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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO:111849/2025

(1) Reportable: No

(2) Of interest to other Judges: No

(3) Revised: No

Date: 1 June 2026

Signature:

In the matter between:

VOORMAX (PTY) LTD

APPLICANT

AND

MPILENG FUNERALS (PTY) LTD

FIRST RESPONDENT

DONALD KOKETSO KHULONG

SECOND RESPONDENT

The matter was heard in open court. The judgment is handed down electronically by circulation to the parties' legal representatives by email. The date for hand-down is deemed to be 01 June 2026.

J U D G M E N T

Mazibuko J

- [1] The applicant seeks an eviction order against the first respondent ('Mpileng') and the second respondent ('Khulong'), together referred to as respondents, from a leased commercial property where the respondents conduct their business, on the basis that the respondents have breached the terms of the commercial lease agreement between them by failing to make timely monthly rental payments, resulting in the termination of the lease by the applicant. The application is opposed.
- [2] The following was common cause between the parties:
- [2.1] The applicant was a lawful and rightful owner of the leased property.
- [2.2] In October 2024, the applicant and the first respondent entered into a written lease agreement ('the agreement'). It was a term of the agreement that the respondent would pay all rentals to the applicant in advance each month.
- [2.3] The applicant concluded a deed of surety with the second respondent, binding himself as surety for and co-principal debtor in terms of the written surety agreement, for the payment of rental and other charges, and for the due fulfilment and performance of all obligations of the first respondent in terms of the agreement.
- [2.4] Despite the applicant's demand for payment of arrears of R392 565.85 as at June 2025 and the applicant's correspondence regarding termination of the agreement in June 2025, the respondents remained in arrears on their rental payments and continued to occupy the property.

- [2.5] In June 2025, the applicant instituted a pending action against the respondents, seeking cancellation of the agreement and damages arising therefrom.
- [2.6] Between July and August 2025, the respondents made payments totalling R200 000, with R100 000 each month.
- [3] Regarding the late filing of the answering affidavit, the applicant averred that it took no issue with it, as it suffered no prejudice, having filed a reply thereafter. Further, the issue of the dates on which the second respondent and the commissioner of oaths signed the answering affidavit was not seriously contested, as the applicant stated in its replying affidavit that it elected to reply to the answering affidavit to expedite and finalise the matter. On this basis, I have accepted the answering affidavit as evidence since the applicant raised no opposition and had already replied to it.
- [4] It was argued on behalf of the applicant that, as the lawful owner, it was relying on *rei vindicatio* and on the respondents' possession of the property.
- [5] The respondents raised a point in limine of *lis pendens*, stating that there is a pending action between the parties, claiming cancellation of the agreement and damages. They further dispute the amount in arrears.
- [6] The issue for determination is whether the applicant has made out a case for an eviction order pending the finalisation of the trial proceedings, and whether the respondents' point *in limine* has any merit.
- [7] Fundamental to the defence of *lis alibi pendens* is the requirement that the same plaintiff has instituted an action against the same defendant for the same subject matter arising out of the same cause.¹ The defence of *lis alibi pendens* is akin to the defence of *res judicata* in that, in both, the elements of the defence are that the parties and the issue are the same. The rationale behind the defence is that it is undesirable to allow two different courts to decide the same issue independently of one another, either where a dispute is

¹ *Hassan & another v Berrange* NO 2012 (6) SA 329 (SCA) paragraph 19.

still pending (*lis alibi pendens*), or where the dispute has already been determined (*res judicata*).

- [8] For the defence of *lis alibi pendens* to succeed, the respondents must show that the litigation is between the same parties; the cause of action is the same; and the same relief is sought in both matters.
- [9] The parties in the two matters are the same. The question is whether the issues for determination are the same. In the action, the applicant sought confirmation of the agreement's cancellation, payment of arrears in the amount of R392 565.85, and damages.
- [10] None of these issues arises in the application before me, nor is the same relief sought in the two matters. In this application, the applicant sought confirmation of the cancellation of the agreement and ejection of the respondents from the leased property. The applicant has demonstrated that the agreement governing the parties' relationship was cancelled in June 2025, and has sought confirmation thereof in both the action and this application. Nothing turns on the fact that, in both the action and the application, the applicant sought confirmation of cancellation of the agreement, as it had already been cancelled, and such was conveyed to the respondents in writing. Consequently, the point *in limine* regarding the defence of *lis pendens* is found to be without merit and dismissed.
- [11] In order to succeed in an eviction application based on *rei vindicatio*, the applicant must allege and prove the following: a) The respondent's right to possess, which is a lease agreement between the parties; b) A valid termination of the respondent's right to possess; c) Continued occupation by the respondent or by someone holding on the respondent's behalf or through the respondent; d) Compliance with any statutory requirements; and e) Damages (if any) suffered as a result of the holding over.²
- [12] It was undisputed that the applicant terminated the agreement because the respondents were in arrears on the rent. However, the respondents disputed

² Amler's Precedent of pleadings Eight Edition p 188.

the amount of the arrears. The respondents did not dispute that they were in arrears; they only disputed the actual amount in arrears, as payments were made in July and August.

[13] In its reply affidavit, the respondent admitted that, although the agreement was terminated in June 2025, it accepted payments from the respondents for July and August rentals after initiating this application on 9 July, as the respondents were still in occupation. I find that the fact that the actual arrears amount is in dispute does not assist the respondents, as the application was not to claim arrears, which would be dealt with in the pending action proceedings. Their reliance on an incorrect arrears figure cannot serve as a defence to the eviction application once the agreement has been terminated, even if the termination was based on those incorrect arrears. There is no dispute that the respondents are in arrears; the dispute is only the exact amount of the arrears.

[14] Further, the applicant stated that the payments made in July and August were allocated to the respective months' rentals, as the respondents were still in occupation of the leased property. It is apparent that the applicant's acceptance of those payments in July and August did not revive the terminated agreement. I am persuaded that, because the agreement has been validly terminated, the applicant is not precluded from recovering its immovable property. Accordingly, there is no reason why the application for an eviction order against the respondents should not succeed, whilst the trial proceedings on a different cause of action continue.

[15] Regarding costs, there is no reason they should not follow the cause.

[16] In the circumstances, the following order is made;

Order:

[16.1] The lease agreement between the applicant and the first respondent is terminated.

[16.2] The first and second respondents, and all other occupants, whether occupying through or under them, are to vacate the premises situated

at Warehouse 0014 Hofmil (The Showroom), 2[...] S[...] Street, Pretoria, Gauteng Province (the premises), together with any movable property on or in the said premises, within 30 (thirty) days of service of this order upon the respondents.

[16.3] Should the first and second respondents, and all those occupying through or under them, fail to vacate the premises known as Warehouse 0014 Hofmil (The Showroom), 2[...] S[...] Street, Pretoria, Gauteng Province, within the time period stated in paragraph 2 above, the sheriff of the area where the immovable property is situated is authorised to assist the applicant in evicting the first and second respondents, and all those occupying through or under them, from the premises.

[16.4] The first and second respondents are ordered to pay the costs of this application, jointly and severally, the one paying, and the other to be absolved.

N G M MAZIBUKO
Judge of the High Court

Date of Hearing: 3 March 2026

Judgment delivered on: 1 June 2026

APPEARANCES:

For the Appellant: Adv Z Schoeman

Attorneys for the Applicant: Savage Jooste & Adams Inc

For the Respondents: Adv L Mello

Attorneys for the Respondent: ME Makgopa Attorneys