IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO: EL410/2021

In the matter between:

MOHAMMAD HOSSAIN DELOWAR	**First Applicant**
RAHILA BEGUM (PTY) LTD	**Second Applicant**

and

ALLIE MAHOMED SOOMAR	**First Respondent**
FIRST FORTUNE INVESTMENT 14 CC	**Second Respondent**

REASONS FOR JUDGMENT

MBENENGE JP:

[1] These proceedings relate to a property situated at 212 Oxford Street, East London. The dispute concerns a convenience store of which the first applicant was dispossessed by the first respondent.

[2] The second respondent, First Fortune Investment 14 CC, has a franchise agreement and a lease agreement with Total SA by virtue of which it conducts business as a fuel station on the property. The first respondent is the sole member of the second respondent.

[3] The convenience store forms part of the property. It is located adjacent to the fuel station and was, at all times relevant hereto, the subject of a lease agreement concluded between the first applicant and the first respondent. It is alleged that the first applicant is the sole owner of the second applicant, Rahila Begum (Pty) Ltd, a private company that runs the convenience store.

[4] The first respondent locked the convenience store because he was of the view that the first applicant breached the lease agreement by virtue of which it occupied the convenience store.

[5] Aggrieved by the lock out, the applicants sought and obtained, on an urgent *ex parte* basis, a rule *nisi* returnable on 4 May 2021, which, in the main, directed the respondents to unlock the convenience store, restrained the respondents from blocking or preventing entry by the first applicant or its employees into the convenience store, and directed the respondents "*to hand over the keys of the property to the first applicant within twenty-four (24) hours from the hour of issue of* [the order sought herein being granted]." This part of the rule *nisi* was made to operate as an interim interdict.

[6] The rule *nisi* further called upon the respondents to show cause why they should not be ordered "*to pay damages for any stock that might be damaged or rotten or expired due to the unlawful eviction, during the period of unlawful ejectment of the applicant from the property or running the convenience store business*" and to "*pay damages for profit lost, at a rate of R15 000 per day for all the days of the store being locked and the applicant being unlawfully evicted from the store and for being prevented from conducting normal business in the store*."

[7] On 28 April 2021, the respondents delivered a notice of intention to oppose the application.

[8] The answering affidavit attested on 3 May 2021 is deposed to by the first respondent and was transmitted per facsimile to the applicant's attorney of record on the same day, at 16:19.

[9] When the matter was called on 4 May 2021, and after the handing up of the answering affidavit from the Bar, the parties agreed to an order postponing the application to 17 June 2021 for hearing as an opposed application, and extending the *rule nisi* accordingly.

[10] The order further directed as follows:

> "2. The applicants are to deliver their replying affidavits by 1 June 2021.
>
> 3. The applicants shall deliver their heads of argument and practice note by 4 June 2021, with the respondents delivering their heads of argument and practice note by 11 June 2021.
>
> 4. The costs of the appearance of today are reserved.
>
> 5. Should paragraphs 2 and 3 hereof not be complied with, the matter may be enrolled in the unopposed court on 15 June 2021."

[11] In the answering affidavit, the first respondent-

[11.1] registered his acquiescence to an order that the first applicant's restored possession of the property be confirmed, subject to an order discharging the rule *nisi*, and directing the respondents to unlock the convenience store and not "*disturb or block or prevent the first applicant or any of its employees from trading and working in the convenience store until termination of the* [occupancy] *agreement or by order of court*; and

[11.2] tendered the applicants' party and party costs of the application for up to the filling of the answering affidavit.

[12] Save as aforesaid, the first respondent contended that -

[12.1] the first applicant never had the keys to the property;

[12.2] the applicants are not entitled to an interdict operating in perpetuance; and

[12.3] motion proceedings are not competent for resolving disputes involving claims for damages for unliquidated amounts premised on the loss of stock and profits resulting from the impugned ejectment.

[13] The application was subjected to judicial case flow management, on 10 June,[1] by which time the applicants had not delivered their answering affidavit, heads of argument and practice note.

[14] The respondents delivered heads of argument and practice note on 11 June. The application remained enrolled for hearing on 17 June, as directing otherwise would have hamstrung the proceedings.

[15] Without having applied for condonation, the applicants delivered their replying affidavit and practice note, out of time, on 14 June. The applicants' heads of argument were only delivered on the eve of the hearing.

[16] Even though it was available to me to disregard the replying affidavit delivered in the circumstances outlined above,[2] I nevertheless perused same, avoiding a possible delay of the matter resulting from an application for the

[1] Pursuant to rule 15A of the Joint Rules of Practice for the Eastern Cape Division of the High Court.
[2] See *Waltloo Meat and Chicken SA (Pty) Ltd v Silvy Luis (Pty) Ltd* 2008 (5) SA 461 (TPD), where, at para 26 – 30, Poswa J held:

> "Let me repeat that the applicant in the present case seeks no . . . indulgence . . . It is important to note that the discretion to condone non-compliance . . . lies with the court.
>
> The late filing [of the replying affidavit] I am referring to is that which did not comply with the provisions of rule 6 (5) (e) . . . within 10 days of receipt of the answering affidavit. Counsel were of the view that the court is entitled to look at the contents of the replying affidavit, for purposes of determining the issue of condonation.
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> In my view both counsel are wrong . . . the court may not resort to information contained in a document that is not before it . . .
>
> It remains in the discretion of the court whether to have [the replying affidavit] admitted or not as evidence, by granting the application for condonation of such late filing."

postponement of the matter to enable the applicants to seek condonation - a course that would have been to the detriment of the respondents.

[17] The explanation proffered by the applicants for the laches in delivering the replying affidavit boils down to this: they required time to collect pictures and video footage, and to secure witnesses who would depose to affidavits confirming that, notwithstanding the interim order directing the unlocking of the convenience store, the respondents had not desisted from the conduct complained of by the applicants.

[18] The applicants also persisted in seeking confirmation of the rule *nisi* in its entirety and alleged that the respondents had breached the terms of the interim order by also not letting the applicants and the employees of the convenient store and customers have access to ablution facilities.

[19] Besides seeking to make out a fresh case in reply, which is legally impermissible, the replying affidavit did not advance the applicants' case beyond where the proceedings had been at the time the respondents delivered their answering affidavit.

[20] The concession made by the respondents that they were not entitled to lock the convenience store put paid to the dispute at the heart of these proceedings.

[21] It is against this background that I granted an order discharging the rule *nisi*, directed the respondents to unlock the convenience store and avail any other facility thereto in terms of the applicable lease agreement. Consequent upon this, the order restrained and interdicted the first respondent from, in any manner whatsoever, disturbing or blocking or preventing the first applicant or any of his employees from trading and working in the convenience store, until the parties' agreement is terminated or other due process of law is set in motion.

The respondents were directed to pay costs of the application on a party and party scale up to the delivery of the respondents answering affidavit, and the applicant to pay the costs incurred thereafter on the same scale.

[22] I stated that reasons for the order would follow in due course, and herein below follow the reasons.

[23] There is merit in the respondents' contention that the applicants are entitled to no more than what was tendered at the time of the delivery of the answering affidavit.

[24] Upon the application of the *Plascon - Evans*[3] rule, the first applicant has not been shown to have been in possession of the keys to the convenience store, all he had having been access to the store.

[25] The spoliation remedy sought by the applicants is available to a person who has been deprived of his or her actual possession or co-possession of the subject property. One of the requisites for the grant of the remedy is effective physical control of the thing,[4] which is lacking in the instant matter.

[26] The applicants also claim unliquidated damages by way of motion proceedings, which flies in the face of *National Director of Public Prosecutions v Zuma*[5] where it was held:

> "Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities."

[3] *Plascon - Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 H - 635 C.
[4] *Dennegeur Estate Home Owners Association and Another v Telkom SA SOC Ltd* 2019 (4) SA 451 (SCA) at para 10.
[5] 2009 (2) SA 277 (SCA), para 26.

[27] The quest for unliquidated damages is also not sanctioned by the Directions applicable in this Division, which provide as follows:

> "1. Default judgment applications in which unliquidated damages are claimed shall, by arrangement with the Registrar at each one of the Centres in this Division, be set down for hearing on a daily trial roll during the first two weeks and the last two weeks of each term.
>
> 2. The-
>
> 2.1 Joint Rules of Practice for the Eastern Cape High Court;
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> 2.2 Directions for the Management of the High Court, Eastern Cape During the National State of Disaster dated 12 May 2020; and
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> 2.3 Case Flow Management Practice Directive dated 25 February 2019,
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> shall, with necessary adaptations, apply to the setting down of the default judgment applications."[6]

[28] Coming to the issue of costs, the general rule is that a party is liable to pay costs incurred unnecessarily through his or her failure to take proper steps or because he or she took wholly unnecessary steps.[7]

[29] The following remarks by Innes CJ in *Scheepers and Nolte v Pate*[8] are apt:

> "I think it is the duty of a litigant to avoid any course which unduly protracts a lawsuit, or unduly increases its expense . . . if he only takes [the course which shortens the lawsuit or does not increase its expense] later on it may still be effective, but the fact that it came late and that considerable expense was unnecessarily incurred in consequence, seems to me an element which may well affect the mind of the court in apportioning the costs."

[30] Following upon this, courts have deprived litigants of the costs to which they would otherwise have been entitled if their conduct has unnecessarily occasioned, encouraged or prolonged a trial.[9]

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[6] Directions governing the setting down of undefended unliquidated claims for damages by Mbenenge JP dated 12 April 2021.
[7] *Lotzoff v Connel and Another* 1968 (2) SA 127 (W); *Protea Assurance Company Ltd v Matinise* 1978 (1) SA 963 (A); *Vilakazi v Malevu* 1979 (1) SA 737 (N); *Van Eck v Santam Insurance Company Ltd* 1996 (4) SA 1226 (C).
[8] 1909 TS 353 - 356.
[9] *King Pie Holdings (Pty) Ltd v King Pie (Pinetown) (Pty) Ltd*; *King Pie Holdings (Pty) Ltd v King Pie (Durban) (Pty) Ltd* 1998 (4) SA 1240 (D) at 1250.

[31] The proceedings ought to have been finalised, at the very latest, on 4 May 2021. It was unreasonable for the applicants not to accede to the respondents' proposed order (which has ended up prevailing) on 4 May 2021.

[32] It is for these reasons that I granted the order which, for the sake of completeness, and in part, reads:

> "1. The *rule nisi* issued on 9 April 2021 is hereby discharged.
>
> 2. The first and second respondents shall unlock the property situated at 212 Oxford Street, Oxford Total Garage, East London (the convenience store) and shall avail any other facility thereto in terms of the lease agreement.
>
> 3. The first respondent is restrained and interdicted from, in any manner whatsoever, disturbing or blocking or preventing the first applicant or any of his employees from trading and working in the convenience store, until such time as the parties' agreement is terminated or other due process of law is set in motion.
>
> 4. The respondents shall pay the costs of the application on a party and party scale up to the delivery of the respondents' answering affidavit.
>
> 5. The applicants shall pay costs incurred thereafter on the same scale."

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JUDGE PRESIDENT OF THE HIGH COURT

Applicants' counsel	:	*M P G Notyawa*
Applicants' attorneys		M N Dwayi Attorneys
		East London
Respondents' counsel	:	*C D Kotzë*
Respondents' attorneys	:	Changfoot Van Breda Inc.
		East London
Date matter heard	:	17 June 2021
Date order granted	:	17 June 2021
Date reasons handed down	:	13 July 2021

[Also, by electronic mail transmitted to the parties' attorneys, in terms of paragraph 68 of the Eastern Cape National State of Disaster Management Directions]