IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 40176/2018

DATE: 2019/04/29

DELETE WHICHEVER IS NOT APPLICABLE
[1] REPORTABLE: NO.
[2] OF INTEREST TO OTHER JUDGES: NO.
[3] REVISED.
DATE : 18/06/2019
SIGNATURE

In the matter between

JOMAUR INVESTMENTS CC Applicant

and

CALTEX PREMIER SERVICE STATION CC Respondent

JUDGMENT

YACOOB (J): The applicant brings this application for a *rei vindicatio* in order to evict the respondent from an immoveable property which the applicant owns.

It is common cause that the applicant is the owner of the property and that the respondent is in possession of the property.

The respondent in opposing the application raises a number of points *in limine* and certain defences. As far as the points *in limine* are concerned the respondent

raised questions of non-joinder, *locus standi* and *lis pendens*.

It was conceded that the party who the respondent contended should have been at court instead of the applicant, that is, Petrotal, had nothing to do with this matter and therefore there is no merit on those points which rely on Petrotal's absence from these proceedings or on the fact that the applicant is here instead of Petrotal. That disposes of the issues of *locus standi* and non-joinder.

Petrotal is the current lessee of the property. The respondent was (or is) a sub-lessee, leasing from an entity known as Future Phambili.

There is evidence on papers that the lease between the applicant and Future Phambili was terminated on 28 June 2018. In July 2018 Future Phambili brought an urgent application to evict the respondent in the Provincial Division of this Court.

That application was struck from the roll for want of urgency and has not been prosecuted, nor has the respondent taken steps to set it down for determination.

The respondent alleges in its answering affidavit, which was filed on 19 December 2018, almost six months after the urgent proceedings, that Future Phambili intends to have the issues between them arbitrated and

until the arbitration and the other application have been dealt with, this application should be stayed on the basis that it was the same relief that was being sought against the respondent.

However the respondent was unable to prove that there is any existing lease between the applicant and Future Phambili and the applicant in its replying affidavit includes a confirmatory affidavit from Mr Masuku, who is the managing director of Future Phambili who confirms that it has waived the right to participate in these proceedings and also confirms the replying affidavit insofar as they refer to him.

Although the replying affidavit does not refer to Mr Masuku in person one would expect that if Mr Masuku took issue with the contents of the replying affidavit as regards the lease between Future Phambili and Jomaur Investments, that is, the applicant, he would have either refused to provide this confirmatory affidavit or would have mentioned any inconsistency. He did not do so.

In my view, on a conspectus of the evidence that is before me, there is no existing lease between Future Phambili and the applicant. As a result any outcome of the application in the Provincial Division between Future Phambili and the respondent can have no effect on the respondent's right to occupy the premises because that

right depends on Future Phambili's right to occupy which does not appear to exist anymore.

That deals with the points *in limine,* all of which I find have no merit. As far as the defences are concerned there are two. The first is an enrichment lien. The respondent claims it has installed pumps and refurbished the premises to the value of R750 000.00.

It does not particularise this refurbishment and does not explain or set out in what manner the value of the premises has increased, if at all.

In my view there is no merit in the contention that there is an enrichment lien, simply because the respondent has failed to even make out a *prima facie* case that there is enrichment.

Secondly the respondent claims that, in addition to the lease with Future Phambili, it has a second agreement with the applicant which entitles it to occupation of the property.

As far as the lease with Future Phambili is concerned I have already found that there is no evidence that Future Phambili still has a right to occupy, so any right that the respondent may have had through Future Phambili no longer exists and that defence must fall away.

As far as an agreement with the applicant is concerned this is based on a document which gives the member of the respondent, Mr Schoombie, a first option on the sale of the property. This document is dated 2008.

This, according to the respondent, is the written part of the agreement. The verbal part of the agreement apparently was concluded in 2017 when a "Mr Jeff Sacks" agreed to give the respondent the right to occupy the property for another 10 years as security for him investing in the property by installing new pumps and refurbishing the site.

There is a confirmatory affidavit annexed to the replying affidavit from Mr Michael Jeffrey Sack who denies having entered into such an agreement.

Taking into account that the respondent has given absolutely no particularity about this investment that the ten year right of occupation was supposed to be security for, and also that an alleged R750 000 investment is less than the cost of eighteen months' rental of the property, I find that the respondent has also not established that it has an agreement to occupy with the applicant.

For these reasons the applicant has in my view established its right to the relief sought and I make an

order in terms of prayers 1 and 2 of the notice of motion.
