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

Not Reportable

Case no: 5341/2024

In the matter between:

WD MOTORS (PTY) LTD — **APPLICANT**

and

SHELL SOUTH AFRICA REFINING (PTY) LIMITED — **FIRST RESPONDENT**

SHELL DOWNSTREAM SOUTH AFRICA (PTY) LIMITED — **SECOND RESPONDENT**

ALL OTHER OCCUPIERS OF ERF 17098
CLAIMING TITLE UNDER THE FIRST RESPONDENT — **THIRD RESPONDENT**

Neutral citation: *WD Motors (Pty) Ltd v Shell South Africa Refining (Pty) Limited and Others* (5341/2024) [2025] ZAFSHC 179 (17 June 2025)

Coram: Daniso J

Heard: 6 February 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 17 June 2025 at 14h00.

Summary: Eviction application founded on breach of lease agreement – no real, genuine and *bona fide* defences of facts raised in rebuttal of alleged breach – claim for eviction made out by applicant.

ORDER

1 The respondents and any other business occupying the premises under the auspices of Wentzel Motors are ordered to, within 60 days from the date of this order to vacate the commercial premises situated at erf 17098 Bloemfontein.

2 The first and second respondents shall pay the costs of this application jointly and severally the one paying the other to be absolved including the costs of counsel on scale C.

JUDGMENT

Daniso J

[1] The applicant seeks eviction of the respondents (Shell) from the business premises situated at erf 17098 in Bloemfontein (the premises). Shell occupies the premises by virtue of a lease agreement it concluded with the previous owners of the premises on 28 October 2009 and notarised on 15 September 2014 for use as a filling station under the name and style Wentzel Motors for a period of 15 years with two renewable periods of five years.

[2] On 24 January 2024, the applicant, relying on clause 20 of the lease agreement, cancelled the lease on the grounds of Shell's breach of the terms of the lease agreement pertaining to the use, subletting and maintenance of the premises including defaulting on payment of the municipal charges relating to the premises. Clause 20 deals with circumstances under which the lease agreement can be cancelled it provides thus:

'20 BREACH

20.1 In the event of:

20.1.1. Shell failing to pay the rent or any portion hereof on the due date and remaining in default for a period of 21 days after receipt of written demand therefore; or

20.1.2. Shell committing a breach of any of the other material terms and conditions of this Lease and failing to remedy such breach within 30 (thirty) days after receipt of written notice from the

Lessor (or should the period of 30 days (thirty) days not be reasonably sufficient for remedying the breach in question, then within such time as is reasonably required therefor)
The Lessor shall without prejudice to any other remedies available to it have the right in law to claim payment of such monthly rental or specific performance as the case may be (in the latter case with an alternative claim for damages) or to cancel this agreement on written notice to Shell and claim damages.'

[3] The terms of the lease agreement pertinent to Shell's right to use and sublet the premises and its obligation to maintain and pay for the municipal charges provide thus:
'9 USAGE
9.1. Shell or its sub-tenant shall have the right to use the premises or nay (sic) portion thereof as a filling station, convenient store, car wash, Automated Teller Machine and any other business reasonable or ordinary ancillary thereto and which for the purposes hereof shall include the right to sell from the premises such items as are customarily sold at Shell filing stations and convenience stores in accordance with Shell's standard policy with the right to Shell and/or its sub-tenant to carry on such businesses up to 24 hours per day at its discretion.
9.2. Shell shall not use or permit the premises to be used for any illegal or improper purpose, nor shall Shell do or permit any act or thing, which may reasonably be considered to be an annoyance or nuisance or cause damage or disturbance to the occupiers of adjoining properties.
. . .
11 ASSIGNMENT AND SUBLETTING
11.1 Shell shall be entitled to sublet the whole or any portion of the premises to any retailer of its choice on the standard terms and conditions of its retail Business Agreement, without obtaining the Lessor's consent, provided that Shell shall at all times remain primarily liable to the Lessor for the due fulfilment of all the terms and conditions of this Lease. For the avoidance of any doubt it is agreed that Shell shall provide the Lessor with notification of any sub-letting that has been occasioned whether wholly or in part and further undertakes in favour of the Lessor that the premises will largely be utlilized for the sale of petroleum fuels.

12 MAINTENANCE
Shell shall at its own expense maintain the structure and the interior and exterior of the improvements, including (but without limitation) the roof, electrical wiring and sanitary and water works in good order and in a proper state of repair and shall at its own expense carry out all

repairs, replacements and renovations thereto that may be reasonably be required from time to time.

16 PROPERTY EXPENSES

16.1. Shell shall pay during the subsistence of this Lease all rates, taxes and other charges whatsoever levied in respect of property or the buildings and improvements erected thereon (collectively "the imposts") with effect from the rental commencement date. If the rates and taxes relating to the property are not at any time increased for any reason, Shell shall pay such increases or imposition; provided that the Lessor gives Shell at least 30 days prior written notice of such increases or imposition.'

[4] In the founding affidavit deposed to by the present owner Ms Denese Lups, it is alleged that, contrary to the provisions of clause 9.1. and 9.2 read with clause 11.1 of the lease agreement, Shell sublet a portion of the premises to Mr Koudia Diata (Mr Diata) without giving the applicant the required notice. Shell also permitted Mr Diata to operate an electronic store selling appliances and television sets, a business which is not an ancillary to a filling station. The premises were also used for illegal purposes in that, Mr Diata sold television sets in contravention of s 27 (4) of the Broadcasting Act 4 of 1999 (the Broadcasting Act).

[5] The applicant further avers that, in terms of clause 12 of the lease agreement, Shell was also obligated to keep the interior and exterior structure of the premises in a good state of repair however, Shell has consistently failed to maintain the premises, the bullnose, walls and pillars of the premises needed to be repainted. Overall, the premises were unkempt and derelict. The applicant's letter, dated 29 September 2022, in terms of which Shell was requested to comply with its obligations to provide the applicant with a copy of the notice of subletting and to attend to the maintenance of the premises was ignored precipitating the applicant to serve Shell with a 30 days' demand to remedy the breach on 16 August 2023 (the breach notice).

[6] Having undertaken to rectify the breach, on 14 September 2023, Shell forwarded a letter to the applicant, together with photographs, stating that the required maintenance work had been done except for the painting of the eastern wall as it required budget

planning. In response, the applicant confirmed that the issue regarding maintenance of the premises was resolved however, Shell has still not painted the eastern wall and it later transpired that the roof also required maintenance. The premises remain in an abject state of disrepair and neglect.

[7] In response to the applicant's query regarding the occupation and business activities of Mr Diata's business on 31 October 2023, Shell simply provided the applicant with Mr Diata's certificate of registration as a second-hand goods dealer in terms of s 3(3) of the Second-Hand Goods Act 6 of 2009, insisting that that Mr Diata's business was not trading illegally. The issue regarding the unilateral sub-letting of the premises and for permitting Mr Diata to trade in activities not ancillary to a filling station were not addressed.

[8] It is the applicant's case that Shell has also been systematically contravening the provisions of clause 16 since 2021 by failing to pay the municipal charges relating to the premises despite the breach notice transmitted to Shell on 24 August 2023. As of 24 August 2023, Shell was in arrears with payment of the municipal account in the amount of R30 373.03 and, in terms of the breach notice, Shell was required to pay the arrears within 21 days thereof.

[9] It is the applicant's case that Shell was served with a cancellation notice, on 24 January 2024, in terms of which Shell and its sub-tenants including those occupying the premises under Shell (third respondent) were required to vacate the premises by 29 February 2024. Notwithstanding the cancellation, Shell and the third respondent remain in occupation of the premises.

[10] Shell opposes the application on the grounds that the lease was terminated on unlawful and on engineered grounds which are not even material to warrant the cancellation of the lease and further states that there is a clear dispute of facts on this issue which can only be resolved by oral evidence. The applicant should have foreseen that a dispute of fact would arise and should have proceeded by way of action proceedings and not application proceedings.

[11] According to Shell, the true motive of the applicant's cancellation of the lease agreement is to lease the premises to an entity known Astron Energy which had offered to pay more rental than what Shell is paying. Astron Energy came to view the premises, had discussions with Ms Lups regarding its aspirations to lease the premises, including modifying the premises to accommodate its needs. Astron Energy also enquired about the notice period required for Shell to vacate the premises. Shortly thereafter, the applicant served Shell with the breach notice.

[12] Shell confirms that it concluded a sublease agreement with Mr Diata in 2020 to operate an electronics store selling cellular phones and repairing television sets. The applicant was notified of the sublease when Ms Lups and the landlord visited the store when it opened in 2020. Since then, until two years later in September 2022, they regularly interacted and greeted Mr Diata and his employees without raising any issues regarding Mr Diata's occupation of the premises and his business activities thereby tacitly representing to Shell that the applicant had no objection to the occupation of the premises. Shell contends that. having overlooked the breach, the applicant is estopped from seeking to cancel the lease on the basis of breach under these circumstances. Mr Diata's business has since vacated the premises.

[13] Shell denies that the store was used for any illegal or improper purpose and points out that the applicant's reliance to the provisions of s 27(4) of the Broadcasting Act is misplaced as they only pertain to a prohibition against selling a television set to a purchaser who does not possess a television licence and not to the dealer. In any event, the electronic store did not sell television sets.

[14] As far as the breach relating to the maintenance of the premises is concerned, Shell admits that pursuant to the applicant's demand on 16 August 2023 for the painting of the walls, replacement of a damaged door and cleaning of the premises was attended to. The applicant was satisfied about the work done and this fact was confirmed by the applicant in its letter, dated 3 October 2023, stating the following:

'. . . Our letter dated the 16th August 2023 and to your email to us dated the 14th of September 2023 refers.
With regards to the maintenance issue, it seems that all the issues have been resolved.'

[15] Shell further states that the breach relating to maintenance of the premises does not entitle the applicant to cancel the lease as clause 17 provides the applicant with a remedy which involves repairing any defects in the premises and thereafter claim the costs of such repairs from Shell.

[16] The validity of the breach notice relied upon by the applicant in support of its right to cancel the lease agreement is also disputed. It is Shell's contention that the breach notice does not state that the breach complained about arises from operating a business not ancillary to a Shell filling station instead it makes non-sensical averments namely that, Shell's is in breach of the lease due to 'the type of business being petroleum as shown is not ordinary and ancillary to a Shell Petroleum Station as envisaged in this clause'. Shell was therefore not placed in *mora* in respect of this alleged breach.

[17] As regards unpaid municipal charges, Shell admits receipt of the breach notice dated 24 August 2023. Nonetheless, Shell avers that its obligation to pay, only arises once the applicant has delivered the account to Shell, Shell has paid the account except for an amount of R4 834 which is subject to a proper reconciliation of the statements and, even if it is found that Shell has failed to pay a particular account in breach of the lease agreement, the breach notice is invalid as Shell was not provided with 30 days to rectify the breach as contemplated in clause 20.

[18] It is argued by counsel for Shell that 'clause 12 simply states that Shell shall pay the rates, taxes and other charges. It does not state promptly or by when. It is clear that time is not of the essence in so far as payment of these amounts is concerned'. Based on these reasons, Shell contends that applicant is not entitled to the relief it seeks, the application must be dismissed with costs.

[19] I agree with Shell's contentions that, on the facts germane to this matter, the breach pertaining to subleasing the premises to be used illegally or improperly has not been established. The applicant has clearly misconstrued the provisions of s 27(4) of the Broadcasting Act as they only relate to:

'A dealer who sells or alienates a television set to a person who is not in possession of a television licence and who is not exempted from the obligation to be in possession of a television licence, is liable to pay a penalty of R3 000 or such higher amount as may be prescribed, but such penalty may not exceed R10 000 in respect of each television set sold or alienated to such person.'

This issue is accordingly decided in favour of Shell.

[20] The remainder of Shell's defences are bereft of any merit. The provisions of clause 11.1 are peremptory:

'Shell shall provide the Lessor with notification of any sub-letting . . .'

Except to fleetingly aver that the applicant was notified about the subletting, Shell has provided no specifics in terms of the exact date and manner in which the required notice was provided to the applicant.

[21] Notwithstanding the inelegant manner in which the breach notice has been worded in relation to the breach premised on the use of the premises for a business not ancillary to a filling station its meaning is clear and unambiguous. In terms of clause 9.1 and 11.1, the premises must be used to sell items that are customarily sold at Shell filing stations and convenience stores including petroleum fuels. Electronics are not listed as items falling within the categories of items permitted to be sold at the premises accordingly, an electronic store is not ancillary to a filling station.

[22] Regarding the maintenance of the premises, Shell conveniently ignores the fact that pursuant to the breach notice, Shell informed the applicant that the painting of the eastern wall was not done pending budget allocation. That aside, in the applicant's pleaded case, it is in indisputable that the maintenance for the roof was discovered at a later stage.

[23] The obligation to pay the municipal charges is linked to the use of the premises therefore, Shell's defence that it has not breached clause 16 because the lease agreement does not state the time of payment is, in my view, unsound.

[24] Similarly, there is no merit to Shell's challenge of the validity of the cancellation of the lease agreement. On the established facts, the applicant cancelled the lease approximately four months after the respective breach notices were served on Shell on 16 August 2023 and 21 August 2023. At that time, the lease agreement was extant.

[25] On the papers, the background facts of this matter and the terms of the lease agreement upon which the applicant's claim is predicated including Shell's nonfulfillment of its obligations in terms of the lease agreement are indisputable. On the other side, the defences raised by Shell are unpersuasive to constitute real, genuine and *bona fide* defences of facts requiring a resolution by way of oral evidence. I am thus inclined to reject them merely on the papers.[1] I have thus come to a conclusion that Shell's conduct constitutes a breach of clause 9.1, 11.1, 12 and 16.1 of the lease agreement.

[26] By virtue of the breach clause, the materiality of the breach to warrant a cancellation of the lease is irrelevant. See in this regard, *Oatorian Properties (Pty) Ltd v Maroun,*[2] where the following is stated regarding a cancellation clause:

'By this clause the respondent explicitly reserved to himself the right to cancel the lease on a breach of a material condition of the lease. Once there is such a breach, the materiality of the breach is irrelevant and the Court will not enquire into the conscionableness or unconscionableness thereof.'

[27] Based on these reasons above, I am satisfied that the applicant has made out a case for Shell's eviction from the premises. The applicant's claim prevails.

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[1] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) para 12; see also *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) ; 2009 (1) SACR 361 (SCA) ; 2009 (4) BCLR 393 (SCA) ; [2009] 2 All SA 243 (SCA) para 26.

[2] *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A) at 785B-C, citing with approval *North Vaal Mineral Co. Ltd. v Lovasz*, 1961 (3) SA 604 (T) at 606; see also *Human v Rieseberg*, 1922 T.P.D. 157 at 163.

Costs

[28] There is no reason why the costs should not follow the result

Order

[29] In the circumstances, I make the following order:

1 The respondents and any other business occupying the premises under the auspices of Wentzel are ordered to, within 60 days from the date of this order to vacate the commercial premises situated at erf 17098 Bloemfontein.

2 The first and second respondents shall pay the costs of this application jointly and severally the one paying the other to be absolved including the costs of counsel on scale C.

The Honourable Justice

2025 [redacted]

N.S. Daniso

DANISO J

Appearances

For the applicant:	C D Pienaar
Instructed by:	Symington & De Kok Attorneys, Bloemfontein
For the second respondent:	M Smit
Instructed by:	Cliffe Dekker Hofmeyer Inc, Johannesburg
	c/o Lovius Block Attorneys, Bloemfontein.