



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case No: 4899/23

**Date Heard: 9 November 2023
Delivered on: 10 November 2023**

In the counter-application between:

CAPE PENINSULA UNIVERSITY OF TECHNOLOGY Counter-Applicant

and

MA-AFRIKA HOTELS (PTY) LTD Respondent

In the main application between:

In the matter between:

MA-AFRIKA HOTELS (PTY) LTD Applicant

and

CAPE PENINSULA UNIVERSITY OF TECHNOLOGY First Respondent

PARK CENTRAL LIFESTYLE (PTY) LTD Second Respondent

PROFESSOR NKO GWANE STOFFEL NHLAPO Third Respondent

PIETER DU PLESSIS Fourth Respondent

JUDGMENT DELIVERED ON 10 NOVEMBER 2023

HOLDERNESS, AJ:

Introduction

[1] This is the resumed hearing of an urgent counter-application for vindictory relief, entailing the eviction of the respondent in the counter application, Ma-Afrika Hotels (Pty) Ltd ('Ma-Afrika') and security for costs, which was postponed on 25 October 2023, by agreement between the parties, for hearing in the Fast Lane of the Third Division on Thursday 9 November 2023. The court file was delivered to me on 7 November 2023 for hearing two days later. This judgment has therefore been prepared in haste.

[2] The applicant in the counter-application is the Cape Peninsula University of Technology ('CPUT'). The immovable property to which the counter-application relates, are units in the Welgevonden sectional title scheme, situated in District 6, Zonnebloem ('the premises'), which are used for the purposes of student accommodation for CPUT students and were originally also leased to Ma-Afrika for running its Best Western Cape Suites Hotel, restaurant and conference centre.

[3] The history of litigation between these parties is long and torturous, dating back to 2021. It has resulted in four judgments by different Judges of this Division, all substantively in favour of CPUT.

[4] The factual background is set out in detail in the judgment of Binns-Ward J in *Ma-Afrika Hotels (Pty) Ltd v Cape Peninsula University of Technology*.¹ It is not necessary to repeat these facts in this judgment, particularly in light of the limited time available and the various applications which have presented before this Court where the factual matrix has been dealt with in great detail.

[5] The counter-application presently before the court was brought in response to an

¹ 2023 (3) SA 621 (WCC)

urgent contempt application launched by Ma-Afrika in June 2023, in relation to an order granted by Gamble J on 31 March 2023.

[6] On 29 June 2023 Francis J dismissed the second contempt application and struck CPUT's counter-application from the roll, with costs.

[7] The counter-application was struck due to certain procedural shortcomings *inter alia* relating to the omission in such application of time periods for the delivery of answering papers. It was not struck due to lack of urgency, nor were the merits of the counter-application determined by Francis J.

[8] On 4 September 2023 CPUT re-enrolled the counter-application for hearing on an urgent basis on 25 October 2023, and filed a supplementary affidavit. Ma-Afrika has not suggested that this Court is precluded from hearing the counter-application on the merits due to it having previously been struck from the roll. However it contends that the counter-application is not urgent, and that any alleged urgency is self-created.

[9] Ma-Afrika delivered its answering affidavit in the counter-application on 26 September 2023. CPUT delivered its reply thereto on 19 October 2023.

[10] The counter-application came before Fortuin J on 25 October 2023. By agreement between the parties, the counter-application was postponed for hearing on 9 November 2023. The parties reserved their rights to argue the issue of urgency on such postponed date.

The issues for determination

[11] I indicated at the hearing that I was not inclined to entertain the application for security for costs in the fast lane, particularly in light of the change in circumstances relating to the current status of other matters pending between the parties, and in light of the fact I

was requested not to read the record in the pending review application. The prospects of success in such application would be one of the factors to be taken into account in determining whether or not Ma-Afrika should be provided to provide security for costs.

[12] Moreover, Mr Andre Pieterse ('Mr Pieterse') who deposed to the answering affidavit in the counter-application on behalf of Ma-Afrika, alleged that Ma-Afrika's financial position has improved significantly since he deposed to the affidavit in support of the second contempt application on its behalf. Mr Magardie, who appeared on behalf of CPUT, accepted that in view of the Court's view regarding the relief for security of costs hereof, an appropriate order in respect of the relief in respect of security for costs would be for it to be postponed *sine die*. The application for security for costs can be re-enrolled, on proper notice, prior to the determination of Part B of the review application.

[13] Therefore the only remaining issues for determination are whether the counter-application is urgent and the merits of the eviction or vindictory relief.

Urgency

[14] Professor Nkogwane Stoffel Nhlapo ('Professor Nhlapo'), the Vice-Chancellor of CPUT, has deposed to affidavits on behalf of CPUT in the present proceedings.

[15] In an affidavit deposed to on 25 June 2023, which served as the founding affidavit in support of the counter-application, Professor Nhlapo averred that the counter-application for eviction and security for costs was urgent, and that CPUT would not be afforded substantial relief at a hearing in due course, for *inter alia* the following reasons:

- 15.1 On 15 June 2023 when Ma-Afrika's second contempt application was delivered, it became clear that the eviction of Ma-Afrika from the premises was urgent.

- 15.2 Until such time, CPUT had been unaware until then that essential services such as sanitation, electricity and security services were at imminent risk of disconnection and termination due to non-payment by Ma-Afrika. On its own version, Ma-Afrika was at that stage unable to even pay for the delivery of toilet paper for the student accommodation.
- 15.3 CPUT had an appointed service provider, Park Central Lifestyle (Pty) Ltd ('Park Central') who was immediately able to take over the student accommodation services but was unable to do so while Ma-Afrika was occupying the premises.
- 15.4 Ma-Afrika was unlawfully holding over the premises purchased by CPUT for R131 million, for student accommodation in the public interest, using public funds. In this regard, it was clear that from 23 May 2023 when Sher J handed down his judgment in part A, the interim interdict part of the main review application, that Ma-Afrika had no legal right to continue occupying the property.

[16] CPUT's assertions regarding urgency in respect of the present counter-application were elaborated on in its supplementary affidavit filed in support of the re-enrolment of the counter-application. In that affidavit, Professor Nhlapo stated that the matter was urgent and CPUT would not get substantial redress at a hearing in the normal course, for the following reasons:

- 16.1 CPUT would not be afforded substantial redress at a hearing in due course on the normal opposed motion roll. At 23 August 2023 the earliest available dates on the semi-urgent and opposed motion rolls were 8 February 2024 and 7 October 2024 respectively.

- 16.2 The eviction proceedings were brought by CPUT as an institution performing the public function of providing higher education, created for that purpose by the National Government and with its operation substantially subsidised from the National Revenue Fund.
- 16.3 Ma-Afrika continued to occupy the property and incur costs for student accommodation on the property without the consent of CPUT, and simultaneously sought to hold CPUT responsible for such costs.
- 16.4 CPUT's appointed service provider, Park Central, which had lawfully been appointed as student accommodation operator for the premises for a limited 18 month period with effect from 1 April 2023 to 30 September 2024, was unable to take over operational control of the property due to Ma-Afrika's unlawful occupation. Almost one third of that period had already elapsed.
- 16.5 CPUT was self-evidently suffering harm by being unable to use and take control of its own property. As a result, it was unable to plan effectively for the use of the premises as long as it remained occupied by Ma-Afrika.
- 16.6 CPUT was unable to proceed with its plans to use the areas of the property occupied by Ma-Afrika's hotel for student accommodation operation for as long as Ma-Afrika was occupying the property.
- 16.7 The effect of this is that CPUT will be unable to save approximately R2,5 million in student transport costs and unable to increase its income by approximately R15 million per annum due to additional student residence fees and state funding allocations, which will only occur when the hotel units are converted to additional student accommodation.
- 16.8 The end of the year period and with it the upcoming student vacations and students exiting the student residence for the December and January vacations,

was an important period as it gave CPUT the opportunity to conduct planning for the residence, repairs and upgrades during this period. CPUT had in this regard taken a decision to decant the student accommodation sections in stages in order to conduct repairs and implement the conversion of the entire premises for CPUT's needs, which do not include the operation of the hotel on the premises. Those planning processes were being frustrated by Ma-Afrika's unlawful occupation of the property.

16.9 Ma-Afrika had instituted an action against CPUT in this court on 14 August 2023 under case no. 13739/23, in which it *inter alia* claimed payment of an amount of R3 171 222, 15 from CPUT based on the *negotiorum gestio* and on the grounds that “...*Since 24 May 2023 to date, the plaintiff has managed the affairs of the defendant by providing accommodation services to 370 students at the premises. The defendant is aware that the plaintiff is managing its affairs and has ratified the plaintiff's conduct in this regard.*”

16.10 Ma-Afrika was consequently seeking to hold CPUT liable for disbursements and expenses which it was incurring to provide student accommodation on the property notwithstanding that this was directly contrary to CPUT's wishes and such services were being provided without CPUT's consent.

Is the urgency self-created?

[17] Mr Elliot SC, counsel appearing on behalf of Ma-Afrika, argued that any urgency was self-created, as CPUT had been aware of Ma-Afrika's defence since 26 June 2023, and subsequent to the striking out of the counter-application and the exchange of correspondence in July 2023 in terms of which CPUT demanded that Ma-Afrika vacate the property within 15 days, no further steps were taken to evict Ma-Afrika.

[18] On 14 August 2023 Ma-Afrika instituted a separate action against CPUT under case number 13739/23 in which it seeks to recover monies under five different claims. The allegations in claims 1 and 4 underpin Ma-Afrika's defence that it has a debtor-creditor lien over the premises, whilst the averments in claim 2 support its defence of exercising either a salvage or improvement lien over the property.

[19] The main thrust of Ma-Afrika's argument regarding self-created urgency is that CPUT waited over two months, from 30 June 2023, to re-issue its counter-application, which was enrolled for hearing on 4 September 2023. According to Ma-Afrika CPUT has failed to properly explain the reasons for such delay.

[20] In its supplementary affidavit dated 1 September 2023, CPUT explained that a substantial amount of time had been spent by CPUT's finance staff in the laborious process investigating and discussing with its legal team the various invoices submitted by Ma-Afrika which it claimed to be due.

[21] Ma-Afrika contends that this explanation does not pass muster. However, in a letter to CPUT's attorneys, Norton Rose Fulbright dated 12 July 2023, Ma-Afrika's attorneys stated inter-alia that *"...our client's continued occupation of the premises is based on liens that it holds over the property. The nature of the liens were explained by our client under oath and your client is in possession of all the invoices which support such claims, which invoices remain unpaid to date."*

[22] The explanation referred to was that proffered by Ma Afrika's Mr Pieterse in his replying affidavit dated 27 June 2023, where he stated:

"...Ma-Afrika has a debtor-creditor lien, as well as a salvage and/or improvement lien over the property. It is entitled to remain in possession of the

property until CPUT makes payment of its claims or puts up acceptable security.”

Ma-Afrika reserves the right to deal more fully with its liens over the property in due course, in the event that CPUT should persist in seeking its eviction from the property in a further application.”

[23] When challenged by CPUT regarding the lack of details in support of the alleged liens, Mr Pieterse’s riposte was to merely state that “...*there is nothing vague about my statement that Ma-Afrika has liens over the property.*”

[24] Mr Pieterse’s statements under oath about Ma-Afrika’s alleged substantial liens (amounting to over R4 million) are indeed vague and unsubstantiated. He failed to provide any meaningful detail regarding the nature of the liens, the items replaced, what exactly the improvements relate to or when and in what circumstances the alleged expenses were incurred.

[25] In its plea filed in the action proceedings, CPUT pleaded *inter alia* that Ma-Afrika failed to comply with an agreed Asset Replacement Request Process, which required the express consent of CPUT for the replacement of assets and items needing replacement.

[26] I accept, as contended on behalf of CPUT, that it was therefore entitled to investigate and gather the facts relating to the liens relied on and acted reasonably in doing so before re-enrolling its counter-application. CPUT has set out in detail the steps it took to investigate the liens and has satisfactorily explained the delay in re-enrolling its counter-application.

[27] In *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and*

*Others*² the Court held that:

“...the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not as urgent as the applicant would want the Court to believe. On the other hand a delay may have been caused by the fact that the Applicant was attempting to settle the matter or collect more facts with regard thereto.

It means that if there is some delay in instituting the proceedings an Applicant has to explain the reasons for the delay and why despite the delay he claims that he cannot be afforded substantial redress at a hearing in due course.

....the fact the Applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress.’

[28] The grounds cited for urgency by CPUT, as further expanded in their supplementary affidavit, are persuasive. CPUT has been deprived of its property for a significant period of time and it is in the interests of fairness and justice for the vindicatory relief to be urgently determined.

[29] Furthermore, both parties have had more than adequate opportunity to place their respective versions before the court and Ma-Afrika cannot argue, nor did it seek to, that it has been prejudiced in this regard by the re-enrolment of the counter-application in the fast lane. The issues have been fully ventilated and it is appropriate for them now to be finally determined.

² (11/33767) [2011] ZAGPJHC 196 (23 September 2011) at para 8 – 9

Does Ma-Afrika have a valid claim to the vindictory relief?

[30] CPUT's claim for ejectment is founded on the *rei vindicatio*.

[31] The requirements of the *rei vindicatio* are trite and are not in dispute in the present matter. CPUT is the owner of the premises. Ma-Afrika is in possession thereof, and the property sought to be vindicated is still in existence and clearly identifiable.

[32] Ma-Afrika has repeatedly and persistently refused to vacate the premises.

[33] Ma-Afrika's only defence to the ejectment relief is that its possession of the premises is lawful as it has a *ius retentionis*, namely a debtor-creditor lien and a salvage and/or improvement lien over CPUT's property.

[34] According to Ma-Afrika, the total amount in respect of which Ma-Afrika exercises its liens over CPUT's property is R 4 863 859.63. Ma-Afrika maintains that for as long as CPUT refuses to pay Ma-Afrika this amount alternatively refuses to provide acceptable security for its claims, its continued occupation of the premises is lawful.

[35] CPUT has tendered security in the form of a bank guarantee for payment of the full amount of the liens asserted by Ma-Afrika, in the amount of R4 863 859.63.

[36] CPUT contends that this tender and form of security disposes entirely of Ma-Afrika's defence to the ejectment relief. It was argued on behalf of CPUT that if it is eventually established in the action proceedings under case no. 13739/23 that Ma-Afrika has valid

claims based on its liens, which form the subject of claims 1, 2 and 4 of the particulars of claim, the bank guarantee tendered by CPUT will provide it with the necessary security to enable its claims to be fully paid.

[37] Ma-Afrika of course cannot dispute that should adequate security be put up by CPUT, it will no longer have a lien or liens in terms of which it is entitled to lawfully remain in occupation. It has been well established for over a century that the court can order that a lien be relinquished against adequate security being furnished by the owner.³

[38] In respect of any right of retention based on the liens claimed by Ma-Afrika, CPUT has tendered security by way of a bank guarantee in the amount of R 4 863 859.63 for payment of the total amount in respect of the liens claimed by Ma-Afrika.

[39] The principle that a right of retention based on a lien is defeated by the owner furnishing to the lien holder security in the form of a banker's guarantee is legally sound.⁴

[40] Mr Magardie argued that CPUT's tender of security in the form of a bank guarantee in the total amount of the liens asserted by Ma-Afrika is proper and adequate, and disposes entirely of Ma-Afrika's defence to the ejectment relief. If it is eventually established in the action proceedings under case no. 13739/23 that Ma-Afrika has valid claims based on its liens which form the subject of claims 1, 2 and 4 of the particulars of claim, the bank guarantee tendered by CPUT will provide it with the necessary security to enable its claims to be fully paid.⁵

³ *Spitz v Kesting* 1923 WLD 45

⁴ *Pheiffer v Van Wyk and Others* 2015 (5) SA 464 (SCA)

⁵ *Sandton Square Finance (Pty) Ltd v Vigliotti* 1997 (1) SA 826 (W)

[41] Mr Elliot SC, relying on the authority of *Myers v Gearbox Centre (Pty) Ltd*⁶ argued that South African courts have persistently followed the course adopted in *Campbell v Muller, Smith and Co*⁷, namely to order the release of goods held as security for monetary claims against payment of the sum claimed to a third party or the furnishing of an adequate and proper banker's guarantee.

[42] Ma-Afrika argues that CPUT's failure to furnish, as opposed to tender, 'an adequate and proper banker's guarantee' is fatal to its claim for ejectment.

[43] In the heads of argument delivered on behalf of Ma-Afrika, reliance is placed on the *Pheiffer* decision *supra* and *FirstRand Bank Limited t/a Wesbank v Abandoned Solutions SA (Pty) Ltd*⁸ as authority for the proposition that it is standard practice for the bank guarantee to be described in the order in a matter of this nature.

[44] Based on the aforementioned authorities Ma-Afrika contends that it is axiomatic that it and the Court is entitled to have sight of the guarantee to ascertain whether it is proper and adequate security for its lien, and that judicial oversight is required to determine whether the guarantee is 'adequate and proper.'

[45] This is not how I understand the authorities on substitution of the right of retention. Indeed Davis J in this Division held in *Standard Bank of South Africa Ltd v D Florention Construction CC and Others*⁹:

⁶ 1977 (4) SA 11 (WLD at 14F-G

⁷ 4 SC 335

⁸ [2020] ZAGPJHC 124 (8 May 2020)

⁹ 2008 (5) SA 534 at [17]

‘Relief can be crafted to provide adequate security for first respondent. Ultimately a lien is a form of security for the claim. If first respondent satisfies his claim he must be in the position where the claim is paid in full and therefore his right is not rendered illusory.’

[46] I was not referred to any authority in which it was expressly provided that security must be provided prior to judgment being granted, and that a tender for adequate and proper security will not suffice.

[47] In *Firststrand Bank Limited t/a Wesbank v Abandoned Solutions SA (Pty) Ltd*,¹⁰ to which I was referred by counsel for Ma-Afrika, the Court referred to a guarantee which had already been furnished by the applicant, however this does not appear to be authority for the contention that the furnishing of security (as opposed to the tendering thereof) is a prerequisite to defeat a lien.

[48] It is self-evident that were it to be left to the lien assertor to debate and ultimately determine the form of security, the parties would in all probability be embroiled in a ‘death spiral’ of litigation.

[49] The Court’s discretion to determine the form of security dates back to *Voet*¹¹:

“But is one who has a right of retention held liable to restore the thing to his opponent whenever the latter tenders sound security for the refund of expenses or the payment of wages? It appears that that ought to be left to the E discretion of a circumspect judge according as it shall have become clear from circumstances either that he who ought to restore is deliberately aiming at holding back possession of the thing too long under cover of expenses or wages; or on the other hand that the person

¹⁰ *Firststrand Bank Limited t/a Wesbank v Abandoned Solutions SA (Proprietary) Limited* (2019/31586) [2020] ZAGPJHC 124 (8 May 2020)

¹¹ 16.2.21 (*Gane’s* translation) as cited in *Sandton Square Finance (Pty) Ltd v Vigliotti* 1997 (1) SA 826 at p 831

owing the expenses has it in mind to recover the thing under security, and then by a lengthy and pettifogging protraction of the suit to make the following up of the expenses, wages and the like a difficult matter for his opponent.'

[50] It goes without saying that in order to adequately secure Ma-Afrika's claims, the order would need to be crafted in such a manner to ensure that the security which CPUT is directed to provide is in a proper and adequate form, and that the ejectment will be conditional upon the furnishing of security, in the form directed by the Court.

[51] At the hearing counsel for CPUT sought to amend the Notice of Motion to provide for the ejectment being conditional upon delivery by the counter-applicant to the respondent's attorneys, of a bank guarantee from one of the four main commercial banks in South Africa, in the amount of R4 863 859.63 on behalf of the Cape Peninsula University of Technology, as tendered by the counter-applicant. Mr Elliot objected to such amendment. I cannot conceive of how Ma-Afrika could be prejudiced by such an amendment, which clearly operates in its favour. The earlier amendment to provide for final relief was not objected to and is accordingly allowed.

[52] In any event, in my discretion I intend making an order in these terms to enable CPUT to vindicate its property whilst at the same time ensuring that Ma-Afrika's claims are adequately substituted and secured. The amendment is accordingly allowed.

Conclusion

[53] In the circumstances, I am satisfied that this matter warranted an urgent hearing and that subject to the furnishing of proper and adequate security, there is no valid defence by Ma-Afrika to the vindicatory relief sought by CPUT.

[54] A proper case has accordingly been made out for the ejectment of Ma-Afrika from the

premises. The 72 hour period within which Ma-Afrika is to vacate, as sought by CPUT in the counter-application is clearly inadequate. In my view a reasonable period would be one month from the date of this order.

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

[56] In the result, the following orders issue:

1. The counter-applicant's non-compliance with the Uniform Rules is condoned and leave is granted for this application to be heard as one of urgency in terms of Rule 6(12).
2. The application for the amendment of the counter-applicant's notice of motion dated 26 June 2023 in terms of the counter-applicant's Notice in terms of Rule 28(10) filed on 5 September 2023, is granted, as follows:
 - 2.1 By the deletion of the words "*That a rule nisi do issue calling upon the Applicant ("Ma-Afrika") to show cause on Thursday 20 July 2023 why the following order should not be made final*" in paragraph 2.
 - 2.2 By the deletion of paragraph 2.5 thereof;
 - 2.3 By the deletion of the words "*Paragraph 2.5 of the rule nisi shall operate as an interim interdict with immediate effect*" in paragraph 3.
 - 2.4 By the consequential re-numbering of paragraphs 2.1, 2.2, 2.3, 2.4, 2.5, 3, 4 and 5 of the counter-applicant's notice of motion as paragraphs 3,4,5,6,7 and 8 respectively.
 - 2.5 By the replacement of the words "*CPUT*" and "*Ma-Afrika*" as they appear in paragraph 2 (inclusive of sub-paragraphs) and 4 of the

counter-applicant's notice of motion with the words "applicant" and "respondent" respectively.

3. The respondent and all persons occupying the premises known as sections 1-13, 15 -40, 43 -54, 56 -69, 78, 116 - 132, 134 -145, 147, 151-175, 177, 181 -187, 189 -194 and 196-202 in the Welgelegen Sectional Scheme No. 47/1997 ("the property") through the respondent, are evicted from the property with effect from one (1) month from the date of this order.
4. The counter-applicant is authorised to have a writ of ejectment issued in order for the eviction to be carried out by the Sheriff for the High Court, Cape Town or his deputy, assisted by the South African Police Service, if necessary, should the respondent fail to vacate the property within one (1) month from the date of this order.
5. The ejectment in terms of paragraphs 3 and 4 above shall take place, and is conditional upon, after delivery by the counter-applicant to the respondent's attorneys, of an irrevocable bank guarantee from one of the four main commercial banks in South Africa (namely Standard Bank Ltd, First National Bank Ltd, Absa Bank Ltd or Nedbank Ltd) in the amount of R4 863 859.63 on behalf of the counter-applicant, Cape Peninsula University of Technology, as tendered by it.
6. The determination of the relief sought in paragraph 2.1 of the counter-application for security for costs in the amount of R2,000,000 is postponed *sine die*;
7. The respondent is ordered to pay the counter-applicant's costs.

HOLDERNESS, AJ

APPEARANCES

For the Applicant:	Adv S Magardie
Instructed by:	Norton Rose Fullbright Peter Rogers

For the Respondent(s):	Adv. G Elliott SC
Instructed by:	Thomson Wilks Inc. Anel Bestbier

<u>Date of Hearing:</u>	9 November 2023
<u>Judgment delivered on:</u>	10 November 2023