 000
• 26 August 2024	–	R50 000
• 27 September 2024	–	R60 000
• 26 October 2024	–	R40 000
• 06 November 2024	–	R 3 000
• 28 November 2024	–	R60 000

[14] It is undisputed that when the full amount of R60 000 was paid Eskom would not be paid. It is also significant that only four full payments were made for the period January to November 2024. Over this 11-month period the applicant should have paid R660 000.00 instead of R483 000.00 leaving an arrear amount of R177 000.00. The amount leaves out of the reckoning the 8% escalation from the 13th month of the contract period or any period outside annexure "BN6". The papers are silent as to what happened to the payments made between 01 November 2020 and 25 January 2025. Clause 3.9 is unambiguous that the obligation for water and electricity lies with the applicant. Clause 3 further deals with an annual escalation of 8% starting from November 2021. The applicant's letter dated 11 August 2024 in response to the 22 July 2024 letter commits to adhering to the R60 000 monthly rental but seems to raise the issue of Eskom repayments as a cause for their non-compliance.

[15] The second requisite relates to injury actually committed or reasonably apprehended. In *Committee of the Church Summit*[6] Friedman AJP explained:

[6] Ibid at 98H - I

'This is the second essential for the granting of a final interdict. The phraseology 'injury' means a breach or infraction of the right which has been shown or demonstrated and the prejudice that has resulted therefrom. See *Setlogelo v Setlogelo* (supra). The term 'injury' is used as a translation of Van der Linden's phrase *'een gepleegde feitelijkheid'* ('a fact committed'). See Law of South Africa (op cit para 318). It has also been held that prejudice is not equivalent to damages. It will suffice to establish potential prejudice.

[16] Mr Ngwane was informed by members of the K/CPA on Friday 03 January 2025 that the applicant was no longer welcome to occupy their premises. Mr Ngwane stated that the applicant intends to bring action proceedings challenging the lawfulness of the termination of the lease agreement. The respondents gave the applicant until 10 January 2025 to vacate the premises and close its business. It is alleged that one of the members of the K/CPA even threatened to lock the pumps of the filling station. Mr Mongala incorrectly invoked s 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1 of 1998 (PIE). The immovable property in issue is business premises and PIE finds no application. There can be no gainsaying that the agreement has ceased to exist then there can be no apprehension of harm.

[17] Whereas the claim for an interim interdict was necessary to preserve or restore the *status quo* pending the final determination of the rights of the parties for a final interdict, the test is objective. The facts established on the return date pertaining to the requirement of injury do not support the grounds to entertain a reasonable apprehension claimed by the applicant. I am satisfied that the applicant has not shown a breach of a right and a prejudice or potential prejudice that stands to flow therefrom. The applicant has, as I have already found above, not demonstrated a clear right which can be protected.

[18] The third and final requirement is the absence of an alternative remedy. The applicant only conveyed the following in the founding affidavit pertaining to the existence or otherwise of an alternative remedy:

"I submit that there is no satisfactory alternative remedy for the applicant, save to approach this Court and seek the relief in the notice of motion. The police would have no right to intervene in the protection of civil rights and that right would only be protected by this Honourable Court"

[19] The aforementioned explanation falls short of this requirement. The applicant failed to honour the terms of the lease agreement over a prolonged period and then sought to interdict the K/CPA and claim an infraction of a right on frivolous grounds. I therefore find that the applicant has not demonstrated a clear right which has been infringed and further failed to make out a case that there were no alternative remedies at its disposal.

Costs

[20] There is no basis why costs should not follow the result.

[21] In the result, the following order is made:

The rule *nisi* is discharged with costs.

[redacted]

M.C. MAMOSEBO
ACTING DEPUTY JUDGE PRESIDENT
NORTHERN CAPE DIVISION

For the Applicant:	Adv. J Mongala
Instructed by:	Moribe Attorneys
For the Respondent:	Mr. C Kgotlagomang
Instructed by:	Towell & Groenewaldt Inc