




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO.: 19633/2021

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
(3)	REVISED: Yes
Signature:	
Date:	_____

In the matter between:

NORTHERN CENTRE SHAREBLOCK (PTY) LTD
(REGISTRATION NUMBER 1991/004276/07)

First Applicant

URBAN REAL ESTATE (PTY) LTD
(REGISTRATION NUMBER 1967/006343/07)

Second Applicant

and

DANCING BEAUTY AND HAIR (PTY) LTD
(REGISTRATION NUMBER 1967/006343/07)

Respondent

JUDGMENT

CORAM: Q LEECH AJ

1. The applicants seek the eviction of the respondent from business premises known as Republic Place, situate at Shop 11, Republic Place, Hill Street, Ferndale, Randburg and described as Erf 886, Ferndale Township, Registration Division I.Q., Gauteng ("the property").
2. The first applicant is the owner of the property. The second applicant is "in the business of letting rental property". The second applicants let the property to the respondent in terms of a written agreement of lease.
3. The respondent went to the trouble of denying the opening paragraphs of the founding affidavit. The allegations in those paragraph include, amongst others, that the deponent is a director of both applicants, the applicants resolved to bring the application and appointed the attorneys of record, the citation of the applicants and that the applicants are duly registered companies with their registered addresses at the places stated in the founding affidavit, and the nature of the second applicant's business. Although the allegations made by the applicants are terse, the facts alleged in these paragraphs are typically raised in this manner as they ordinarily do not attract spirited opposition and where they do, applicants shore up the allegations in the replying affidavit. The applicants in this matter elected not to do so in the face of modest opposition from the respondent.
4. The parties would be well advised to bear in mind that the affidavits are both the pleadings and the evidence (*Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) para. 28) and that "the mere assertion of any witness does not of itself need to be believed" (*DA Mata v Otto*, NO 1972 (3) SA 858 (A) at 869D-E). The deponents to the affidavits are required to set out

sufficient information from which the probity and reliability of their knowledge of the events can be assessed. The affidavits in this matter resemble pleadings with limited factual averments and evidential material to assist the court in arriving at a considered conclusion.

5. It would be of assistance if legal representatives took advantage of the opportunities provided by the practice manual in this division to not only identify the issues that will be raised but also to expressly remove disputes that arise on the papers from the purview of the court, if the parties no longer persist in those issues. Although the disputes raised by the perfunctory allegations and denials mentioned above were not raised in argument by counsel, they were not expressly abandoned. In the circumstances, I am required to assess the denials raised by the respondent in order to determine whether those denials raise real, genuine or *bona fide* disputes of fact and, if not, whether the allegations by the applicants are admissible and inherently credible, and whether I can proceed on the basis of the correctness thereof (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634A; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 291B).

6. The deponent to the answering affidavit asserts personal knowledge, "unless the context indicates otherwise". An allegation of personal knowledge "is of little value without some indication, at least from the context, of how that knowledge was acquired" (*President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) para. 38). "The key question is whether the deponent would, in the ordinary course of his or her duties or as a result of some other capacity described in the affidavit, have had the opportunity to acquire the information or

knowledge alleged” (*President of the Republic of South Africa and Others v M & G Media Ltd* 2012 (2) SA 50 (CC) para. 28).

7. The deponent to the respondent’s answering affidavit would not typically have personal knowledge of the facts mentioned above and the deponent does not provide any indication as to how he has acquired the knowledge that the applicant’s allegations are allegedly incorrect. The deponent at best has no knowledge of the facts and any denials based on the absence of knowledge do not raise a real dispute. The denials are furthermore incongruous with the allegations concerning the interactions between the respondent and the applicants. The denial of the standing of the applicants, for example, is inconsistent with the acknowledgement of the lease agreement and the assertion that it was orally extended. In my view, these denials by the respondent do not raise genuine disputes of fact.

8. The deponent to the founding affidavit similarly provides no indication of the source of the knowledge of the asserted facts. However, as indicated above, a witness is permitted to derive personal knowledge from various sources and particularly sources that are available to the witness in the ordinary course of the duties associated with the nature of their office (*Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 424B). Although the deponent does not identify the sources, or for that matter his duties, as a director of the applicants it can be assumed that the deponent has knowledge of the facts relating to the incorporation of the applicants and their business. The applicants attach a Windeed extract in support of some of the allegations concerning the companies and the allegations find corroboration in the answering affidavit. I am accordingly satisfied that the allegations are inherently credible and, as the

respondent does not object to their admissibility, I can proceed on the correctness thereof.

9. The respondent has not sought to contest the authority to institute the proceedings in terms of rule 7 of the uniform rules of court and counsel for the respondent correctly abandoned the contention that the deponent to the founding affidavit is required to be authorised by the applicants.
10. The conclusion of the agreement of lease, that a copy is attached to the founding affidavit and the material terms, are common cause. (I point out that the respondent notes these allegations which has the same effect as an admission in the context of the affidavits read as a whole.) In terms of the lease, the lease could be terminated if the respondent failed to remedy a breach. If the lease was not terminated, it would continue post the effluxion of the lease period on a monthly basis.
11. The applicants allege that the respondent breached the lease agreement by failing to make payment in terms thereof and, despite demand, failed to remedy the non-payment. The applicants thereafter terminated the lease. However, the respondent failed to vacate the property. In this regard, the applicants allege that "[t]he Respondent failed to make payment in terms of the agreement of lease", a letter of demand to remedy the breach was delivered, "the Respondent failed to remedy the breach", and a letter terminating the lease was delivered.
12. The respondent, peculiarly, denies the allegations but alleges in response to the allegations concerning the failure to pay that "[t]hese allegations are denied, the Respondent did make some rental payments" and "[t]hese allegations are denied, the Respondent continued to make payments though it was not full payments". In respect of the demand to

remedy the breach and the failure to do so, the respondent alleges that the respondent was prevented from complying “fully with the terms of the lease”. The respondent repeats that type of allegation in respect of the cancellation. The respondent indicates by those allegations the intention to rely on particular defences and in such circumstances the respondent is required to state clearly and concisely the material facts on which it relies and, as the affidavits are both the pleadings and the evidence, the evidence in support of those facts.

13. The particular defences raised by the respondent do not entail any opposition to the material allegations made by the applicants and I did not understand Mr Mantsha who appeared for the respondent to contend that the respondent did so. I understood from counsel that the respondent accepted that it had not paid the full amounts due under the lease and did not take issue with the allegations that the respondent had failed to remedy the non-payment, despite notice, and that the applicants had informed the respondent that the lease was cancelled. The respondent effectively contended that the applicants was not entitled to do so for the reasons stated in the answering affidavit. Those reasons are extraneous to the allegations made by the applicant.

14. I also cannot discern from the answering affidavit that any material aspect of the allegations made by the applicants is seriously and unambiguously placed in dispute by the respondent. If the respondent intended to do so, the answering affidavit should have been prepared in a manner that made that clear and in the absence of a serious and unambiguous engagement with the alleged facts, a robust view of the matter is justified (*Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) para. 13). In my view, considering both the answering

affidavit as a whole and the argument by counsel, the respondent does not effectively dispute the allegations made by the applicants.

15. The applicants attach a “reconciliation of the Respondent's account”. The deponent asserts that the document reflects that the respondent fell into arrears in August 2020 and remained in arrears as at March 2021, when the lease was terminated. The applicants provide no indication of the source of the information set out in the document or any information concerning its compilation. However, the respondent does not take issue with the admissibility or the content of the document, and this application is not concerned with the extent to which the respondent is indebted to the applicants. In the circumstances, in my view, I can proceed on the basis that the material aspects of the allegations made by the applicants can be accepted as correct.
16. As stated above, although the respondent contends that it “continued to make payments” it accepts that it did not make “full payments”. A defence raised by the respondent is that “the Respondent at all material times always had oral agreement with the representatives of the Second Respondent (sic) each time, it paid less amount than what was agreed on.” The respondent appears to lay claim to a series of oral agreements on each occasion that an amount less than the agreed amount was paid. The respondent does not explain the nature of this alleged defence and the allegations are deficient both as a pleading and in respect of the evidence required. The respondent has not made sufficient allegations of fact to establish the oral agreements and does not adduce any evidence in support thereof. I cannot find that oral agreements were concluded without knowing when, where, how and by whom they were allegedly concluded, and the terms of those agreements. I also cannot assess the probity and reliability of the allegations without knowing something about

its source. The agreements are inherently improbable in the context of the matter and, in my view, the allegations can be rejected on the papers to the extent that the respondent intended to allege a series of agreements excusing its non-payment of the agreed rental.

17. A further difficulty with any defence founded on the alleged oral agreements to accept less than the full amounts under the lease, is that such a defence is comprehensively precluded by the express terms of lease. In terms of the lease, any relaxation or indulgence, and “more particularly no act of the Lessor ... in accepting a lesser sum than the amount of the rental and other charges due shall be construed as a waiver” and “the receipt by the Lessor or its Agent of any rental or other payment shall in no way whatsoever operate as a waiver, rescission or abandonment of any ... right acquired prior to the receipt of that rental or other payment” (clause 18). And, in more general terms, “[n]o agreement at variance with the terms and conditions of this Lease ... shall be binding unless stipulated in writing and signed”. In the circumstances, any oral agreement that excused non-payment of the agreed rental is unenforceable.
18. The contention that the lease was “orally extended for another three years” is affected by similar difficulties. The lease only permits a renewal in the event that the respondent has “faithfully complied with all the terms and conditions of this Lease” and written notice had to be delivered not less than three months prior to termination. The respondent has made insufficient allegations to trigger a renewal, failed to provide any evidence and an oral extension is precluded by the lease.
19. Mr Mantsha submitted that I should consider whether a separate oral lease agreement was concluded that would take effect on the termination

of the lease and for this relies on an email sent to the applicants' attorneys by the respondent on 14 March 2021. I mention that the respondent does not allege that a separate oral lease agreement was concluded and none of the material facts for such an agreement are contained in the answering affidavit. The answering affidavit is deficient both as a pleading and in respect of the evidence.

20. The email to which I have referred was first mentioned by the applicants in the founding affidavit and attached thereto as an annexure. The applicants stated in the founding affidavit that "[t]he contents of the e-mail refer to a purported payment arrangement concluded between the Second Applicants and the Respondent." The applicants do not make any other allegations which explain why the email only purports to be a payment arrangement. However, in a letter from the applicants' attorneys in response to the email it is stated that "our client attempted to enter into a new agreement with you ... provided you paid an amount ... by an agreed date". The letter is written after "having taken instructions". The amount to be paid is stated in the letter but there is no indication that it was agreed. In contrast, the payment date, which is not specified, is stated to be an "agreed date". Although the allegations and statements are unclear, they nevertheless indicate that there was a discussion and an understanding of some description, which the applicants accept purports to be a payment arrangement. I understand the applicants to be alleging that the conclusion of a new lease agreement depended on the respondent paying an amount by a certain date.

21. The respondent answered the allegation by admitting that the deponent to the answering affidavit made the statements contained in the email, which it quotes, "recording Respondent and Second Applicant's agreement". The amount to be paid, according to the email, was

discussed and was initially slightly less than that stated in the letter from the applicants' attorneys but was significantly reduced after further discussion. The applicants do not reply to the allegations in the replying affidavit and the applicants do not address the content of the email in either the founding or replying affidavit.

22. In my view, I must accept that the email accurately records the discussions between the parties and that there was an agreement that the respondent would make a payment to discharge part of the arrears.
23. However, the issue is whether the agreement constitutes an oral contract of lease as suggested by Mr Mantsha. In my view, it does not. I understand the applicants to be alleging that their willingness to conclude a new lease agreement depended on the respondent paying an amount by a certain date. The email does not refer to the conclusion of a contract, and corroborates the applicants' contention. The email records a discussion and that the second applicant "will prepare the new lease for me to sign (sic)" and "the said the will call me to come and sign last week the next thing I hear is that the file is not with them again and the send me to you". The email refers to a written lease contract that would be prepared and signed. The written lease contemplated in the email was not concluded. And the deponent to the answering affidavit, who wrote the email, does not allege that such a contract was concluded.
24. The applicants alleged further that the deponent to the founding and replying affidavit was the only person who was "empowered to conclude such an agreement". The applicants made that allegation in the replying affidavit. The deponent does not provide any facts or evidence against which the probity and reliability of that statement can be assessed. Although there may be reason to be sceptical about that statement, as Mr

Mantsha suggested, the respondent does not identify the person who allegedly concluded the oral lease agreement and did not seek to contest the applicants' allegation, or assert or establish an evidential basis for actual or ostensible authority in the answering affidavit or the supplementary answering affidavit filed after the replying affidavit.

25. In my view, the probabilities are such that an oral lease agreement was not concluded, and particularly so as the parties had concluded a comprehensive written lease agreement which was due to terminate by the effluxion of time at the end of the month in which the discussions referred to above took place, the written lease precluded oral agreements, the parties had previously concluded a written addendum to cater for the reduction in the rental, the respondent was in breach or alleged by the applicants to be in breach for failing to pay the agreed rental and at the material time the arrears were substantial as the applicants had reversed the reduction granted under the addendum. In such circumstances, the probabilities are that the parties would not have replaced the written lease agreement with an oral lease agreement.
26. The respondent contends that "unforeseeable circumstances have prevented the fulfilment of the lease agreement" and "a force majeure, being [the] Covid-19 pandemic have prevented the Respondent to comply fully with the terms of the lease agreement". In the heads of argument, the respondent added the phrase "... or made it objectively impossible. And according to the argument, the respondent, "[o]wing to the Covid-19 pandemic and lockdown rules ... could not afford to comply with the payment obligations". I point out that the respondent does not allege that the performance of the lessor was rendered impossible.

27. The respondent accordingly attempts to bring the defence within the ambit of the authorities in which the debtor was deprived of the ability to perform the contract by the action and authority of the state (e.g. *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427 and *Petersen v Tobiansky and Tobiansky* 1904 TH 73).
28. The respondent's allegations are bald. The respondent does not set out the circumstances which resulted in the alleged objective impossibility and entitle it to a reduction in rental. The circumstances are material as a lessee is only entitled to a reduction in rental if the consequences of the impossibility are such that the contract is not extinguished or terminated by a party who is entitled to do so (*Peters*, at 434 - 435; *Oerlikon South Africa (Pty) Ltd v Johannesburg City Council* 1970 (3) SA 579 (A), at 585 A; and *World Leisure Holidays (Pty) Ltd v Georges* 2002 (5) SA 531 (W), para. 8 and 9). The termination of the lease by one or other of the parties does not arise. However, the circumstances may be such that the contract was extinguished (e.g. in *Peters* the contract terminated and in *Peterson* the rental was remitted, despite both cases being founded on regulations which interfered with the ability to perform) and in that event, the respondent would have no right to occupy the property.
29. The respondent, in order to maintain an entitlement to occupation, cannot and does not assert that the lease terminated. The respondent to the contrary contends that the lease continued and was extended. In other words, the lease would continue to afford the respondent a right to undisturbed occupation (and establish a corresponding obligation to provide and maintain undisturbed occupation) but free the respondent from its payment obligations and abrogate the right to insist on payment of the agreed rental, until the respondent could "afford to comply". In my view, in the context of a short term commercial lease, there is a real

prospect that any circumstances that have such an unusual consequence would be severe enough to cause the contract to be extinguished.

30. The alleged impossibility must be decided on the facts impacting on the contract in issue. "In each case it is necessary to 'look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied'. The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault. Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving the impossibility will lie upon the defendant" (*MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA), para. 28).
31. The respondent provides no evidence to support the allegation that the payment of the agreed rental was objectively impossible. The court is not provided any particularity and certainly no evidence on which to assess the impact of the pandemic and the "lockdown rules" on the business of the respondent. In the absence of any evidence, the court cannot arrive at the conclusion that compliance with the terms of the lease was objectively impossible. The allegation is serious, as are its potential consequences, and accordingly there is a heightened demand for the evidence before a court will find the allegation established (*National Director of Public Prosecutions supra*, para. 27).
32. The following can be discerned from the papers. The lease records that the property may be used for the sole purpose of conducting a hair salon. The use of the property for that purpose is intimated by the name of the respondent and in the replying affidavit the applicants state that the

respondent was operating as a hairdresser. The unforeseeable circumstances that allegedly prevented performance are limited to the Covid-19 pandemic. In the answering affidavit, the respondent does not refer to the “lockdown rules” mentioned in the heads of argument. However, in the replying affidavit, the applicants state that the respondent was “statutorily required to refrain from economic activity” in terms of the regulations under the National Disaster Management Act 57 of 2002 from 15 March 2020 to 19 June 2020, after which the respondent could resume operations. The date when the respondent did so and what its experiences were, are not explained.

33. The respondent does not explain the nature of the impact of the Covid-19 pandemic on the business of a hair salon in general or with specific reference to the business of the respondent. The respondent does not make the statement contained in the heads of argument that as a consequence of the pandemic, the respondent could not afford to comply with the payment obligations and there is no evidence to support the contention. In any event, if the respondent could not afford to pay, an assessment of the reasons is required as the financial circumstances may be self-created. Although the respondent does state that it could not “comply fully”, the financial position of the respondent is not set out and the respondent made some payments and made arrangements to liquidate the outstanding arrears.

34. The respondent neither alleges nor presents any evidence of the period of the impact of the Covid-19 pandemic on its business. The period during which the respondent was allegedly prevented from performing in full is of particular importance as the parties concluded an addendum to the lease agreement, in June 2020, which provided for a conditional reduction of the rental and certain other charges for the months of April to

July 2020. The conclusion of the addendum and its terms are not disputed by the respondent. In terms of the addendum, the respondent was entitled to a 75% reduction and the remaining 25% was deferred to the end of the lease period. In the event of early payment, a further reduction would be granted on the deferred portion. However, the reduction and deferment could be reversed if the respondent failed to comply with the lease in the subsequent period. As stated above, the respondent fell into arrears in August 2020 and the reduction was reversed some time later in March 2021. In response, the respondent reiterates *inter alia* that the pandemic prevented compliance, presumably the respondent means that compliance was prevented for the entire period in which it remained in arrears. In my view, the pandemic could not be described as unforeseen once the parties had concluded the addendum and had done so “by reason of the problems caused by the Coronavirus (sic) and to assist the Lessee” (addendum, clause 1).

35. The assertions by the respondent are no more than bare conclusions. The constituent probative facts that may establish those conclusions are not provided and no evidence is provided in support. In my view, the mere *ipse dixit* of the deponent to the answering affidavit that the respondent was prevented from performing in full is generally insufficient and particularly so in the context of this matter.

36. The evidence is required because “[i]mpossibility is ... not implicit in a change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable” (*Unibank Savings and Loans Ltd (Formerly Community Bank) v Absa Bank Ltd* 2000 (4) SA 191 (W)198 D - E). As prophetically indicated in *Johannesburg Consolidated Investment Co v Mendelsohn & Bruce Limited* 1903 TH 286, “[s]uppose, for instance, that in

consequence of the outbreak of an epidemic disease a large proportion of the inhabitants fled, with the result that owing to the absence of their usual customers the tradesmen temporarily were carrying on business at a loss, and closed their shops, it would come as an unpleasant surprise to the lessors to find that the whole of the loss is to fall upon them, and that they occupy in effect the position of insurers of their lessees' custom." The outbreak of a war stands on a similar footing as stated in *Hansen, Schrader and Co v Kopelowitz* 1903 TS 707, "[t]he war no doubt was the indirect cause of the dearth of tenants, and a heavy and continued fall in the market may also produce an exodus of people, and lessees of rooms may find themselves without sub-tenants, but the falling stock would not be the direct, immediate and necessary cause of particular bedrooms not being let." And in *Matshazi v Mezepoli Melrose Arch (Pty) Limited* [2020] 3 All SA 499 (GJ) at para. 40.5, "[t]rading may be burdensome or economically onerous, but economic hardship is not characterised as being a force majeure event; it does not render performance objectively and totally impossible."

37. The reason is that an event which causes the fluctuations in the financial position of the lessee ordinarily is an indirect cause, and in most businesses it would be reasonable to assume that the event will be only one of a number of factors that contribute to the current financial position of the lessee, and accordingly the alleged impossibility. The event must be the direct cause of the impossibility. As the authorities mentioned above indicate, events of the nature contemplated in this matter usually cause a reduction in customers or have some other effect that causes revenue to reduce, and in the context of the business concerned, the rental is considered by the lessee to be unaffordable. The inability to afford the agreed rental is ordinarily subjective and depends on the means of the lessee concerned. The respondent presents no facts or

evidence which demonstrate that the pandemic was the direct cause, rendering the payment of the agreed rental unaffordable and its payment objectively impossible.

38. A further difficulty is that, in order to avoid the cancellation, the respondent must demonstrate an entitlement to a reduction in the agreed rental to the level of the paid amount. The amount to which the agreed rental should be reduced requires evidence because, “[i]n every case a value judgment, based on objective criteria, will be required to establish whether it is just that the bargain should, to the extent still possible, be upheld and the obligations of the parties adjusted” (*World Leisure Holidays*, para. 10). The respondent does not indicate the extent of the reduction which it claims or how it should be determined and provides no objective criteria. I cannot exercise a value judgment in the absence of facts and evidence.
39. The entitlement to a reduction may be founded on an implied term and need not be an express term as contended by the applicants. However, the parties may override the implied terms (*Bischofberger v Vaneyk* 1981 (2) SA 607 (W), at 611A) and, accordingly, “agree that the risk of impossibility of performance is to fall upon the debtor” (*Oerlikon*, 585 B). The respondent does not allege such a term or indicate that such a term is compatible with the express terms of the lease, which overwhelmingly exclude claims by the respondent. In particular, the lease provides that “[t]he Lessee shall not be entitled to claim from the Lessor any remission of rental or any other charges payable in terms of the Lease for any reason whatsoever and nor shall the Lessee in any circumstances have any claim against the Lessor for damages or otherwise be entitled to withhold or defer payment of rental and other charges for any reason

whatsoever" (clause 13.3). In my view, this express term precludes a claim for a reduction of rental.

40. In the premises, the respondent is in unlawful occupation of the property and in the circumstances the following order is made:

- (1) The respondent and all those occupying the property by, through or under it, are evicted from the property known as Republic Place, situate at Shop 11, Republic Place, Hill Street, Ferndale, Randburg and described as Erf 886, Ferndale Township, Registration Division I.Q., Gauteng ("the property").
- (2) The respondent and all those occupying the property by, through or under it, shall vacate the property on or before 1 January 2022.
- (3) In the event that the respondent and all those occupying the property by, through or under it do not vacate the property on or before 1 January 2022, the Sheriff of the Court or his lawfully appointed Deputy is authorised and directed to evict the respondent and all those occupying the property by, through or under it, from the property.
- (4) The respondent shall pay the costs of this application.



QG LEECH

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

HEARD ON: 5 October 2021

DATE OF JUDGMENT: 9 December 2021

COUNSEL FOR THE

FIRST AND SECOND

APPLICANTS: M. Beckenstrater

INSTRUCTED BY: Vermaak Mashall Wellbeloved Inc.

COUNSEL FOR THE

RESPONDENT: M. Mantsha

INSTRUCTED BY: Lugiusani Mnantsha Inc.