THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 149/10

SAVVAS SOCRATOUS Appellant

and

GRINDSTONE INVESTMENTS 134 (PTY) LTD Respondent

Neutral citation: *Socratous v Grindstone Investments* (149/10) [2011] ZASCA 8 (10 March 2011)

CORAM: Navsa, Ponnan and Shongwe JJA

HEARD: 22 February 2011

DELIVERED: 10 March 2011

SUMMARY: Cancellation of lease agreement – proliferation of litigation concerning cancellation on alternative bases – defence of *lis alibi pendens* wrongly rejected by court below – courts are a public resource under severe pressure – congested court rolls prejudiced by repeated litigation involving the same parties, based on the same cause of action and related to the same subject matter – court ought not to have decided the merits.

ORDER

On appeal from: Eastern Cape High Court (Mthatha) (Dukada AJ sitting as court of first instance).

1. The appeal is upheld with costs on the attorney and client scale.

2. The order of the court below is set aside in its entirety and substituted as follows:

'a. The applicant's application to strike out succeeds with costs.

b. The proceedings are stayed pending the determination of either case 464/08 in the Magistrates' Court for the district of Mount Currie or case 522/09 in this court.

c. The applicant is to pay the respondent's costs of these proceedings on the attorney and client scale.'

JUDGMENT

NAVSA JA (Ponnan and Shongwe JJA concurring)

[1] This is an appeal against a judgment of the Mthatha High Court (Dukada AJ), in terms of which it granted an order confirming the cancellation of a lease agreement in respect of commercial property and ordered the appellant's eviction from the premises. The appellant was ordered to pay the costs of the application on an attorney and client scale. The appeal is before us with the leave of the Mthatha High Court.

[2] In November 2006 the respondent company, Grindstone Investments 134 (Pty) Ltd (Grindstone), concluded a lease agreement with the appellant, Mr Savvas Socratous (Mr S), in terms of which it let to him, for a period of twelve years, certain premises situated at 107 York Road, Mthatha. The property was used to conduct a supermarket business under the style of a national

supermarket chain. Clause 14 of the agreement provides that in the event of the destruction of or damage to the property to the extent that it was 'untenantable', either party was entitled to declare the lease cancelled by giving written notice to the other to that effect by pre-paid registered post within 30 days.

[3] Clause 18 of the agreement provides that in the event of the lessor cancelling the agreement and the lessee disputing the cancellation and remaining in occupation, the lessee shall, pending the resolution of the dispute by litigation or otherwise, continue to pay to the lessor an amount equivalent to the monthly rental. Clause 23 of the agreement provides that in the event of the rental or any other amount remaining unpaid the lessor shall be entitled, after giving notice to remedy the breach, to cancel the lease forthwith and retake possession of the property, without prejudice to its right to claim arrear rentals and any damages it might have sustained as a result of the lessee's breach. The agreement provides that in the event of legal action being taken against the lessee the latter shall be liable for costs on the attorney and client scale. Importantly, clause 18 provides that in the event that the dispute is resolved in favour of the lessor the amounts paid by the lessee shall be deemed to be amounts suffered by the lessor on account of damages suffered by it as a result of cancellation of the lease and/or the unlawful holding over.

[4] It is undisputed that during September 2008 a fire broke out at the premises. Whilst the parties agreed that the damage caused by the fire was extensive they disagreed on whether the premises were, as a result, 'untenantable'. On 28 September 2008 Grindstone purported to cancel the lease agreement on the basis that the property had been destroyed and was 'untenantable'. The response by Mr S to the cancellation was that the premises could still be partially used and the lease agreement provided that in those circumstances it was not liable to be cancelled.

[5] This dispute precipitated much litigation. During March 2009 Grindstone instituted action against Mr S in the Mthatha High Court, in terms of which it

sought an order declaring the lease agreement cancelled by virtue of the notice given in terms of clause 14 of the lease, referred to in para 2 above. Grindstone also sought the eviction of Mr S. It did not in that action claim any amount for arrear rental or for holding over.

[6] On 3 April 2009 Grindstone wrote to Mr S demanding payment of arrear rental in an amount of R262 020 for the period March 2008 to September 2008, when the fire broke out. It also claimed an amount of R439 692 for the period September 2008 to April 2009 on the basis that Mr S continued in occupation after the cancellation referred to in paragraph 4. Grindstone stated that in the event of these amounts not being paid it would cancel the lease agreement in terms of clause 23. That demand went unheeded. During May 2009 Grindstone brought the application that led to this appeal. In its founding affidavit it relied for its right to cancel on the destruction of the property and for failure to pay arrear rental and the amounts it considered due to it for the continued occupation by Mr S after the fire and subsequent to the cancellation. Significantly, in its founding affidavit, Grindstone referred to the action instituted by it, referred to in para 5 above, and stated the following:

'There is accordingly pending litigation between the parties to determine the right of the applicant to cancel the lease.'

[7] Mr S opposed the application on several bases. First, that at the time that it had brought the application Grindstone had unlawfully resorted to self-help and had physically retaken possession of the property. Thus, Mr S contended, the application for eviction was misconceived. The spoliation by Grindstone had caused Mr S, in separate proceedings, to apply to the High Court on an urgent basis for the restoration of the property. The accusation by Mr S of spoliation on the part of Grindstone is unchallenged.

[8] Furthermore, Mr S brought it to the attention of the court below that during June 2008, before any high court proceedings had been instituted, Grindstone had commenced litigation in the Magistrates' Court for the district of Mount Currie for an order cancelling the lease agreement and his eviction. Grindstone's

response to this disclosure by Mr S was to submit that those proceedings related to arrear rentals due at that time and it should be considered to be distinct from the application proceedings leading up to the present appeal, which was for cancellation based on non-payment of rental for a different period and on the destruction of the property. If this litigation cocktail has not yet had a dizzying effect, there is more. It appears that as early as March 2008 there had been litigation between Grindstone and Mr S in relation to the lease and that it involved the alleged failure to pay stamp duties and the provision of a bank guarantee. At the time that the application in the court below was heard all these proceedings had not been disposed of and were still pending. It was contended by Mr S that all those proceedings were between the same parties based on the same cause of action and related to the same subject matter. Put simply, Mr S raised the defence of *lis alibi pendens*.

[9] On the merits of the application in relation to the damage or destruction of the property Mr S relied on the provisions of clause 14, which, over and above the provisions referred to above, states that in the event of the lessor failing to give notice to cancel it would be obliged to proceed expeditiously with rebuilding the premises and for the period that the premises are 'untenantable' the lessee would not be liable for rental. Clause 14 also provides that in the event that the premises are partially tenantable the rental would be abated pro-rata to the beneficial use. In his opposing affidavit, Mr S states contradictorily, that since the fire the premises are tenantable and that he has been 'forced to close the doors'. Clause 14 provides that when a dispute arises concerning the extent of the abatement of rental the dispute should be settled by arbitration. Mr S contended that the application by Grindstone was premature. Mr S also relied on a counterclaim he instituted against Grindstone which is the subject of the proceedings in the action instituted by the latter in the high court. In the counterclaim Mr S sought to hold the lessor liable for the national supermarket chain withdrawing its franchise rights from him.

[10] In deciding the matter in the court below Dukada AJ was dismissive of the

spoliation complaint. He stated that Mr S had retaken possession of the premises and that if the court held the basis for cancellation to be well-founded the eviction order could be executed. The learned judge went on to consider the requirements for a successful plea of *lis pendens*, namely, that there must be litigation pending between the same parties based on the same cause of action and in respect of the same subject matter. He rightly discounted the action in the magistrates' court relating to unpaid stamp duties and the failure to provide a bank guarantee. Dukada AJ had regard to the submission on behalf of Grindstone, that cancellation on the basis of clause 23 of the lease agreement for failing to pay the rental, after Mr S remained in occupation subsequent to the fire, was a separate and distinct cause of action. Thus, he considered the proceedings in the magistrates' court for the district of Mount Currie to be based on a different cause of action. He reached the same conclusion in relation to the high court action. He took the view that even if he had erred in relation to the question of *lis pendens* he had a residual discretion which he would have exercised in favour of Grindstone.

[11] Having dismissed the points *in limine* the court below went on to decide the merits against Mr S. In respect of the allegations by Mr S concerning his counterclaim the court below decided to grant Grindstone's application to strike them out on the basis that they were irrelevant. The court below confirmed the cancellation of the lease agreement and ordered the eviction of Mr S. The court appears to have held that the cancellation was justified on the basis of both the destruction of the property as well as for the non-payment of rental. It should be borne in mind that the litigation in the court below did not involve a determination of the amount owing in respect of the arrear rental or continued occupation after the fire or cancellation.

[12] It is necessary to record certain events that unfolded subsequent to the judgment of the court below which are matters of concern. By the time the application for leave to appeal was argued in the court below the eviction order had already been executed. It appears that the court below was not informed of

this fact. Furthermore, pending the appeal, the buildings on the property had been rebuilt by Grindstone and let to someone else. We were informed by counsel representing Grindstone that this was done against his advice. He rightly accepted that this conduct was deserving of censure. He assured us that since the premises in question were let to a fully owned subsidiary a decision of this court in favour of Mr S could be executed. These are troubling aspects to which I will return.

Conclusions

[13] It is necessary to consider the underlying principle of the defence of *lis alibi pendens*. In *Nestle (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) para 16 this court said the following:

'The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to revive once it has been brought to its proper conclusion (*res judicata*). The same suit between the same parties, should be brought once and finally.'

This principle has been stated and repeated by the authorities over a period of more than a century.[1]

[14] The proceedings in the Magistrates' Court at Mount Currie, instituted in June 2008, indisputably concerned cancellation of the lease agreement based on non-payment of rental. The action instituted in the high court which preceded the application which is the subject of the present appeal was based on the destruction of the premises. The application that is the subject of this appeal was

---

1 Voet 45.2.7 Gane's translation vol 6 at 560:
'**Exception of *lis pendens* also requires same persons, thing and cause.** The exception that a suit is already pending is quite akin to the exception of *res judicata*, inasmuch as, when a suit is pending before another judge, this exception is granted just so often as, and in all those cases in which, after a suit has been ended there is room for the exception *res judicata*, in terms of what has already been said. Thus the suit must already have started to be mooted before another judge between the same persons, about the same matter and on the same cause, since the place where a judicial proceeding has once been taken up is also the place where it ought to be given its ending.'

based on both. It is no answer to the defence of *lis pendens* in this case to say that part of the claim for arrear rental is for non-payment of rental for the period after the fire and that it is regulated by clause 23, the relevant parts of which are set out in para 3 above. It misconceives clause 23 and the effect of a prior cancellation for non-payment of arrear rental with amounts that may be due because of continued occupation. Clause 23 does not have the effect of reviving a prior cancellation and the court below was wrong to accept the submission that this distinguished the present litigation from the preceding litigation. Importantly, as pointed out in para 6 above, the claim for cancellation in the application that is the subject matter of the present appeal is based on non-payment of rental for a period that overlaps with the period on which the claim for cancellation was based in the Mount Currie proceedings.

[15] There can, of course, be no doubt that the high court action sought confirmation of a cancellation based on the destruction of the property, which is one of the bases advanced in the application. One might rightly ask how many times a cancellation must occur to take effect. It is disingenuous to suggest that the litigation is distinguished on the basis that cancellation is sought on the basis of non-payment of arrear rental for a different period. Had the Mount Currie litigation been allowed to run to its conclusion the cancellation of the lease and its termination would have been decided. Likewise, if the high court action had proceeded to a conclusion it would have decided whether the lease had rightly been terminated. These are the same two questions the court below was asked to consider. As stated in para 6 above, Grindstone, in its founding affidavit, itself stated that there is pending litigation in the high court concerning its right to cancel the lease agreement.

[16] Courts are public institutions under severe pressure. The last thing that already congested court rolls require is further congestion by an unwarranted proliferation of litigation. The court below erred in not holding that against Grindstone when it dismissed the defence of *lis pendens* without due regard to the facts and on wrong principle. The court below ought not to have proceeded to

consider the merits. Furthermore, in my view, Grindstone's failure to disclose in its founding papers that it had despoiled Mr S and to fully disclose all of the other litigation referred to above was deserving of censure, at least to the extent of a punitive costs order (see *Trakman NO v Livshitz & others*).[2] It had come to court with unclean hands. The court below ought to have taken a dim view of that fact.

[17] The failure by each counsel representing the respective parties to inform the court below at the time that the application for leave to appeal of the execution of the eviction order is baffling. I have little doubt that had the high court been appraised of that fact it would have refused the application. Grindstone's conduct before and subsequent to judgment in the court below makes it liable to a punitive costs order on appeal. The same applies to its conduct in bringing the application in the court below. One final aspect remains. Strictly speaking the allegations struck out by the court below were irrelevant.

[18] The following order is made:

1. The appeal is upheld with costs on the attorney and client scale.

2. The order of the court below is set aside in its entirety and substituted as follows:

'a. The applicant's application to strike out succeeds with costs.

b. The proceedings are stayed pending the determination of either case 464/08 in the Magistrates' Court for the district of Mount Currie or case 522/09 in this court.

c. The applicant is to pay the respondent's costs of these proceedings on the attorney and client scale.'

_____

M S NAVSA
JUDGE OF APPEAL

2 1995 (1) SA 282 (A) at 288E-H.

APPEARANCES:

For Appellant: A R Duminy

Instructed by
Elliot & Walker Kokstad
Naudes Inc Bloemfontein

For Respondent: T J M Paterson SC

Instructed by
Bate Chubb & Dickson Inc East London
Honey Inc Bloemfontein