

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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

Date: **2nd March 2023** Signature: _____

CASE NO: 55828/2021

DATE: 2ND MARCH 2023

In the matter between:

AFHCO HOLDINGS (PROPRIETARY) LIMITED

Applicant

and

MBOWA SCHOOLS (PROPRIETARY) LIMITED

Respondent

Coram: Adams J

Heard: 27 February 2023

Delivered: 02 March 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 02 March 2023.

Summary: Commercial lease agreement – cancellation due to breach – *pacta servanda sunt* – opposed eviction application – factual dispute relating to grounds of opposition – respondent's version rejected as far-fetched – application for the eviction from commercial premises granted.

ORDER

- (1) The respondent and all other occupiers of the Commercial premises situate at Shop 101, Anchor Towers, 2 Plein Street, Johannesburg ('the applicant's property'), be and are hereby evicted from the said property.
 - (2) The respondent and all other occupiers of the said premises shall vacate the applicant's property on or before the 1st of May 2023.
 - (3) In the event that the respondent and the other occupiers of the premises not vacating the applicant's property on or before the 1st of May 2023, the Sheriff of this Court or his lawfully appointed deputy be and is hereby authorized and directed to forthwith evict the respondent and all other occupiers from the said property.
 - (4) The respondent shall pay the applicant's cost of this application.
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JUDGMENT

Adams J:

[1]. The respondent is a private company, which carries on business as a private School and a Training College, which it runs from commercial premises situated at Shop 101, Anchor Towers, 2 Plein Street, Johannesburg. The respondent presently occupies these premises ('the leased premises') pursuant to and in terms of a written lease agreement, which it concluded with the applicant on or about the 20th August 2020 or the 10th of January 2021. The lease agreement was signed on behalf of the respondent on 20 August 2020 and on behalf of the applicant on 10 January 2021. The lease agreement was to endure for a period of five years from 1 February 2021 to 31 January 2026 and the respondent was to be given vacant occupation of the premises on 01 October 2020. The initial rental payable in terms of the lease, exclusive of municipal

services and related charges, was the sum of R43 125 per month, and an initial deposit of R64 687.50 was also payable by the respondent to the applicant.

[2]. The respondent took occupation of the leased premises, as provided for in the lease, on 01 October 2020, and the lease commenced on 01 February 2021. The deposit of R64 687.50, as well as certain amounts in settlement of the rental for the months of February and March 2021, were paid by the respondent to the applicants during March 2021. However, during April 2021 the respondent started falling into arrears with its monthly rentals and by August 2021, the arrear rentals and arrear services and related charges amounted in total to R158 818.87. Because of this breach by the respondent of the lease agreement, the applicant subsequently cancelled the said agreement and demanded from the respondent that they vacate the leased premises, which the respondent refused or failed to do.

[3]. In this opposed application, the applicant applies for an order evicting from the said property the respondent, who, so the applicant alleges, is in unlawful occupation of the leased premises. The respondent does not dispute that, as and at August 2021, it was in arrears with payment of the monthly rental to the tune of R158 818.87, and that it subsequently failed to make any further payments towards the monthly rental payable in terms of the lease agreement. It is instructive that, during the months of February and March 2021, the respondent complied, almost to the letter, with the provisions of the lease agreement in that payment of the initial deposit and the monthly rental due was duly made by it to the applicant. The respondent does however oppose the application on the basis of what can best be described as 'fanciful' defences, to which I shall revert later on in this judgment.

[4]. At first blush and *ex facie* the applicant is entitled to the relief claimed in this eviction application. And I say so for the simple reason that the respondent was in arrears with its monthly rental, which entitled the applicant to cancel the lease agreement and to have the respondent evicted from the leased premises. In that regard, the lease agreement provided as follows:

‘(2) Rent and Deposit

The monthly rental payable in terms of this Lease shall be payable monthly in advance, without deduction or set off including bank charges, on the first day of each calendar month.

The rent in respect of the first month shall become due and payable by the [respondent] on the date of signature of this Lease Agreement, and prior to occupation of the leased premises.’ (My Emphasis).

[5]. The point is simply that, if regard is had to this provision of the lease, the rental was payable in advance and the respondent’s failure to timeously make payment of the rental amounted to a breach of the contract. The lease also expressly provides that, in the event of breach or failure by the respondent, as the lessee, to pay any amount due by it on the due date, ‘and fails to remedy that breach within a period of seven days after the receipt of written notice to that effect to [the respondent] by the [applicant], or, being hand delivered by the [applicant]’, the applicant becomes entitled to cancel the lease agreement.

[6]. That is exactly what the applicant did. On 10 August 2021, the applicant hand delivered to the respondent’s offices a letter, demanding that the arrear rental, amounting at that stage to R158 818.87, be brought up to date, failing which the applicant, so the demand read, intended cancelling the lease agreement. The respondent did not comply with the demand, and on the 7 September 2021, the applicant addressed to the respondent a notice of cancellation of the lease agreement and demanded that the respondent vacates the premises by the 16 September 2021.

[7]. Therefore, in my view, the lease was validly cancelled by the applicant, entitling it to an eviction order. The only question remaining is whether there is merit in any of the defences raised by the respondent in opposition to this eviction application.

[8]. In its answering affidavit, the respondent denies that the lease was signed on its behalf by a duly authorised representative and it takes issue with the fact that the lease was signed by ‘Mbowa Schools’. This, so the respondent contends, means that the agreement was not properly signed on behalf of the respondent, which, according to its resolution passed on the same day on which the lease was allegedly signed by the respondent, namely 20 August 2020, should have

been represented by a Mr Abbey Mbowa. Mr Mbowa did in fact sign the lease agreement, albeit in his capacity as a Surety, on the exact same page on which the 'signature' of the respondent ('Mbowa Schools') appears.

[9]. All of the foregoing mean, so the argument on behalf of the respondent is concluded, that the lease agreement is invalid and unenforceable. This argument, which relates to a factual issue, is void of any merit. This contention flies in the face of the admission by the respondent that it occupied the premises in terms of the lease agreement. What is more is that the respondent acted in accordance with the provisions of the lease, which is as clear an indication as one will ever get that the respondent regarded itself as bound by the agreement. So, for example, the respondent paid the exact amount of the initial deposit payable in terms of the lease agreement. Also, the agreement appears to have been signed by Mr Mbowa, who signed on behalf of the respondent as 'Mbowa Schools'. Howsoever one views this matter, it has to be accepted that the respondent signed the agreement and regarded itself as bound by its terms and conditions. The respondent's denial in that regard is so far-fetched and untenable that it can and should be rejected on the papers. The point is simply that, having denied that a valid and enforceable lease agreement had been entered into between the applicant and it, the respondent does not proffer an alternative basis for its occupation of the leased premises or for the fact that it evidently acted in accordance with the letter of the said agreement. The respondent's contention that the lease is invalid and unenforceable makes no sense.

[10]. The second ground on which the respondent opposes the eviction application relates to a number of complaints which it has relative to the leased premises. The respondent avers that, in terms of the agreement between the parties, the applicant was required to attend to the following issues: additional toilets were to be installed; water and sewer leaks were to be repaired; an occupancy certificate by the local authority was to be furnished; and a glass wall, which was unstable and had at least two cracked panes, was to be repaired. Also, so the case on behalf of the respondent went, the leased premises were supposed to have been ready for occupation thirty days after the commencement of the lease, but to date the premises are still not ready for occupation. In fact, so

the respondent avers, it had caused to be installed partitioning for classrooms and offices at a cost of approximately R600 000, which, presumably, it requires to be set off against the rental.

[11]. The difficulty with this part of the respondent's case is that it flies in the face of the express provisions of the agreement, notably clause 3, which provides that the applicant 'does not warrant that the leased premises are fit for the specific purposes for which the [respondent] intends to use them'. Moreover, as alluded to *supra*, payment of rental on a monthly basis was to be made 'without deductions of set-off'. Then, there is also the non-variation so-called *Shifren* clause in the lease (clause 17), which provides as follows: -

'(17) General – Whole Agreement

This Lease Agreement comprises the entire agreement between the [applicant] and the [respondent], and the [respondent] records that no representations of any nature whatsoever have been made by the [applicant] or any person acting on the [applicant's] behalf to the [respondent] inducing it to enter into this Lease Agreement.

No alteration or variation of this Lease Agreement shall be of any force or effect unless it is recorded in writing and signed by both the [applicant] and the [respondent].'

[12]. The death knell for the respondent's case – and especially its claim that the applicant was in terms of the agreement required to effect certain repairs and renovations to the property by the time of the official commencement of the lease – is however the following clauses in the lease: -

'(8) Alterations to Premises and Installation therein

- (a) Unless anything to the contrary is stated anywhere else in this Lease Agreement, the [respondent] shall not make or allow, any alterations or additions of any nature whatsoever, to the leased premises or any structural alterations or additions to the leased premises without the [applicant's] prior written consent.
- (b) The [respondent] shall not at any time be entitled to any compensation whatsoever from the [applicant] for any such alterations or additions, nor shall the [respondent] at any time be entitled to remove such alterations or any part thereof, whether made with or without the [applicant's] prior written consent, but should it nevertheless do so, then without prejudice and in addition to the [applicant's] rights in terms of this Lease Agreement, the [applicant] shall be entitled to direct the [respondent] to reinstate the leased premises to their same state and condition as prior to the carrying out of such alterations or additions or removals. Any such reinstatement will occur at the [respondent's] own cost and expense

and will be completed by the [respondent] within 30 (thirty) days of notice to the [respondent] to reinstate the leased premises, failing which;

- (c) The [applicant] shall be entitled to enter upon the leased premises to reinstate the same as aforesaid at the cost of the [respondent].’

[13]. The foregoing clause defeats completely the respondent’s second ground of opposition. The clause in fact goes further and provides that, if in order to obtain a licence to carry on the business for which the premises are hired, the premises are required to be altered, added to or renovated, ‘the [applicant] shall not be obliged to do so’. The respondent is, however, entitled at its own expense to carry out such alterations, additions or renovations provided that the applicant’s prior written consent is obtained. In the face of these express and unequivocal provisions, it is inconceivable that the respondent can persist with its contentions in regard to the additional work allegedly required to be performed on the premises. The point is best demonstrated finally by citing one more sentence from clause (8), which reads thus: -

‘The [respondent] shall under no circumstances have any claim for compensation for any such alterations, additions or renovations, whether or not they are removed and the premises reinstated, save where otherwise agreed between the parties.’ (My emphasis).

[14]. The respondent also relies on an alleged oral agreement between the parties that the applicant would grant the respondent, over a six-month period, a thirty percent so-called ‘Covid relief discount’ on the rental. This assertion suffers from the same defect as all of the other supposed agreements between the parties which had not been reduced to writing. They are not binding by virtue of the non-variation clause. There is a good reason for the existence of such non-variation clauses in contractual arrangements, which our courts, including the Constitutional Court, have declared to be binding. The rationale behind them are to avoid disputes between contracting parties, exactly as is the case *in casu*. There is a further problem with the averment by the respondent relating to the ‘Covid relief discount’, that simply being that the respondent, by all accounts failed to pay even the balance of seventy percent due in respect of the monthly rental. So even on its own version, the respondent was in arrears with its monthly instalments and therefore in breach of the lease, which, in turn entitled the applicant to cancel the contract.

[15]. This point therefore falls to be rejected.

[16]. During the hearing of this opposed application on 27 February 2023, Mr Ngqwalgele, Counsel for the respondent, argued that there is a factual dispute between the parties, as evidenced by what is averred by the parties in their respective affidavits, which cannot be resolved on the papers. For this reason alone, so he submitted, the application should be dismissed. As an example, Mr Ngqwalgele referred to the denial by the deponent to the respondent's answering affidavit that the lease agreement was not signed by a duly authorised representative for and on behalf of the respondent. Another example relates to the numerous oral agreements, which, according to the respondent, were concluded between the parties. It is pointed out that the applicant, in responding to these allegations, did not dispute them and therefore they should be accepted by the Court.

[17]. The respondent's arguments in that regard are misguided. All of the facts which, according to the respondent, are disputed are not material to the adjudication of this matter. I say so for the reasons already alluded to *supra*, notably the fact that any evidence of agreements at variance with the written instrument is irrelevant because of the non-variation clause. In fact, all of that evidence is inadmissible by virtue of the parole evidence rule. The simple fact of this matter is that a written agreement of lease was entered into between the parties, and *pacta servanda sunt*. Therefore, on the basis of that agreement the applicant is entitled to the relief sought in this application.

[18]. In any event, the one possible material factual dispute between the parties – whether or not the respondent signed the written lease agreement – can and should be decided in favour of the applicant on the basis of the principles enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Limited*¹. As already alluded to above, on the evidence as a whole, the respondent intended to be bound by the lease agreement, which was probably signed by its representative on its behalf. Why else, would the respondent conduct itself in accordance with the provisions of the said lease? Moreover, the respondent

¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A).

admits and concedes that it occupied the leased premises in terms of a lease agreement, but denies that it is the lease agreement attached to the founding affidavit. However, the respondent does not say what the other detailed terms and conditions of the lease agreement are. This, in my view, makes the version of the respondent on that aspect of the matter an untenable one, which can and should be rejected on the papers as far-fetched.

[19]. The general rule is that a court will only accept those facts alleged by the applicant which accord with the respondent's version of events. The exceptions to this general rule are that the court may accept the applicant's version of the facts where the respondent's denial of the applicant's factual allegations does not raise a real, genuine, or *bona fide* dispute of fact. Secondly, the court will base its order on the facts alleged by the applicant when the respondent's version is so far-fetched or untenable as to be rejected on the papers. It is necessary to adopt a robust, common-sense approach to a dispute on motion. If not, the effective functioning of the Court can be hamstrung and circumvented by the simplest and blatant stratagem. A Court should not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.

[20]. Applying these principles, I reject the version of the respondent insofar as there may be a dispute of material facts.

[21]. There were two more issues raised by the respondent's Counsel during the hearing of the matter, although those issues were not canvassed in the papers, and for that reason alone I should disregard them as grounds on which to refuse the application. The first issue relates to the non-joinder of the surety in these proceedings, the argument being that he has a vested interest in this application, because he is at risk of being held liable, at a later stage, by the applicant if the application is successful.

[22]. As stated by *Erasmus: Superior Court Practice*, 'the question as to whether all necessary parties had been joined does not depend upon the nature of the subject matter of the suit, but upon the manner in which, and the extent to which,

the court's order may affect the interests of third parties'. The test is whether or not a party has a 'direct and substantial interest' in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court. A mere financial interest is an indirect interest and may not require joinder of a person having such interest. The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party. (*Amalgamated Engineering Union v Minister of Labour*²).

[23]. Applying these trite principles *in casu*, it cannot possibly be suggested that the order sought by the applicant may affect the Surety – far from it. An eviction order against the respondent would have no effect whatsoever on him. Moreover, as *In re BOE Trust Ltd and Others NNO*³ held, the failure to join a necessary party may also be cured if an informal notice asking such party whether it wished to intervene is met by an unequivocal response that it would abide by the decision of the court. In the matter before Court, the Surety was in fact the deponent to the respondent's answering affidavit, which means that he was well aware of application against the respondent. In my view, it can safely be inferred that, if the Surety wished to intervene in these proceedings he would long have done so. The fact that he did not, can be interpreted as an unequivocal decision to abide by this court's decision. Accordingly, the point of non-joinder should fail on the basis of the applicable legal principles, but in any event because it was not raised by the respondent on the papers.

[24]. The last point raised by the respondent, which was not dealt with on the papers, relates to the alleged infringement on the constitutional rights of the learners who attend the respondent's school. Their basic right to education, so the respondent contends, would be violated, as would be their right to human

² *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659;

³ *In re BOE Trust Ltd and Others NNO* 2013 (3) SA 236 (SCA) at 242A–C;

dignity should the respondent be evicted from the leased premises. The main difficulty with this contention is that no case is made out in the papers based on the alleged infringement of the constitutional rights. So, for example, the respondent has not pleaded nor proven that the children, when the respondent is evicted from the premises, would not be able to receive the same or similar education somewhere else. This defence should therefore fail.

[25]. Accordingly, the relief sought by the applicant should be granted.

Costs

[26]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*⁴.

[27]. I can think of no reason why I should deviate from this general rule.

[28]. I therefore intend awarding costs against the respondent in favour of the applicant.

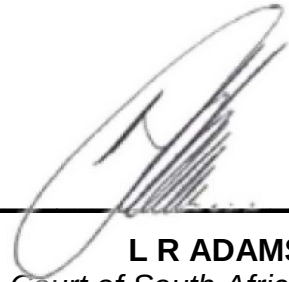
Order

[29]. Accordingly, I make the following order: -

- (1) The respondent and all other occupiers of the Commercial premises situate at Shop 101, Anchor Chambers, 2 Plein Street, Johannesburg ('the applicant's property'), be and are hereby evicted from the said property.
- (2) The respondent and all other occupiers of the said premises shall vacate the applicant's property on or before the 1st of May 2023.
- (3) In the event that the respondent and the other occupiers of the premises not vacating the applicant's property on or before the 1st of May 2023, the Sheriff of this Court or his lawfully appointed deputy be and is hereby authorized and directed to forthwith evict the respondent and all other occupiers from the said property.

⁴ *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

- (4) The respondent shall pay the applicant's cost of this application.



L R ADAMS

*Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

HEARD ON:	27 th February 2023
JUDGMENT DATE:	2 nd March 2023 – judgment handed down electronically.
FOR THE APPLICANT:	Advocate Vanessa Fine
INSTRUCTED BY:	Mervyn Joel Smith Attorneys, Parkhurst, Johannesburg
FOR THE RESPONDENT:	Advocate Ngqwalgele
INSTRUCTED BY:	TJP Attorneys, Marshalltown, Johannesburg