REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 5989/2020

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

In the matter between:

MUSANDIWA SUSAN MADZIVHANDILA **APPLICANT**

And

BOTTOM LINE TRADING CC **FIRST RESPONDENT**

THEOPHILUS RAMOKOKONO MPHOSI **SECOND RESPONDENT**

SASOL (PTY) LTD **THIRD RESPONDENT**

JUDGEMENT

KGANYAGO J

[1] On 14th October 2018 Mukandangalwo Wilbert Madzivhandila (deceased) entered into a lease agreement with Bottom Line CC (first respondent) which was represented by Theophilus Ramokokono Mphosi (second respondent) in respect of a petrol filling and service station (premises) known as Tshibevha Motors. The deceased had an agreement with Sasol (Pty) Ltd (third respondent) wherein the premises used the words Sasol filing station. In terms of the agreement between the deceased and the third respondent, the Sasol and Excel products were supposed to be sold at the premises. The fuel pumps, insignia and other colours at the premises were the intellectual properties of the

third respondent. The petroleum products to be sold at the premises were supposed to purchased exclusively from the third respondent.

[2] It was a material term of the lease agreement that during its currency, the first respondent shall purchase exclusively from the third respondent all products to be retailed on the premises. It was also a condition of the lease agreement that the first respondent and the third respondent shall within thirty days of signature of the lease agreement enter into an operation agreement which will be effective for the duration of the lease agreement. The thirty days period provided for a further thirty days period in the event the condition was not fulfilled due to circumstances beyond the deceased's own making. There was a further condition for the lease agreement to come into operation, that the first respondent had to pay the deceased the agreed legal costs in the amount of R700 000.00 in respect of court case no 8276/2017 which amount had to be paid within five days into the deceased attorneys trust account. The first respondent was also to be liable for the legal costs of drafting the lease agreement in the sum of R10 000.00.

[3] The first respondent had duly paid the R700 000.00 and R10 000.00 and took occupation of the premises on 1st November 2018. However, it is the deceased contention that the first respondent is conflict with the lease agreement in that it is purchasing its fuel from the third respondent's competitor and had also failed to enter into an operation agreement with the third respondent. That led to the deceased on 3rd August 2020 through his attorneys to notify the first respondent through its attorneys that he was formally cancelling the lease agreement dated 14th October 2018.

[4] On 16th September 2020 the deceased brought an urgent application seeking orders that it be declared that the lease agreement between the deceased and first respondent has lapsed on 14th December 2018; that the first and second respondents be ordered to vacate the premises that is the subject matter of the said lease agreement; alternatively that it be declared that the deceased has lawfully cancelled the lease agreement, and further that the deceased is authorised to institute action against the first respondent for the recovery of damages flowing from such breach of contract. On 1st October 2020 the deceased passed away and was substituted by Musandiwa Susan Madzivhandila as the applicant in these proceedings.

[5] The first and second respondents (respondents) have opposed the applicant's urgent application and have filed a provisional opposing affidavit. The respondents in their provisional opposing affidavit have disputed that the applicant's application was urgent. The respondents submit that the lease agreement has not lapsed, but that it never became effective as it was impossible for the first and third respondents enter into an operation agreement due to the fact that the first respondent did not have a retail licence. The respondents further submitted that the third respondent refused to do business directly with the respondents as long as the first respondent did not have a retail licence.

[6] The respondents further submitted that the applicant has no right or legal standing in law to claim repossession of the premises on an alleged failed or terminated contract until she had tendered restitution of the amount of R700 000.00 and R10 000.00 paid by the respondents. It is the respondents contention that the premises were handed over to the respondents by the

deceased willingly and with the full knowledge that until the deceased surrendered his retail licence to the authorities so that a retail licence could be issued to the first respondent, the business would have to operate under the deceased's licences without the first respondent being able to make its own contract with government. The respondents dispute that the failure by the first and third respondent to enter into an operation agreement has anything to do with the conduct of the first respondent, but that it was a simple factual circumstance or event.

[7] The respondents have submitted that the supply agreement between the deceased and the third respondent had expired on 1st February 2017, and that at the time the lease agreement was signed, there was no supply agreement between the deceased and third respondent. It is the respondents' contention that the deceased had refused to have the bills for deliveries made out to him and insisted that it should be made out to the first respondent, whilst the third respondent was not prepared to have the bills issued out to the first respondent without it having a retail licence. The respondents submit that in order to solve the impasse and also to save the deceased retail licence from lapsing due to the fact that the premises was going to be no longer trading as a going concern, the first respondent arranged with Global Oil which is a Sasol stockist and is owned by the brother of the second respondent, to make deliveries to the premises. It is the respondents' contention that they were entitled to do that while the lease agreement was in a state of uncertainty or effectiveness in order to make deliveries to the premises. The applicant's application was struck off the roll due lack of urgency. The respondents did not file a final answering affidavit, but have argued the matter based on their provisional answering affidavit.

[8] The applicant is seeking to be restored possession of the premises by this court declaring that the lease agreement between the parties have lapsed, and further that the respondents be evicted from the premises. Both parties are in agreement that the lease agreement never came into operation due impossibility of the respondents entering into an operation agreement with the third respondent. It is not in dispute that the parties have signed the lease agreement regarding the premises on 14th October 2018, and the respondent took occupation of the premises on 1st November 2018. From 1st November 2018 the respondents have been trading on the premises and paying rental of R70 000.00 per month. In this court when the matter was argued, counsel for the applicant submitted that the respondents have discontinued paying the monthly rentals with effect from November 2020.

[9] The applicant even though she did not specifically plead that her case is based on *rei vindicatio*, the facts of this case and the relief which the applicant is seeking, shows that its cause of action is based on *rei vindicatio*. The respondents also seems to understand the applicant's claim to be based on *rei vindicatio* as the respondents are seeking that the applicant tender or offer *restitutio* of the amount R700 000.00 paid by the respondents in settlement of the debt of the second respondent's brother against the applicant and also the R10 000.00 paid by the respondents in settlement of the legal fees for drafting the lease agreement that never took effect. What the respondents are raising is a defence available to a *rei vindicatio* action.

[10] It is trite that *rei vindicatio* is available to an owner for the recovery of his/her movable/immovable thing from whomsoever is in possession or has detention of the thing irrespective of whether the possession is bona fide or mala fide. All

what the owner need to prove for successful *rei vindicatio* action is to prove (i) that he/she is the owner of the thing; (ii) the thing is still in existence; and (iii) the respondent has possession or detention of the thing at the time the action is instituted. In the case at hand the applicant is seeking the recovery of immovable property. Normally when the thing recovered is an immovable property, the appropriate relief for the applicant will be an application for an ejectment, and that is one of the prayers that the applicant is seeking.

[11] From the facts of this case, it is not in dispute that the applicant is the owner of the premises, the premises are still in existence and the respondents are in possession of the premises. The respondents defence to the applicant's claim are that they are entitled to remain trading on the premises as there was consensual delivery of the premises and that if the applicant wants them to vacate the premises, the applicant must tender payment of the R710 000.00 they have paid to the applicant. What this court must determine is whether what the respondents are raising constitute a valid defence to ward of the *rei vindicatio* claim by the applicant.

[12] In *Rhoode v De Kock*[1] Cloete JA said:

> "[22] …Patel's case is similar to the present matter on facts, but it contains one important distinguishing feature: there, although the plaintiff relied on rei vindicatio for ejectment of the defendant from the property that had been sold in terms of a contract that was void, he specifically tendered payment of the amount paid to him on account of the purchase price. Rabie JA said at 670A-D:
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> *'Such enrichment occurs, it has been said (see, eg, Mattheus v Stratford and Others 1946 TPD 498 at p 504) when the seller retains both the land the price. There can, of course, be no quarrel*

[1] 2013 (3) SA 123 (SCA) at pars 22 and 23

with this view, but where, as in the present case (where, it may be noted, there is – save for the reference to improvements made by the defendant, a matter not in issue in these proceedings – no allegation that the plaintiff will be enriched at the expense of the defendant if he is granted the relief he seeks), the seller claims possession of his property against repayment of what he has received from the purchaser, there is no question of his being enriched at the expense of the purchaser if possession of the property is restored to him: the position in such a case is, simply, that the parties are restored to their original, ie, pre-agreement, position. I can see no inequity in such a result: the agreement which the parties purported to conclude is, after all, declared by statute to be of no force or effect.'

[23] The court in Patel was therefore not concerned with the question whether the failure to tender the return of what had been received under a void contract was fatal to a rei vindicatio brought by the owner. In the present matter, the mere fact that the appellant would be entitled to a repayment of the R400 000.00 (absent a defence) in order to prevent the respondents being unjustly enriched, does not mean that he is entitled to resist ejectment until the amount is repaid or tendered: he could do so only if the repayment has to take place at the same time that the appellant is ejected…"

[13] As I have already pointed out above, the parties are in agreement that the lease agreement never took effect. There is no merit in the respondents submission that there was consensual delivery of the premises and that they are entitled to remain on the premises. The respondents were paying R70 000.00 monthly rentals which is provided for in the failed lease agreement. The respondents does not dispute signing the failed lease agreement. In terms of the failed lease agreement the respondents had to take occupation of the premises on 1st November 2018, and that is the date on which they took occupation. Occupation of the premises was therefore in terms of the failed lease agreement, and there was no such a thing as consensual delivery.

[14] The respondents are not claiming expenses for the improvement of the premises. The R700 000.00 paid by the respondents was for a debt of the

brother of the second respondent which has got nothing to do with the improvement or enhancement of the premises. The R10 000.00 for legal costs was paid to the legal practitioner who drafted the failed lease and did no benefit the applicant or improve the premises. The R700 000.00 payment was clearing a brother's debt which the respondents' knowingly and willingly agreed to that well aware that it has got nothing to do with them. The applicant saw an opportunity to secure payment of the amount due to her by the second respondent's brother and he used that opportunity. In my view, the payment by the respondents' which did not bring any improvement to the premises but was in settlement of a private debt, is not sufficient to resist the ejectment.

[15] The condition for the lease agreement to come into operation was never fulfilled, and both parties are in agreement that the lease agreement never took effect. The lease agreement could not took effect as it was impossible for the respondents to fulfil the condition of entering into an operation agreement with the third respondent. The agreed time period within which to comply with the condition had lapsed. There is no possibility that the respondents will be able to comply with that condition since the first respondent is unable to obtain a retail licence. Legally the lease agreement had lapsed on 14th December 2018 despite the continued relationship which the parties had. The relationship that existed after the lapsing of the lease agreement was formally terminated by the applicant on 3rd August 2020. As there is no longer any lease agreement to govern the relationship between the applicant and the respondents, it will therefore be just and equitable to make an order ejecting the first and second respondents from the premises.

[16] In the result I make the following order:

16.1 The lease agreement between the applicant and the first respondent had lapsed on 14th December 2018.

16.2 The first and second respondents are ordered to vacate the premises that is the subject matter of the lease agreement, i.e. Thsibevha Motors, BA 35, Thohoyandou, Limpopo Province within 30 days from date of this order.

16.3 The first and second respondents jointly and severally to pay the applicants costs on party and party scale.

KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION,

POLOKWANE

APPEARANCES:

Counsel for the applicant	**: Adv Q Pelser SC**
Instructed by	**: Tambani Matumba INC**
Counsel for first and second respondents	**: BG Savvas**
Instructed by	**: Legodi Attorneys**
Date heard	**: 4th August 2021**
Delivered electronically on	**: 6th September 2021**