IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA 5/11/2014

CASE NO: 76939/2013

In the matter between:

DITSONG MUSEUMS OF SOUTH AFRICA	Applicant
and	
FUNDI PROJECTS (PTY) LTD	First Respondent
HELOISE VAN DYCK	Second Respondent
ALTA VAN DER WESTHUIZEN	Third Respondent
JACO BONDISIO	Fourth Respondent
ELNA VAN RENSBURG	Fifth Respondent
HINDENBURG VAN RENSBURG	Sixth Respondent
TOENIEN VAN RENSBURG	Seventh Respondent
SHARIDON VAN RENSBURG	Eighth Respondent
CITY OF TSWHANE METROPOLITAN MUNICIPALITY	Ninth Respondent

JUDGMENT

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED. ✓

5/11/2014
DATE SIGNATURE

DAVIS, AJ

THE PARTIES:

[1] 1.1 The initial entity which features in the subject matter of this litigation was "*die Nasionale Kultuurhistoriese- en Opelug Museum*" (the National Cultural History Museum), being an

entity established in terms of Section 4(2) of the Cultural Institutions Act, No. 29 of 1969.

1.2 In terms of Section 6(1) the Cultural Institutions Act, No. 119 of 1998, the National Cultural History Museum, as a "*declared institution*" has subsequently been incorporated in the Northern Flagship Institution.

1.3 In terms of a National Cabinet approval the name of the Northern Flagship Institution was subsequently changed to that of the Applicant, being Ditsong Museums of South Africa on 9 October 2009.

1.4 The First Respondent is FUNDI PROJECTS (PTY) LTD, a private company incorporated in terms of the Companies Act and the Second to Eighth Respondents are natural persons.

1.5 The Ninth Respondent is the local authority within whose area of jurisdiction the immovable property in question is situated. The Ninth Respondent played no part in these proceedings.

1.6 The First Respondent has indicated that the Second, Third and Fourth Respondents no longer reside on the property in

question. The Applicant conceded the issues regarding the Second and Third Respondents but still persisted in the relief against the Fourth Respondent. Having regard to the order which I intend making, this is presently also of little consequence.

DISPUTE:

[2] The First, Fifth, Sixth, Seventh and Eighth Respondents' (and possibly the Fourth Respondent) occupy immovable property which is either adjacent to or on a part of a property on which a museum, known as the Willem Prinsloo Landboumuseum, is operated by the Applicant. The Applicant seeks to terminate this continued occupation.

[3] The Applicant relies on two causes of action for the aforesaid termination, being:

3.1 a *rei vindicatio* claim based on the Applicant's alleged ownership of the property and the relevant Respondents' occupation thereof; **alternatively**

3.2 a claim for eviction of the relevant Respondents pursuant to an alleged valid cancellation of a lease agreement between

the National Cultural History Museum and the First Respondent.

OWNERSHIP:

[4] For purposes of its *rei vindicatio* claim, the Applicant alleged that it was the owner of the immovable property in question. This allegation is disputed by the Respondents.

[5] There are various references in the papers to the property/ies:

5.1 In the Applicant's Notice of Motion the property in question is described as follows:

> "*1.1 The Remaining Portion of Portion 88 of the Farm Kaalfontein 513 Registration Division JR Transvaal ... initially registered and still kept in terms of Certificate of Incorporated Title No. 30531/1973 ...*
>
> *1.2 The Remaining Portion of Portion 2 (a part of Portion 1) of the Farm Kaalfontein 513 Registration Division JR Transvaal ... kept by the donator in terms of Certificate of Registered Title No. 16844/1967 ...*"

5.2 The aforementioned property descriptions accord with that contained in the lease agreement (to which I will refer to more fully hereunder).

5.3 As proof of its alleged ownership the Applicant relied on certain title deeds and Certificates of Consolidated Title annexed to its Founding Affidavit and counsel for the Applicant, Mr Vorster, persisted in argument with the contention that these deeds provide "*conclusive proof*" of the Applicant's requisite ownership.

[6] An examination of the documents on which the Applicant relies, however indicates the following: The Remaining Portion of Portion 2 (a portion of Portion 1) of the farm Kaalfontein No. 513 was held by Willem Petrus Prinsloo Snr. by way of Title Deed T2698/1905. Various subsequent deeds resulted in this property being held by one Maria Elizabeth Le Roux (born Prinsloo on 16 December 1908) by way of Certificate of Registered Title No. T16844/1967. This property was subsequently transferred by way of Title Deed T19866/1977 to the "*Raad van Nasionale Kultuurhistoriese- en Opelug Museum*". For ease of reference I shall refer to this property as "*Property A*".

[7] A second property (to which I shall refer to as "*Property B*"), being Portion 108 (a portion of Portion 1) of the farm Kaalfontein 513 was initially held by Willem Petrus Prinsloo Snr. in terms of Deed of Transfer T6526/1898. It was subsequently held by way of Certificate of Registered Title T16845/1967 by aforementioned Maria Elizabeth Le Roux who in turn transferred it to the "*Raad van Nasionale Kultuurhistoriese- en Opelug Museum*" who then held it by way of Deed of Transfer T52900/1981.

[8] Properties A and B were consolidated by way of a Certificate of Consolidated Title T52901/1981 and thereafter known as Portion 109 of the farm Kaalfontein 513, held by the "*Raad van Nasionale Kultuur-historiese- en Opelug Museum*" (or their successors in title).

[9] By way of an endorsement on T52901/1991, Portion 109 of the farm Kaalfontein was transferred to the National Government of the Republic of South Africa, which endorsement was registered as T68881/2010.

[10] Another endorsement, effective on the same day as the aforesaid transfer to the National Government and registered as BC59922/10 against T52901/1981 indicates a name change from the Northern

Flagship Institution to that of the present Applicant (Ditsong Museums of South Africa).

[11] If it is so that the Applicant is the successor in title of the Raad van Nasionale Kultuurhistoriese en Opelug Museum (and therefore the owner of both Properties A and B, now known as Portion 109 of the farm Kaalfontein 513), then it is clear that the documentation presented by the Applicant, only pertains to the property which include that portion still described as such in paragraph 1.2 of the Notice of Motion (i.e. aforementioned "*property A*").

[12] I therefore find that the Applicant as failed to prove ownership of the property described by it as the remaining portion of Portion 88 of the farm Kaalfontein 513.

[13] Irrespective of the aforesaid deficiency in the Applicant's case, the parties are at least *ad idem* as to the physical property which is occupied by the relevant Respondents. The certainty in respect of the physical appearance and description of the property stems from the formulation thereof in the lease agreement wherein it has been described as Figure ABCDEFGHIJKLMNOPQ as depicted on a sketch plan and map annexed to the lease agreement and which is situated on or forms part of the property "*... wat in die algemeen bekend is as*

die Willem Prinsloo Landboumuseum ..." and which comprises of show-grounds, arenas, stables, sheep complexes, stoors, a "*lapa kraal*", houses, caravan park, lecture hall, paddocks and certain offices. For ease of reference this shall hereinlater be referred to as "*the occupied property*" (so as to avoid confusion with the various property descriptions, title deeds and allegations of ownership as described hereinbefore).

RELEVANT HISTORY OF OCCUPATION:

[14] As is apparent from the uncontested version of the Applicant, as supplemented by the evidence presented by the First Respondent, the relevant history of the occupation of the occupied property is as follows:

14.1 In the period leading up to 1999, the National Cultural History Museum struggled to maintain the occupied property which was adjacent to the actual museum. The occupied property is far larger than the museum property, lastmentioned which also comprises of main museum buildings, restaurants, parking lot, sheep pens, a cattle kraal, a farmstead, pastures and picnic areas (all of which on a rough estimate from the

sketch plan is about one quarter of an area in extent of that of the occupied property).

14.2 The First Respondent had made proposals to the then curator of the National Cultural History Museum regarding the taking over of the maintenance tasks, which referred not only to the buildings and pastures and stables and the like but also the fencing of the occupied property as well as the development thereof. This proposal was designed to relieve the National Cultural History Museum from a considerable financial burden.

[15] Pursuant to the aforesaid, the then Director of the Council for Geoscience (Dr Frick) apparently directed a letter to the Acting Director-General of the Department of Arts, Culture, Science and Technology requesting permission from the relevant Minister for the renting out of property and assets of the Northern Flagship Institution to private companies and institutions.

[16] On 17 August 1999 the Acting Director of the aforementioned Department advised as follows:

"*Renting out of property: Northern Flagship Institution*

Please be informed that your letter dated July 1999 regarding the Minister's approval for the renting out of property and assets of the Northern Flagship Institution to private companies/ institutions has been approved."

[17] Hereafter the First Respondent's deponent and sole director negotiated for the conclusion of a lease agreement on behalf of the First Respondent.

[18] On 20 September 1999 a long-term lease agreement was entered into between "*die Nasionale Kultuurhistoriese- en Opelug Museum*", represented by the Acting Chief Executive Director thereof (the aforementioned Dr Frick who was apparently also the Director for the Council for Geoscience) and who was duly authorised thereto by way of a resolution of the board of the Northern Flagship Institution dated 30 March 1999.

[19] The lease was for an initial period of 20 years with the option to extend the lease for another 20 years. Although the lease agreement provided only for a nominal annual rental, it further provided that the main object of the lease was the development of the occupied property in terms of a 5 year master plan. It also obligated the First Respondent to maintain the gates, boundary fences and fences on the property, to provide for fire breaks on the terrain, to maintain the

access to the museum to the satisfaction of the lessor, to provide grazing and feed for livestock of the lessor, including 20 cattle, 90 sheep, 28 pigs, 50 chickens and 4 donkeys, to maintain the sewerage system, to provide for wood for the use in historical fireplaces on the museum terrain, to provide for security services for the property including that of the museum and to market its facilities and report the attendance of its facilities and its activities, being "*byeenkomste en funksies, boerdery, perde byeenkomste* [and] *toerisme*".

[20] The lease agreement was registered against the title deeds of the relevant properties as required for long-term leases.

[21] During the 15 years since the inception of the lease agreement and the occupation of the occupied premises, the First Respondent states that it has, *inter alia*, maintained the fences, started with a plan of substituting the fences with concrete walling, held numerous equestrian events which included the International Polocrosse Tournament between Zimbabwe, Zambia and South Africa, the National Polocrosse Championships, the Gauteng Polo Championships, the Mpumalanga Polocrosse Championships, the South African Military Gimkana, endurance horse races and various polocrosse club tournaments as well as Arabian horse auctions and Ntuli cattle auctions. In addition it had implemented a visitor

monitoring system whereby entrance slips are given to visitors and which were then utilised for statistical data. Entrance fees charged for visitors were paid to the representatives of the Applicant insofar as the visitors had not paid the entrance fees directly to the Applicant. A 5 year master plan had been implemented and the First Respondent provided numerous examples of instances of maintenance, upkeep and improvement of the various structures on the occupied property, often substantiated by extensive reports and photographs. The First Respondent was also a member of the Cullinan Fire Protection Association and performed the requisite duties in terms of the National Veld and Forest Fire Act, No. 101 of 1998 for the occupied property. Insofar as the First Respondent had an obligation to provide the Applicant with financial information, it states that it has done so and it had provided annual financial statements as audited from time to time. Polo fields, exercise fields for horses, drainage systems therefor, a dressage and jumping area have also been either used, maintained or are in the process of being transformed. Various aerial photographs of the occupied property indicate confirmation of the above as well as eventing tracks and cycling and equestrian endurance trails having been established.

ALLEGED TERMINATION OF THE RIGHT TO OCCUPY:

[22] During the 5 or 6 years preceding the events which led to the current application, it appears that differences of opinion between the First Respondent's director and the museum manager escalated, particularly regarding the frustration of, alternatively restrictions placed on the Respondents' use of the occupied property. This apparently led to attempts by the Applicant to have the lease agreement terminated by agreement and the First Respondent was allegedly also requested to "*name his price*" for such termination. For purposes hereof, the Respondent even visited and consulted with the Applicant's attorneys.

[23] When voluntary termination of occupation could not be attained, the Applicant delivered a letter of demand on 17 May 2013, claiming that the First Respondent had been in breach of its obligations in terms of the lease agreement in that it had allegedly fallen in arrears with payments, failed to provide the Applicant with a "*full monthly account with regard to the number of gatherings held, the number of people as well as the amount of money received at the gates*", failed to maintain the gates, boundaries and fences, failed to prepare adequate fire breaks, failed to market the occupied property "*adequately*" and "*failed to consistently inform the Applicant about the planning and execution*

of the First Respondent's intended development of the terrain" as well as an alleged failure to "*successfully*" implement the 5 year plan for development of the occupied property.

[24] The letter of demand was followed by a letter of cancellation dated 6 June 2013.

[25] Not surprisingly, the validity of the cancellation is hotly disputed and the allegations of breaches on the part of the First Respondent vehemently denied. This was done prior to the launch of the application by correspondence between the parties. The parties are *ad idem* that there are insurmountable factual disputes regarding the determination of these issues.

THE PRESENT APPLICATION:

[26] Despite the aforesaid disputes, the Applicant launched the present application. In its Founding Affidavit, the Applicant's deponent, being its Chief Executive Officer, after a description of the parties and the Willem Prinsloo Agricultural Museum and its activities, referred to the letter of the Acting Director-General of the then Department of Arts, Culture, Science and Technology of 17 August 1999, the lease agreement, the contents thereof and the registration thereof.

[27] The Applicant's initial attack on the occupation of the occupied premises (which was never raised in the preceding 15 years) is set out and due to the nature of the dispute it is necessary that the Applicant's averments are quoted in full:

> "*5.6 The lease was registered against the title deed of the property as is required for long-term leases…*
>
> *5.8 This lease agreement is void for non-compliance* [with] *the Cultural Institutions Act, 1998 (Act No. 119 of 1998) and the Constitution of the Republic of South Africa, 1996.*
>
> *6. 6.1 Section 4(3) of the Cultural Institutions Act, 1998 (Act No. 119 of 1998) provides as follows:*
>
> *'A declared institution may not, without the prior approval of the Minister, granted in consultation with the Minister of Finance –*
>
> *(a) purchase or otherwise acquire, hire, sell, let, exchange or otherwise alienate, hypothecate or encumber immovable property; or*
>
> *(b) invest, lend or borrow monies.'*

6.2 *The long-term lease agreement, encumbering the property for a period of 20 years, was not agreed to by the Minister of Arts and Culture, and the approval was certainly not done in consultation with the Minister of Finance.*

7. 7.1 *Section 217(7) of the Constitution, 1996 provides as follows:*

> *'When an organ of State in the national, provincial or local sphere of government or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.'*

7.2 *The system preceding the conclusion of the lease agreement was not fair, equitable, transparent, competitive or cost-effective.*

7.3 *According to the Applicant's records the First Respondent was the only entity that was given an opportunity to contract and the nominal amount payable for rental was most definitely not cost-effective.*

8. 8.1 *Should the court find that the lease agreement is not void ... the Applicant relies on a valid cancellation of the lease agreement for the relief set out in the Notice of Motion ..."*

[28] In the First Respondent's Answering Affidavit these allegations were fairly and squarely placed in dispute. The First Respondent relied on the ministerial approval alluded to in the letter of the Acting Deputy Director-General referred to above, and gave details regarding the cost-effectiveness of the agreement. The First Respondent's deponent stated that although the First Respondent has no knowledge of the Applicant's "*system*" it denied that any of the statutory prescripts had not been complied with. It furthermore submitted that the Applicant has failed to provide any evidence in substantiation of its contentions.

[29] On behalf of the Applicant it was argued that the Applicant need not have provided any evidence and that either on the Respondents' failure to prove the validity of the agreement alternatively the inference that they were the only party considered, it must be found that the agreement was void. It is clear that, in considering this issue, the incidence of onus plays a pivotal role.

AD THE INCIDENCE OF ONUS:

[30] Generally speaking an owner reclaiming possession of his property with the *rei vindicatio* need only allege and prove ownership of the thing (whether movable or immovable) and that the Defendant was in

possession of the property when the action was instituted. In support of this general proposition the Applicant's counsel also referred me to the work of the learned author Harms, **Amler's Precedence of Pleadings** (7th Edition) under the heading "*Vindication*". In the same work however in the section where the possible defences of an occupier faced with a *rei vindicatio* application is dealt with, the following is stated:

> "*Should the Defendant wish to rely on a right to possession (by virtue of a lease, for example), the Defendant must allege and prove the right.* ***Woerman NO v Masondo*** *2002(1) SA 811 (SCA). If the Plaintiff concedes this right at any stage of the proceedings, the onus is on the Plaintiff to prove a valid termination of the right.* ***Matador Buildings (Pty) Ltd v Harman*** *1971(2) SA 21 (C);* ***Chetty v Naidoo*** *1974(3) SA 13 (A);* ***Schnehage v Bezuidenhout*** *1977(1) SA 362 (O).*" (my emphasis)

[31] The Applicant argued that the type of "*concession*" referred to in the aforementioned quotation and the cases referred to therein, only deals with the situation presupposed in the Applicant's alternate cause of action, namely the concession of the existence of a lease agreement and the consequent onus to prove a cancellation of the lease and not with the position where the invalidity of the agreement is in question.

[32] The distinction appears to be artificial and the artificiality is increased in the matter under consideration where the two alternate causes of action are mutually destructive. It is trite that in motion proceedings the affidavits constitute both pleadings and evidence and although it is permissible in pleadings to plead mutually destructive causes of action in the alternate to each other, it is more difficult to reconcile the position where mutually destructive evidence is tendered by the Applicant. The Applicant argues that its "*concession*" in its second/ alternate cause of action, should not be held against it in respect of its first cause of action.

See: **Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others** 1999(2) SA 279 (W) at 323G; and

Harms, **Civil Procedure in the Supreme Court** at B6.23 footnote 6 and the cases quoted there.

[33] In the present instance the answer, in my view, lies in the manner in which the Applicant pleaded its case. The Applicant is claiming the return of possession of a portion of his property which possession he concedes he has voluntarily relinquished. Where the Applicant has now alleged as part of his case that that relinquishing was of no legal consequence then he attracts the onus in respect of that which he

alleges, i.e. proof of the voidness or illegality of the relinquishing act. Viewed like this, I see little or no reason to deviate from the general rule that he who alleges must prove as enunciated in **Pillay v Krishna** 1946 AD 946 by Davis, AJA which proposition has been termed "*an exposition of the fundamental rules which govern the incidence of onus*" in **Neethling v Du Preez and Others** and **Neethling v Weekly Mail** 1994(1) SA 708 (A) at 716B-C.

[34] I am fortified in the above view by the following statement in **Goudini Chroom (Pty) Ltd v MCC Contracts (Pty) Ltd** 1993(1) SA 77 (AD) at 84C per Nienaber JA:

> "*If an owner, in his particulars of claim or founding affidavit, alleges, in addition to his ownership, the agreement in terms of which his counterpart is in occupation, it is incumbent on him to make the further allegation that the agreement is invalid or has expired or has been terminated. Otherwise his cause of action is incomplete and excipiable ...*"

[35] Although, as a matter of law, an owner is entitled to claim repossession of his property by way of the *rei vindicatio* from any one who cannot prove a valid right to retain the property, the Applicant in this instance in the manner in which it pleaded its first cause of action, attracted the onus.

[36] The aforesaid approach regarding the incidence of onus in the present application corresponds with the general approach a court is obliged to take in motion proceedings. As I understand the Applicant's argument, it relies on the proposition that the principles stated in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984(3) SA 623 (A) at 634-635 work "*in reverse*" in situations where the onus in respect of an issue is on the Respondent. However, in the matter of **Nqumba and Others v State President and Others** 1987(1) SA 456 (OK) (incorrectly reported as the true spelling of the Plaintiff's name was Ngqumba as corrected on appeal) Kannemeyer J dealt with the issue as follows:

> "*The approach laid down in* ***Plascon-Evans Paints Ltd v Van Riebeeck Paints*** *... is not concerned with the question of onus. It determines the evidence upon which an application or notice of motion must be decided when there is a conflict of fact on the affidavits.*"

This judgment in the court *a quo* found approval on appeal.

See: **Ngqumba / Damons NO / Jooste v Die Staatspresident** 1988(4) SA 224 (AA) at 260H-J

[37] The following principle stated in **Tamarillo (Pty) Ltd v B N Aitkin (Pty) Ltd** 1982(1) SA 398 (A) at 430G-431A was also confirmed in the **Ngqumba** judgment on appeal:

> *"A litigant is entitled to seek relief by way of notice of motion. If he has reason to believe that facts essential to the success of the claim will probably be disputed, he chooses that procedural form at his peril for the court in the exercise of its discretion might decide neither to refer the matter for trial nor to direct that oral evidence be placed before it, but to dismiss the application."*

[38] This proposition applies irrespective of the incidence of onus as set out later in the judgment at 261E-G:

> *"Miller AR het nie na die kwessie van onus verwys nie maar dit blyk myns insiens dat hy na die algemene reëls, soos in die **Plascon-Evans** saak supra vermeld, verwys het as 'n reël wat normaalweg toegepas word wanneer iemand by wyse van mosieverrigtinge 'n bevel wil verkry en daar dan feitegeskille ontstaan. In **Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en 'n Ander** 1982(3) SA 893 (A) waar dit om die afdwing van 'n voorkoopsreg gegaan het, het Botha WnAR in 'n minderheidsuitspraak (waarmee Hoexter AR saamgestem het) beslis dat die benadering wat ek hierbo die algemene reël genoem het ook*

geld waar die onus op die Respondent rus (die aangeleentheid is nie in die meerderheidsuitspraak behandel nie)."

[39] The learned author Harms in Civil Procedure in the Superior Courts (supra) at B6.45 further interpreted the judgment in **National Director of Public Prosecutions v Zuma (Mbeki and Another Intervening)** 2009(2) SA 277 (SCA) par. 26 to mean the following:

> *'In motion proceedings the questions of onus does not arise and the approach set out above governs irrespective of where the legal or evidential onus lies.'* (The approach is that set out by me in paragraph [37] *supra*.)

[40] In summary therefore I find the following: The incidence of onus to prove the invalidity of the lease agreement is on the Applicant, if not in general then as a result of the manner in which the Applicant had pleaded its case. Even if I am wrong in this finding, having regard to what the Applicant has stated in its Founding Affidavit, it can only succeed if, on the application of the **Plascon-Evans**-principles, there is no real dispute of fact regarding the issue of validity.

THE DISPUTE REGARDING VALIDITY OF THE APPLICANT'S LEASE AGREEMENT WITH THE FIRST RESPONDENT:

[41] The Applicant's contentions regarding the alleged invalidity of the agreement are twofold: Firstly the Applicant alleges that the requisite ministerial approval was lacking and secondly the Applicant alleges that the provisions of Section 217 of the Constitution have not been complied with.

[42] As regards the first contention, the letter from the Acting Director-General of the relevant State Department to which I have already referred to earlier and which forms part of the Applicant's own papers, if not expressly constituting the requisite approval, certainly gives rise to an inference of such approval.

[43] In addition to the abovementioned inference, derived from a clear wording of the letter, the Respondent relies on the maxim *omnia praesumuntur rite esse acta donec probetur in contrarium* and the principles set out in **Rex v Naran Samy** 1945 AD 618.

[44] Having regard to annotations of the aforementioned case and applying the said *maxim*, I accept and find that the letter is an accurate statement that ministerial approval had been given and that

such approval had been given in the proper manner in consultation with the Minister of Finance and in compliance with Section 4(3) of the Cultural Institutions Act, No. 119 of 1998.

[45] Having regard to the Applicant's contentions regarding the non-compliance with Section 217(1) of the Constitution, no evidence was produced by the Applicant to enable the court to determine which "*system*" was in place for the contracting for goods or services, whether the system was fair, equitable, transparent, competitive and cost-effective and no evidence was placed before the court by the Applicant as to non-compliance with any such system. Bald allegations have been made which have been placed in dispute by the Respondents as I have already indicated.

[46] There are accordingly no uncontested allegations by the Applicant which would entitle it to final relief in this regard in this application.

[47] It is furthermore astounding how the Applicant as an organ of State and subject to all the requirements of record-keeping and archiving could not produce a single document in substantiation of its claims. There is also an absolute lack of information regarding the efforts which the Applicant had performed or attempted to perform in establishing its allegations. No information pertaining to the conduct

of the Applicant or its various predecessors or the relevant State Department has been placed before the court. In effect, all the court is left with are assertions in the form of secondary facts which, in the absence of primary facts on which they should have been based, are nothing more than the Applicant's deponent's own conclusions.

See: **Die Dros (Pty) Ltd v Telefon Beverages (Pty) Ltd** [2003] 1 ALL SA 164 (C) at par. [28] and

Radebe v Eastern Transvaal Development Board 1988(2) SA 785 (A) at 793C-E.

[48] Accordingly they do not constitute evidential material capable of supporting a cause of action. The Applicant's first "*cause of action*" is therefore dismissed.

[49] In one of the judgments on which all the parties rely (of course with divergent emphasis), namely **Municipal Manage: Qaukeni Local Municipality and Another v F V General Trading CC** 2010(1) SA 356 (SCA), the following was stated (at [23]):

> "*This court has on several occasions stated that, depending on the legislation involved and the nature and functions of the body concerned, a public body may not only be entitled but also duty-bound to approach a court to set aside its own irregular administrative act: See* ***Pepcor Retirement Fund and***

Another v Financial Services Board and Another *2003(6) SA 38 (SCA) at par. 10. Consequently, in* ***Rajah & Rajah (Pty) Ltd and Others v Ventersdorp Municipality and Others*** *1961(4) SA 402 (A) at 407D-E it held that the interest a municipality had to act on behalf of the public entitled it to approach a court to have its own act in granting a certificate to obtain a trading licence declared a nullity. Similarly, in* ***Transair (Pty) Ltd v National Transport Commission and Another*** *1977(3) SA 784 (A) at 792H-793G this court held that an administrative body, which held wide powers of supervision over air services to be exercised in the public interest, had the necessary locus standi to ask a court to set aside a licence it had irregularly issued. Finally, in* ***Premier v Free State and Others v Firechem Free State (Pty) Ltd*** *supra, Schutz JA concluded in giving the unanimous judgment of this court that the province (the Appellant) was under a duty not to submit itself to an unlawful contract and (was) entitled, indeed obliged, to ignore the delivery contract and to resist* [the Respondent's] *attempts at enforcement."*

[50] The Respondents argue that this is what the Applicant is attempting to do by way of its application which is, in its view, a roundabout and improper manner of obtaining a review of its own administrative action taken 15 years ago. The Applicant, however, in argument denied that this is what it was doing. This denial is of course contrary to the contentions of alleged invalidity of the lease agreement and it is to be questioned, if the Applicant had been serious in its contention of

invalidity, why this had not been raised previously and why no approach as set out in the abovementioned finding of the Supreme Court of Appeal had not properly and previously been taken. Having regard to the view taken by me as set out earlier in this judgment, I need not decide this issue.

THE APPLICANT'S "*SECOND CAUSE OF ACTION*":

[51] In respect of the Applicant's alleged termination of the relevant Respondents' right of occupation based on the alleged valid cancellation of the lease agreement, there is (as already pointed out) consensus between the parties that this issue cannot be resolved without the hearing of oral evidence.

[52] With reference to the judgment by Davis J in **Ripoll-Dausa v Middleton NO and Others** 2005(3) SA 141 (CPD), I make an order as set out hereunder:

ORDER:

1. The application is postponed to a date to be arranged with the Registrar of the High Court, Pretoria for the hearing of *viva voce* evidence.

2. The issue to be resolved at such hearing shall be whether the Applicant had validly cancelled the long-term lease agreement with the First Respondent in respect of the immovable property mentioned in the Applicant's Notice of Motion.

3. The evidence to be adduced at the hearing of the oral evidence shall be that of any witnesses the parties may elect to call, subject to paragraph 4 below.

4. Save in the case of any persons who had already deposed to affidavits in these proceedings, neither party shall be entitled to call any person as a witness, save with the leave of the court and after a notice had been served on the other party at least 15 days prior to the date appointed for the hearing of oral evidence wherein the evidence to be given in chief by such a person is set out.

5. Within 30 days after the date of this order, each of the parties shall make discovery on oath of all documents relating to the issue referred to in paragraph 2 above which are or have, at any time, been in the possession or under control of such parties.

6. Such discovery shall be made in accordance with Rule 35 of the Uniform Rules of Court and the provisions of that rule with regard to

the inspection and production of such documents discovered shall be operative including the provisions relating to further and better discovery.

7. The Applicant shall pay the First Respondent's costs occasioned by the hearing of this application on the opposed motion court roll of the week of 20 to 24 October 2014.

8. Save as aforesaid, the costs of the application are otherwise reserved for determination after the hearing of the *viva voce* evidence.

N DAVIS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION
PRETORIA