

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 61818/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

[18 July 2023]

SIGNATURE

In the matter between:

YASMIEN MATTHEWS N.O.

Applicant

and

LOUIS FRANCES KRUGER

First Respondent

HUMAN RAUTENBACH KRUGER

Second Respondent

**THE CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

Third Respondent

JUDGMENT:

NEL AJ

INTRODUCTION

[1] This is an opposed application in terms of which the Applicant, in her capacity as Executrix, seeks, *inter alia*, the eviction of the First and Second Respondents from property situated in E[...], Extension 3, which property is described as commercial premises.

[2] The First and Second Respondents oppose the relief sought, have raised certain *in limine* points, which I deal with below, and have launched a Counter-Application.

THE LEASE AGREEMENT

[3] On 1 May 2019 the Applicant, in her capacity as Executrix, concluded a lease agreement in respect of the property described as Plot 3,5[...] D[...] D[...] Avenue, E[...], Extension 2, (“the Leased Premises”) with the First and Second Respondents, for a duration of three years, terminating on 30 April 2022 (“the Lease Agreement”).

[4] The Applicant contends that the Respondents repeatedly failed to pay the monthly rental, either timeously or at all. The Respondents admit ceasing to pay rental to the Applicant, but contend they were not obliged to do so, on the basis that the Applicant has no legal title to the Leased Premises.

[5] The Applicant contends that the lease agreement was repudiated by the Respondents on 3 September 2021, alternatively that the lease agreement was cancelled on 15 November 2021, pursuant to a breach by the Respondents, which breach, despite notice to remedy the breach, was not remedied. The Respondents contend that the Lease Agreement is void *ab initio*, and the parties are accordingly *ad idem* that there was no lease agreement in existence as between the parties as at the time of the launching of the Application.

[6] The Applicant contends that regardless of the reason for the termination of the Lease Agreement, such Lease Agreement has terminated, and the termination is not in dispute.

- [7] Regardless as to whether or not the Lease Agreement was repudiated by the Respondents or cancelled by the Applicant, the Lease Agreement came to an end by the effluxion of time on 30 April 2022.
- [8] Despite the termination of the Lease Agreement, by the latest on 30 April 2022, the Respondents have remained in occupation of the Leased Premises.
- [9] There is no dispute that the Leased Premises are used for commercial purposes, being the selling of fresh produce.

FIRST *IN LIMINE* POINT

- [10] The first *in limine* aspect raised by the Respondents is that the Applicant does not have the necessary *locus standi* to evict the Respondents from the leased premises, as the Applicant is not the owner of the leased premises.
- [11] The Applicant's stated *locus standi* derives from her capacity as Executrix of the estate of her late father, Mr Moses Matthews, who was the owner of the Leased Premises. The ownership of the Leased Premises by the late Mr Matthews is based on a registered title deed, being Title Deed TB27045/1974,
- [12] The Respondents contend that the Leased Premises form a portion of Erf 2[...] E[...], Extension 2, and that Erf 2[...] was expropriated by the City of Tshwane Metropolitan Municipality ("the Municipality") on or about 15 March 2013, and that accordingly the Applicant is not the owner or title holder of the Leased Premises.
- [13] The expropriation documentation relied on by the Respondents does not refer to the expropriation of the entire extent of Erf 2[...], as alleged, but only to a portion of Erf 2[...], for the purposes of a servitude.

- [14] The Respondents allege that the Leased Premises (Plot 3) is part of Erf 2[...] that has been expropriated, but do not provide any documentary evidence, despite referring to a sketch plan, that Plot 3 falls within the intended servitude area.
- [15] In the Replying Affidavit, the Applicant explains that the Leased Premises do not fall within the intended servitude, and it is also clear from the Replying Affidavit that the Municipality elected to withdraw the Notice of Expropriation, and never became the owner of Erf 2[...] or any part thereof.
- [16] In the circumstances, I am satisfied that the Applicant has established that she has the required *locus standi in iudicio* to have launched the Application.
- [17] I was also referred to the matter of *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another*¹, in which it was confirmed that a lessee cannot rely on a defence that a lessor does not have the right to the leased property, in order to resist eviction.
- [18] Whilst I am aware that the Respondents contend that the Lease Agreement is void *ab initio*, the first *in limine* aspect must be determined as if it is accepted that the Lease Agreement exists, as the Respondents contend that the Applicant is not the registered owner of the Leased Premises, and therefore has no *locus standi*. The first *in limine* aspect is not based on the Lease Agreement being void *ab initio*.
- [19] The first *in limine* point raised is accordingly without merit and is dismissed.

THE SECOND *IN LIMINE* POINT

- [20] The second *in limine* aspect raised is that there are genuine disputes of fact raised in the Affidavits that cannot be resolved without a referral to trial or oral evidence.

¹ 2016 (1) SA 621 (CC) at paras [26] to [33].

- [21] The Respondents contend that the disputes relate to whether the Applicant has a real right in respect of the Leased Premises, whether the Leased Premises were expropriated, and whether there was a misrepresentation on the part of the Applicant in concluding the Lease Agreement.
- [22] The crux of the disputes raised by the Respondents essentially relate to the same factual issue, being whether the Leased Premises were expropriated by the Municipality.
- [23] The Applicant has stated that the Leased Premises do not fall within the servitude area, and even if there was an expropriation, the expropriated servitude would not impact in any manner on the Leased Premises. The Respondents simply allege that the Leased Premises fall within the portion expropriated, without any evidence or indication that the Leased Premises are indeed within the servitude area.
- [24] In addition, it appears clearly from the Applicant's explanation of the events surrounding the alleged expropriation and the subsequent events, that the expropriation by the Municipality never came into existence or took effect.
- [25] I was referred by the Respondents' counsel to the matters of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions Ltd*², *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd*³ and *Lombaard v Droprep CC*⁴ in support of the contention that the Applicant ought to have foreseen that there would be material *bona fide* disputes of fact, and that accordingly the Application should be dismissed or referred to oral evidence.
- [26] In the matter of *Fakie N.O. v CCII Systems (Pty) Ltd*⁵ the Supreme Court of Appeal held⁶ that a robust approach by Courts in motion proceedings should

² 1949 (3) SA 1155 (T).

³ 1984 (2) All SA 366 (A).

⁴ 2010 (5) SA 1 (SCA).

⁵ 2006 (4) SA 326 (SCA).

⁶ At paragraph [56].

be followed, in order to avoid respondents from hiding behind implausible versions or bald denials.

[27] This is clearly an Application in which a robust approach should be adopted, as not only are the alleged disputes of fact resolved by the Applicant, once raised by the Respondents in the Answering Affidavit, such alleged disputes could certainly not have been foreseen, and are in addition, based on an unsubstantiated allegation that the Leased Premises were expropriated.

[28] In the circumstances, I am satisfied that no material *bona fide* disputes of fact exist, and that the second *in limine* aspect must be dismissed.

THE THIRD *IN LIMINE* POINT

[29] The third *in limine* aspect raised by the Respondents is that the issues to be considered in the Application are *lis pendens* as there is a pending action in terms of which the Respondents seek to have the lease agreement set aside.

[30] The Respondents contend that an action has been instituted by the First Respondent in which action the setting aside of the lease agreement is sought on the basis of fraudulent misrepresentation by the Applicant ("the Action"), which alleged misrepresentation presumably induced the conclusion of the Lease Agreement.

[31] Despite having raised the *in limine* aspect based of *lis alibi pendens*, the First Respondent rather strangely filed a Counter-Application seeking a declaratory order to the effect that the Lease Agreement is void *ab initio*, and that the Lease Agreement is not binding on the parties to the Lease Agreement.

[32] It is not possible to say with any certainty whether this is precisely the same relief that is sought in the Action, as no Summons or Particulars of Claim relating to the Action has been attached to the affidavits in this Application, but the allegations in the Answering Affidavit and the Replying Affidavit

suggest that the relief sought in the Action appears to be similar to what is sought in the Counter-Application, and in addition, the Respondents seek damages for a structure or structures erected on the Leased Premises.

- [33] Whilst the requirements for a defence of *lis alibi pendens* can be relaxed in appropriate circumstances, a party seeking to rely on a defence of *lis alibi pendens* must show that there are existing litigation proceedings between the same parties, for the same (or similar) relief, arising out of the same cause.⁷
- [34] It is a well-established principle that if a party would be entitled to raise a plea of *res judicata* after the conclusion of the first legal proceeding, in respect of the relief sought in the second legal proceeding, the requirements for a defence of *lis alibi pendens* would have been met.
- [35] It is however clear that the relief sought in this Application, being ejectment, in circumstances where the Parties are *ad idem* that there is no current existing lease agreement regulating their contractual relationship, would not result in a defence of *res judicata* being raised in the Action instituted by the Respondents.
- [36] The issues relating to the Respondents' entitlement to remain in occupation of the Leased Premises or to be ejected from the Leased Premises would have no impact at all on a consideration of the validity of the Lease Agreement in the Action. The Respondents contend that the Municipality is the owner of the Leased Premises and that no Lease Agreement ever came into existence, and accordingly, their presence on the Leased Premises could not be linked to the validity of the Lease Agreement.
- [37] In the circumstances, I am satisfied that the Respondents have not established that the pending Action entitles the Respondents to raise a

⁷ See the extensive discussion in *Ceasarstone SDot-Yam Ltd v World of Marble and Granite 2000 CC and Others* 2013 (6) SA 499 (SCA).

defence of *lis alibi pendens* in the Application, and accordingly the third *in limine* point must also be dismissed.

MERITS OF THE APPLICATION

[38] As regards the merits of the Application, the Respondents do not contend that they are entitled to remain in possession of the Leased Premises. The thrust of the Respondents' defence to the relief sought by the Applicant is based entirely on the three *in limine* aspects raised, and in particular that the Applicant has no right to seek the ejectment of the Respondents from the Leased Premises.

[39] Insofar as I have already found that the Applicant has established that she has the necessary *locus standi* to seek the relief as sought in the Notice of Motion, the inevitable consequence is that I must find that the Applicant is entitled to an order ejecting the Respondents from the Leased Premises.

THE COUNTER-APPLICATION

[40] Insofar as the Respondents have launched a Counter-Application for declaratory relief relating to the status of the Lease Agreement, the Respondents have not made out a case for the declaratory relief sought. The Respondents contend that the Lease Agreement should be set aside on the basis of a fraudulent misrepresentation by the Applicant. The Respondents have not established that the representation made by the Applicant, being that she had the legal capacity to conclude a lease agreement in respect of the Leased Premises, was fraudulent.

[41] On the Respondents' version, the issues that would have to be considered in determining the relief sought in the Counter-Application would require oral evidence.

[42] The issues raised in the Counter-Application would clearly, in any event, have to be considered in the Action.

[43] The Respondents did not file a Replying Affidavit to the allegations made by the Applicant in the Answering Affidavit (which was incorporated in the Replying Affidavit) in respect of the Counter-Application.

[44] During the hearing of the Application there were no submissions made relating to the relief sought in the Counter-Application, but I have in any event considered the allegations made in such regard in the Answering Affidavit, as well as the submissions made in such regard in the Respondents' Heads of Argument.

[45] Insofar as I may be wrong that the issues to be determined in the Counter-Application will have to be considered in the Action, or if the issues cannot be considered in the Action, I am satisfied that the Respondents have failed to make out a proper case for the relief sought in the Counter-Application.

[46] In the circumstances, I find that the Respondents' Counter-Application must fail.

COSTS

[47] The conduct of the Respondents in remaining in occupation of the Leased Premises, despite their own belief that the Lease Agreement did not entitle them to occupy the Leased Premises, coupled with the fact that they ceased paying rental to the Applicant is certainly irregular. There is no suggestion that the Respondents paid rental to the Municipality or any other person or entity.

[48] However, such conduct would, in my view, not justify a punitive costs order as sought by the Applicant.

THE ORDER

[49] I accordingly make the following order:

[49.1] The First and Second Respondent, and any other persons or entities occupying the premises described as Plot [...], 5[...] D[...]

D[...] Avenue, E[...] Extension 2 ("the Premises"), are to vacate the Premises by no later than 17h00 on 31 July 2023;

[49.2] In the event of the First and Second Respondent, and any other persons or entities occupying the Premises failing to vacate the Premises within the period referred to in paragraph 49.1 above, the Sheriff (or any authorised Deputy Sheriff) is authorised to take such reasonable steps as are required to facilitate the eviction of First and Second Respondent, and any other persons or entities from the Premises;

[49.3] The First Respondent's Counter-Application is dismissed;

[49.4] The First and Second Respondent, jointly and severally, are to pay the costs of the Application and the Counter-Application.

G NEL
[Acting Judge of the High Court,
Gauteng Division,
Pretoria]

Date of Judgment: 18 July 2023

APPEARANCES

For the Applicant: Adv N Mhlongo
Instructed by: Mothilal Attorneys

For the Respondent: Mr SJ Mphakathi
Instructed by ML Rababalela Attorneys