

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2025-119853

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

In the matter between: -

GARDENSHOP (PTY) LIMITED

Applicant

and

**GERMAT HOSPITALITY CC
(REGISTRATION NUMBER: 2001/052602/23)
TRADING AS MUNCH PARKTOWN**

Respondent

JUDGMENT

Mfenyana J

Background

[1] This is an urgent application in which the applicant seeks an order for the eviction of the respondent from a portion of the business premises known as the GardenShop, situated at 1[...] J[...] S[...] Avenue, P[...] North (the leased property). The property features a café, operated under the trading name of Munch Parktown.

[2] The entire dispute between the parties stems from a lease agreement concluded

by the parties on 10 May 2021, under which the applicant contracted with the respondent to operate the café. The respondent would pay a monthly rental of R42 717.10 for an initial period of 12 months, whereafter the rental amount would escalate at 8% per annum on the first day of each month, free of exchange and deduction.

[3] The terms of the lease agreement are common cause. It is further common cause that the café is one of the key features of the property, with an environment suitable for a wide range of patrons, including families with small children, as it hosts a play area for children. As the name suggests, the property also features a nursery, providing gardening and landscaping products, as well as patio furniture.

[4] On 26 June 2025, the applicant cancelled the lease agreement, citing a material breach on the part of the respondent in that it failed to pay the rent timeously and was thus indebted to the applicant. The applicant contends that it was well within its rights in terms of the lease agreement to terminate the lease without making demand, as the respondent (i) had failed to pay rent timeously and had (ii) committed two or more breaches within a period of twelve months. In so doing, the applicant avers, it took reasonable steps to mitigate its damages as envisaged in the lease agreement and immediately looked for a new operator for the café. Following negotiations with the new operator, the applicant concluded a lease agreement with them.

[5] The respondent opposed the application on the basis that it is not urgent, and that the lease agreement was not validly cancelled by the applicant. It avers that the applicant did not allege a breach of the lease agreement, but relied on a 2024 agreement, which is void *ab initio*.

Submissions

[6] The applicant avers that the matter is urgent, as it will not obtain substantial relief at a hearing in due course, as it needs to reinstate the property and commence with refurbishments and installations for the new tenant to start trading. This, the applicant states, will take approximately a month or two to complete, the

arrangements for which the applicant has already secured ahead of the applicant's peak trading season. According to the applicant, this peak season accounts for 75% of its annual turnover. The applicant points out that it cannot be required to wait until the respondent decides to vacate the property, as it has indicated through its legal representative that it would not vacate the property and would resist an application for ejectment.

[7] It is common cause that on 30 June 2025, the applicant concluded a lease agreement with a new operator to take over the operation of the café. In terms thereof, the lease period is to commence on 1 December 2025, with the new tenant to take beneficial occupation of the property by 1 August 2025. The lease will run for an initial duration of five years on the terms agreed to by the parties, the total value of which is R4 182 041.52. The applicant, thus, contends that it would suffer significant loss if it were not able to provide occupation of the property to the new tenant as agreed.

[8] The record indicates that discussions aimed at settling the issue between the parties following the applicant's cancellation of the lease were unsuccessful. The applicant claims that on 14 July 2025, the respondent, through its legal representatives, proposed that it would leave the property by 31 July 2025 in exchange for a payment of R4.5 million by the applicant and permission to remove its movable assets from the property. The applicant considered this proposal to be unsustainable, stating that it left it with no option but to approach this court, as it became apparent at that stage that the respondent was recalcitrant. It avers that it instituted these proceedings just five days after it became clear that the respondent was not cooperative.

[9] The applicant refers to the case flow turnaround times in this Division, arguing that were this application to be brought in the ordinary course, it would only be heard in approximately 9 months. At that point, the new tenant may have been forced to find other premises, which would expose the applicant to a damages claim. Thus, it would suffer irreparable harm, which would prevail if it cannot fulfil its obligations under the new lease agreement and deliver the café to the new tenant.

[10] The respondent, on the other hand, contends that the matter is not urgent, and to whatever extent urgency may be found to exist, it is self-created. It contends that the applicant knew all along that it did not have vacant possession of the property, but proceeded to enter into an agreement with the new tenant.

[11] The respondent further raises the plea of *lis alibi pendens*, stating that there are pending arbitration proceedings. It is so that the respondent has not referred any dispute to arbitration. What it says is that after the negotiations with the applicant fell through on 14 July 2025, it made the applicant aware of its intention to refer the matter to arbitration in accordance with the lease agreement. The applicant, however, instituted the current proceedings before any arbitration proceedings could be initiated. In this regard, the respondent concludes that the applicant's conduct is vexatious as it knowingly bypassed the arbitration process. The applicant argues that there are no pending arbitration proceedings. Importantly, the applicant further argues that there is no arbitral dispute, and even if there was, by its own admission, the respondent has admitted that it does not relate to the same issue as in these proceedings.

[12] On the merits, the respondent avers that the applicant has oversimplified and sanitised the issue between the parties and that the true version of events renders the 'purported' cancellation by the applicant invalid. This true version of events relates to what the parties refer to as an alternative lease agreement concluded between the applicant and a third party.

[13] From the respondent's perspective, the present dispute is predicated on that lease agreement concluded between the applicant and Munch Enterprise (Pty) Ltd (Munch) on 26 June 2024 (the 2024 agreement). The respondent avers that this agreement is void *ab initio* and unenforceable as the suspensive conditions were not fulfilled and the 2021 lease agreement was not lawfully cancelled. The respondent, thus, argues that the applicant is the author of the predicament it finds itself in, as it was not open to it to conclude a lease agreement with the new tenant. It avers that the applicant's conduct is unlawful. In response thereto, the applicant contends that the 2024 agreement has nothing to do with the respondent, as it was concluded with a third party.

[14] The respondent details events pertaining to the 2024 lease agreement and a dispute which seemingly arose between the applicant and Munch in respect of some building plans and renovations stipulated in that lease agreement. Of relevance is that the respondent contends that at no point during those discussions did the applicant allege any breach of the 2021 agreement. The respondent argues, therefore, that the basis for the present dispute is flawed, as the applicant mistakenly believed the 2024 agreement to be valid. Consequently, it is the 2024 agreement that the applicant attempted to cancel in its letter of 26 June 2025, which was preceded by a notice of material breach on 4 October 2024.

[15] The respondent points out that the applicant's reference to clauses 7.1 and 7.2 (renovation clauses) in the notice of breach proves that the breach was in relation to the 2024 agreement with Munch and not the 2021 agreement. Interestingly, the respondent views the applicant's demand as simply stating that the lease was cancelled exclusively because of non-compliance with the renovation clauses. Furthermore, the applicant indicated an intention to collect the arrears and provided the respondent until 30 June 2025 to remedy the breach, so contends the respondent. Having accepted the applicant's invitation to remedy its arrears, the respondent settled the outstanding amounts on 30 June 2025. The respondent's position is that the applicant was, therefore, not entitled to cancel the 2021 lease. It, however, does not dispute being in arrears.

Discussion

[16] The relevant portion of the lease agreement stipulates:

“16.1 An event of material breach will occur if:

16.1.1 ...

16.1.2 ...

16.1.3 The rental or any other amounts due in terms hereof are not paid on the due date and remain unpaid for a period of 7 (seven) days;

16.1.4 The Sub-lessee commits two or more breaches of any of the provisions of this agreement (regardless of whether the same provision is breached) within a period of 12 (twelve) months;

16.1.5 ...

16.1.6 ...

16.2 In the event of default (as provided for in clause 16.1.3) occurs, the non-

defaulting party will be entitled, without prejudice to any other rights that it may have under this Agreement or in law, to either:

16.2.1. cancel this Agreement and claim the arrear rental and all other charges and/or damages; or

16.2.2. claim specific performance of all the defaulting party's obligations.

16.3 Should any amount of rental not be paid in terms of this agreement, the sub-lessor shall be entitled, without prejudice to any of its rights in terms of this agreement or in law, to display in notice that goods in the premises are judicially attached in perfection of the sub-lessor's hypothec.

16.4 Where the goods on the premises form the object of the sub-lessor's tacit hypothec, and where such hypothec is perfected by the sub-lessor, the lessee shall be entitled to the proceeds from the sale of such goods should such goods be sold by the sub-lessee and such proceeds shall be used towards the payment of the indebtedness to the sub-lessor. Nothing contained in this clause shall afford the sub-lessee the right to sell, dispose of or alienate any of the assets or goods forming part of the sub-lessor's hypothec.

[17] The key question is whether the applicant properly cancelled the lease agreement with the respondent, signed in May 2021. Clause 16 permits cancellation and claims for rental arrears in the event of a material breach. It is undisputed that the respondent failed to pay the rental for two consecutive months and remained in breach for more than seven days. It is further common cause that on 26 June 2025, the applicant addressed a notice of cancellation to the respondent and to Munch, invoking the provisions of clause 16. The respondent argues that the reference to Clauses 7.1 and 7.2 in the notice of cancellation indicates that the applicant attempted to cancel the 2024 agreement, which is void *ab initio*, rather than the 2021 agreement. It makes no mention of the reference in the same notice to arrear rental in the amount of R167,056.89, which the respondent owed to the applicant. As already indicated, the fact that the respondent was in arrears is not in dispute.

[18] By its own admission, the respondent states that it took up the applicant's offer to pay the arrears by 30 June 2025 and because it complied with this demand, the applicant was not entitled to cancel the agreement. Two issues arise from this construction by the respondent. First, the notice of cancellation states unequivocally that the agreement is cancelled. Second, it notes that if the respondent fails to pay the arrears, the applicant will initiate proceedings to recover the outstanding balance. This is in accordance with the lease agreement.

[19] It does not follow that because the respondent has paid the arrear amount it owed to the applicant, the cancellation is invalid. At the time the arrears were paid, the applicant had already cancelled the lease agreement. The payment itself is a tacit admission that the respondent was in breach of the agreement. With that admission, it goes without saying that the applicant was well entitled to cancel the lease.

[20] What renders the matter even more urgent is not only that the applicant seeks to preserve the agreement it concluded with the new tenant, but rather the prejudice that it stands to suffer, as it is now held because of the dilatory conduct of the respondent. There is no conceivable basis why the applicant should be exposed to litigation by the new tenant, potential or actual, when it has fully complied with the lease agreement. This is more than the respondent could say with regard to compliance.

[21] Cancellation in those circumstances flows naturally from the agreement. There can therefore be no doubt that enforcing the terms of the agreement and vindicating the rights of the applicant to take possession of the property as a sequel to the respondent's breach is urgent. The applicant was entitled to act as expeditiously as it did. In my view, the degree of urgency with which the applicant approached this court is proportionate to the relief it seeks.

[22] The *lis alibi pendens* defence is without merit. There is no referral to arbitration, and consequently, there is no dispute pending arbitration. Moreover, there is no question about the respondent's breach. Clause 22 of the lease agreement, which

deals with dispute resolution, provides *inter alia* that, if mutual consultation between the parties does not yield any positive results, any party may refer any dispute (including whether a breach has occurred as contemplated in clause 16) to arbitration. Clause 22.2 is instructive in this regard.

[23] Clause 22 further states that a party shall not be precluded from accessing an appropriate court of law for either interim relief, a *mandamus* or an order for specific performance, pending the outcome of the arbitration, any other form of relief if the facts are not disputed, and provided that if a *bona fide* dispute arises in the course of the proceedings, they shall be stayed pending the arbitration of the dispute.

[24] In *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others*¹, Wallis J explained the doctrine of *lis pendens* as follows:

"[2] As its name indicates, a plea of *lis alibi pendens* is based on the proposition that the dispute (*lis*) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions. It is a plea that has been recognised by our courts for over 100 years."

[25] In this case, no arbitration proceedings are pending. The respondent's reliance on the applicant's alleged failure to refer the matter to arbitration, raised for the first time in its heads of argument, does not take the respondent's case any further. The applicant's case is clear: it argues there is no arbitral dispute and considers the respondent's contentions a ruse intended to frustrate the applicant's rights.

Order

In the result, I make the following order:

¹ [2013] ZASCA 129; 2013 (6) SA 499 (SCA).

- a. The respondent is directed to vacate the property known as “the building above the staff canteen and restroom next to the kids’ play area, including the kids’ play area on the property known as the GardenShop”, situated at 1[...] J[...] S[...] Avenue, P[...] North, Randburg, within 7(seven) days of this order and allow the applicant vacant possession of the property.
- b. Should the respondent fail to vacate the property, the sheriff of this court, duly assisted by members of the SAPS, if necessary, is authorised and directed to evict the respondent and all persons or entities occupying the property through the respondent.
- c. The respondent is ordered to pay the costs of this application on scale B.

S MFENYANA
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

For the applicant: Adv. A W Pullinger instructed by Hadar Inc.
jjunkoon@hadarinc.co.za

For the respondent: Adv. C Garvey instructed by Chanelle Kapp Attorneys
chanelle@kapplaw.co.za

Date of hearing: 05 August 2025

Date of judgment : 27 August 2025