REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: No.
(2) OF INTEREST TO OTHER JUDGES: No.

6/10/2021

DATE SIGNATURE

Case No.: 2021/46429

In the matter between:

SANDTON SQUARE PORTION 8 (PTY) LIMITED	First Applicant
SANDTON SQUARE PORTION 7 (PTY) LIMITED	Second Applicant

and

COFFEE CHEFS (PTY) LIMITED	First Respondent
SIBANYONI, SIMON	Second Respondent
WELO, CHRIS	Third Respondent

JUDGMENT

This judgment was prepared and authored by Acting Judge Gilbert. It is handed down electronically by circulation to the parties' or their legal representatives by email and uploading it to the electronic file of this matter on CaseLines.

Gilbert AJ:

1. The applicants are the lessors of the Michelangelo Towers Mall in Sandton. The first respondent is a lessee in the shopping mall. The second and third respondents are involved in the conduct of the lessee's business from the leased premises.

2. The applicants seek the eviction of the respondents from the leased premises. The applicants seek the relief on an urgent basis because, they contend, the respondents in conducting business from the premises are creating a safety and security risk by not only breaching the terms of the lease agreement but also contravening the COVID-19 regulations. These breaches and contraventions, the applicants contend, include continuing to trade from the premises during curfew as a bar or club, where alcohol is sold. These grounds for urgency are also some of the grounds relied upon by the applicants as founding the breaches by the first respondent of the lease agreement and which breaches the applicants relied upon for cancelling the lease agreement on 17 September 2021.

3. It is common cause that there is a written lease agreement between the applicants and the first respondent pursuant to which the applicants let the premises to the first respondent and pursuant to which the first respondent occupies the premises. The terms of the lease agreement are also common cause and include that:

3.1. the lease is on a month-to-month basis, commencing on 1 June 2021, with either party being entitled to terminate the lease by giving the other party one-month's written notice (clause 12 of the schedule to the lease agreement);

3.2. the premises is to be used exclusively for selling coffee, sandwiches, salads and bread and must not be used for any other purpose without the applicants' prior written consent (clause 10.1 of the schedule to the lease agreement read with clause 13.1 of the general conditions of lease);

3.3. the operating hours of the business in the premises are 10h00 to 20h00 Sunday to Thursday and 10h00 to 22h00 Friday to Saturday (clause 10.2 of the schedule to the Lease Agreement read with clause 13.1 of the general conditions of lease);

3.4. the first respondent is to trade or do business from the premises under the name of Coffee Chefs and is not use any other name (clause 5 of the schedule to the lease agreement read with clause 13.2 of the general conditions of lease);

3.5. the first respondent must not contravene any law, by-law, rule or regulation relating to the use of the premises (clause 13.4 of the general conditions of lease);

3.6. the first respondent must not effect any improvements, alterations or additions to the premises without the prior written consent of the applicants and that if the first respondent does so effect any improvements, alterations or additions, whether with or without the permission of the applicants, those will become the property of the applicants and the applicants would not be obliged to compensate the first respondent in respect thereof (clause 20.2 of the general conditions of lease);

3.7. if the first respondent commits a breach of the lease agreement and fails to rectify that breach within seven days after written notice requiring rectification, then in such event the applicants will have the right, in addition to any other rights that they might have at law and in their sole discretion to *inter alia* cancel the lease agreement and to retake possession of the premises (clause 27 of the general conditions of lease).

4. On 3 September 2021 the applicants' attorneys furnished the first respondent one month's notice of termination of the lease agreement, the lease expressly being on a month-to-month basis and terminable upon one month's notice. In the ordinary course, the lease would terminate on 3 October 2021.

5. On 6 September 2021 the applicants' attorneys, without derogating from their earlier notice of termination, furnished the first respondent with written notice calling upon the first respondent to remedy various breaches of the

lease agreement which included calling upon the first respondent to cease trading from the premises outside the agreed trading hours and during curfew under the COVID-19 regulations, to cease selling alcohol from the premises when not permitted to do so by law and to cease continuing to effect alterations and improvements to the premises without the applicants' consent to do so.

6. On 17 September 2021, the applicants in writing cancelled the lease agreement because the first respondent had failed to rectify the breaches. This cancellation letter although dated 15 September 2021 was emailed on 17 September 2021, as appears from the covering email.

7. Although the respondents have sought to make something of the dates of these various letters, it is clear from the correspondence attached to the founding affidavit when these dates were dispatched per email to the first respondent. These notices have been furnished in accordance with the terms of the lease agreement, including the breach provision. Should the breaches as contended for by the applicants be factually sustainable and should they not have been remedied, the applicants' cancellation of the lease on 17 September 2021 will be good and whereafter the respondents' continued occupation of the premises would be unlawful. Although the respondents contend that they would then lose the value of their investment in what they contend are various improvements they made to the premises, that cannot render their continued occupation of the premises lawful. Nor does it give the respondents a basis to continue to use the premises once

the lease agreement has been cancelled.[1] In any event, the lease agreement expressly provides that the applicants would not be liable for compensation for any improvements.

8. The issue accordingly to be determined is whether the first respondent was in fact in breach of the lease agreement, as contended for by the applicants.

9. As the applicants seek an eviction order which is final relief, the applicants are obliged to establish their case upon the application of the usual *Plascon-Evans* approach to any relevant *bona fide* factual dispute where the respondents' version is effectively to be preferred over that of the applicants,[2] unless the respondents' version can be rejected as far-fetched and fanciful.[3]

10. As the *Plascon-Evans* approach is used to resolve *bona fide* factual disputes, the first step is to determine whether there is a relevant *bona fide* dispute of fact:

> *"The crucial question is always whether there is a real dispute of fact. That being so, and the applicant being entitled in the absence of such dispute to secure relief by means of affidavit evidence, it*

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[1] *Rekdurum (Pty) Limited v Weider Gym Athol (Pty) Limited* 1997 (1) SA 646 (C) at 654 A – D; *Guman NO v Ansari* [2011] ZAGPJHC 124 (23 September 2011*)* at paras 14, 16 and 17

[2] Final relief can only be granted on motion if the facts as stated by the respondents, together with the admitted facts in the applicants' affidavits, justify the granting of the relief: *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A) at 634E-G, as reaffirmed in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290D-G. Effectively, the factual disputes ought to be resolved by accepting the respondents' version, save where such version is "*so far-fetched or clearly untenable that the court is justified in rejecting (it) merely on the papers*": *Botha v Law Society, Northern Provinces* 2009 (1) SA 277 (SCA) at para 4, with reference to *Plascon-Evans Paints*.

[3] If and once the respondents' version is rejected as far-fetched and fanciful, there would only be one version before the court, namely that of the applicants and therefore the *Plascon-Evans'* approach would not come into play as there would no longer be conflicting factual versions.

does not appear that a respondent is entitled to defeat the applicant merely by bare denials such as he might employ in the pleadings of a trial action, for the sole purpose of forcing his opponent in the witness box to undergo cross-examination. Nor is the respondent's mere allegation of the existence of the dispute of fact conclusive of such existence." [4]

11. If there is no genuine factual dispute, and so the respondents' version can be rejected, then the applicants' version will effectively stand alone and so there would be no need to resolve a factual dispute by the *Plascon-Evans* approach. Whether there is a *bona fide* factual dispute is an anterior issue to the application of the *Plascon-Evans* approach.

12. In deciding whether there is a factual dispute, the court adopts a *"robust, common sense approach*":

"If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to Court on motion, then motion proceedings are worthless for a respondent can always defeat or delay a petitioner by such a device. It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must 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."[5]

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[4] *Room Hire Co (Pty) Limited v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162-1163.

[5] *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154G/H.

13. A denial will be inadequate for creating a genuine dispute of fact where the person making the denial has in his or her possession the relevant facts to amplify the denial.[6]

14. The applicants in support of their averment that the respondents continued to trade from the premises as a bar and nightclub after the agreed trading hours and after curfew provide a series of some fifty six photographs taken from CCTV footage of a security camera just outside the main entrance of the premises, supported with a confirmatory affidavit by the compiler of those photographs. Those photographs are described as depicting patrons leaving the premises after the agreed trading hours and during curfew, with the premises closing sometimes as late as 04h22 in morning. Some of these photographs are also described as showing the unruly behaviour of exiting patrons, damaging property within the shopping mall.

15. The respondents in their answering affidavit to not respond squarely to these detailed averments supported by the photographs but to refer to the first respondent's earlier success on 1 September 2021 in obtaining a spoliation order in the magistrates' court against the applicants and by contending that it was open to the applicants to have opened a criminal case with the South African Police Services but that they have failed to do so. When the answering affidavit is read as a whole, at best for the respondents they deny the applicants' averments, reasoning that if the first respondent had so breached the lease agreement then the police who attended the premises

[6] *Wightman trading as J W Construction v Headfour (Pty) Limited* 2008 (3) SA 371 (SCA) at 375G-376B

would have done something about it and because the police did not do something about it, it must follow that they had behaved permissibly.

16. Applying the legal principles as to what would constitute a *bona fide* dispute of fact, the respondents have not demonstrated a *bona fide* dispute of fact in relation to the applicants' assertion that trading continued at the premises after the agreed trading hours and during curfew. The respondents have not attempted to give any exculpatory explanation for what appears in the photographs. The respondents do not seek to contest what the applicants describe is depicted in the photographs. The photographs, explains the applicants, shows patrons leaving the premises on numerous occasions on many days and at various times in the late night and early morning during the month of September 2021. The respondents do not offer an alternate explanation, and do not even specifically deny that these are patrons leaving the premises at these hours. But even if the answering affidavit is to be read as containing such a denial, such denial can be rejected as not being *bona fide*.

17. The applicants further assert that the respondents were trading in alcohol, contrary to the lease agreement, and without a liquor licence and, it would appear, also contrary to the COVID-19 regulations. The respondents do not deny that they were trading in alcohol but contend they were entitled to do so. I do not take the respondents to be contending that they were entitled to deal in alcohol contrary to the COVID-19 regulations but rather that they were selling alcohol permissibly during trading hours under a valid liquor licence.

18. The applicants contend that the sale of alcohol, even during trading hours and with a liquor licence, is not permitted under the lease agreement as it goes beyond the agreed use of the premises. The lease agreement does not mention alcohol but does describe the premises to be used exclusively for purposes of coffee, sandwiches, salads and bread. In an email attached to the respondents' answering affidavit, dated 23 August 2021, and which the applicants' highlight in their replying affidavit, the applicants' retail manager specifically records that there are to be no alcohol sales, and asks for a copy of the first respondent's liquor licence. Although it appears from the respondents' answering affidavit that the parties were negotiating towards concluding a long-term lease pursuant to which the first respondent would conduct the business of a restaurant and bar that would sell alcohol, that was something for the future and not something that is permissible under the applicable written lease agreement. I however need not make a final determination on this issue because even should the sale of alcohol have fallen within the permitted use of the premises, the applicants have established that the sale of alcohol, even if during permissible trading hours, was without a valid liquor licence.

19. The applicants in their founding affidavit particularise how they attended to photograph the liquor licence displayed in the inside of the leased premises and which photograph shows that the liquor licence is ostensibly for "Knead Bakery & Café – Sandton" for the period 2020 / 2021 in respect of Shop L08 in the Michelangelo Towers. This is what is shown in the photograph annexed to the founding affidavit. The applicants further continue in their

founding affidavit that they through the services of a liquor licence attorney ascertained that according to the records of the Gauteng Liquor Board the liquor licence for Knead Bakery had not been renewed for 2020 / 2021. The founding affidavit continues by furnishing a letter from Knead Bakery, who were previously a tenant in the mall but had since vacated, to the Gauteng Liquor Board dated 20 September 2021 confirming that it did not renew its liquor licence and so that the purported renewal of their liquor licence must be fraudulent. Further, the leased premises occupied by the first respondent is not Shop L08 as reflected in the liquor licence but rather Shop L14. And the permitted trading name of the first respondent in terms of the lease agreement is Coffee Chefs, albeit that it is now operating as Towers Lounge. Neither of these names match the name reflected on the liquor licence, which is Knead Bakery & Café – Sandton.

20. The respondents' response in their answering affidavit to this detailed evidence relating to the liquor licence is to deny it "*with the contempt it deserves,*" asserting that the applicants are misrepresenting the facts and that liquor is validly sold, with the Liquor Board having come to the premises and satisfied itself that the first respondent is in possession of valid liquor licences. But no facts are given in support of these assertions. No attempt is made to explain why the liquor licence which is displayed in the premises relates to a different named licensee and to different premises. Neither does the first respondent adduce any evidence that it has a valid liquor licence, which should have been simple enough to do by adducing the licence.

21. In the circumstances, there are no *bona fide* factual disputes in relation both to the respondents' impermissible trading after the agreed trading hours and during curfew, and to the sale of liquor without a liquor licence. The applicants' version therefore stands alone and so there is no need to have recourse to the *Plascon-Evans* approach, which, as described above, only operates where there are two *bona fide* conflicting factual versions.

22. The applicants have accordingly established several of the breaches that they relied upon and in respect of which they furnished written notice to remedy to the first respondent on 6 September 2021. The applicants have also established that those breaches were not remedied and continued even after the seven-day rectification period. For example, some of the photographs pertain to a period after the seven-day notice period, with the most recent being on 25 September 2021. It is therefore unnecessary to consider the other breaches relied upon by the applicants.

23. In the circumstances, I find that the applicants validly cancelled the lease on 17 September 2021 and therefore the respondents' continued occupation of the premises after the termination of the lease agreement on 17 September 2021 is unlawful. It is also significant that the one-month notice period as commenced on 3 October 2021 had also expired by the time this application was argued.

24. I also find that the matter is sufficiently urgent to have justified approaching the urgent court and truncating the usual periods for the filing of affidavits given the serious nature of the breaches that have been demonstrated. The

continued conduct of the respondents in contravention of the COVID-19 regulations is serious and potentially life-threatening, and justifies the applicants approaching the court on a urgent basis. The applicants also, correctly, set down the matter for a Tuesday, as required in this Division.

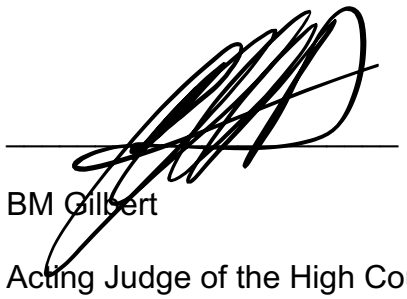
25. The applicants seek that the respondents pay the costs of the application on and attorney and client scale, motivating this as an appropriate order given the egregious nature of the respondents' conduct. The respondents were furnished an opportunity to explain themselves in their answering affidavit, particularly as the detailed version was set out in the founding affidavit. The respondents avoiding doing so. In my discretion, I accede to the applicants' request.

26. The following order is granted:

26.1. The first, second and third respondents and all other persons who claim any title, right or interest through or under the respondents to occupy Shop L14 on the ground floor in the Michelangelo Towers Mall, Maude Street, Sandton ("the premises") are to vacate the premises within five (5) days of this order.

26.2. In the event that the respondents and all other persons referred to above fail to vacate the premises within the above period, the sheriff is directed and authorised to evict such respondents and other persons forthwith and in doing so are authorised to call upon the South African Police Services for assistance.

26.3. The respondents are ordered to pay the costs of the application, jointly and severally, and on an attorney and client scale.



BM Gilbert

Acting Judge of the High Court

Date of hearing:	5 October 2021
Date of judgment:	6 October 2021
Counsel for the applicants:	Mr H D Baer
Instructed by:	KN Kleynhans Inc, Randburg
Counsel for the respondents:	Mr Mohlala
Instructed by:	Ngoetjana Attorneys, Kempton Park Kempton Park