



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

CASE NO: 2021/10643

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

.....
.....
..... DATE

In the matter between:

IKENANANUO OGECHUKUO BRIGHT

Applicant

and

**KINGS AND QUEENS REAL
FUNERAL SERVICES**

First respondent

**G3 HOLDINGS T/A G3
INVESTIGATIONS AND SECURITY
SERVICES**

Second respondent

TIMER ESTATES (PTY) LTD

Third respondent

JUDGMENT

ENGELBRECHT, AJ:Introduction

1. On 3 March 2021, the applicant launched an urgent spoliation application. to restore his occupation and possession of Edge Bar Restaurant, situated at Stand 18, New Doornfontein, Johannesburg (the Restaurant). The Notice of Motion set the same day as the hearing date, although calling for notice of opposition within three days and an answering affidavit by 9 March 2021.
2. My sister Kathree-Setiloane J, enrolled the matter as urgent. In the absence of the respondents, she issued a rule *nisi* returnable on 23 March 2021, calling upon the respondents to show cause why a final order should not be issued (i) compelling the respondents to return the Restaurant to the applicant's possession; and (ii) interdicting the respondents from unlawfully dispossessing the applicant from the Restaurant. Pending the return day, the respondents were interdicted from dispossessing the applicant of his possession of the Restaurant. The respondents were given leave to anticipate the return day.
3. On 23 March 2021, the matter came before Twala J in the urgent court, who removed it from the urgent roll and directed that it be enrolled on the ordinary roll.
4. And so the matter came before me.

The facts

5. In the founding affidavit, the applicant asserts that in 2011 he entered into a five-year lease agreement with the late Mr Max Hodes (Mr Hodes), in respect of the premises on which the Restaurant are situated. A signed copy of the lease agreement sent from Mr Hodes' facsimile is indeed attached.

6. Then, in October 2015 the applicant and Mr Hodes are said to have entered into a new lease agreement for a period of 9 years. A signed copy of the second lease agreement is attached to the founding papers. Part of the applicant's obligations under the second lease agreement are said to have been to make improvements to the Restaurant, which the applicant asserts was done. However, such a term does not appear from the agreement itself. Be that as it may. Allegedly in consequence of non-payment of monies due to the City of Johannesburg Metropolitan Municipality (the City), the City terminated electricity supply to the Restaurant for a period of about 8 months, with obvious adverse consequences for the applicant. The applicant fell into arrears with payment of rental amounts.

7. According to the answering affidavit, the applicant was placed in breach by way of a letter of 5 July 2019 and "*the lease agreement was thereafter cancelled orally when the Applicant did not remedy his breach*". The letter forms part of the annexures to the answer. The applicant denies receipt of this letter. Notably, in the affidavit in response to the rescission application, Mr Hodes does not explain in what way the letter was dispatched to the applicant: he asserts that "*A copy of the letter placing the Applicant ni breach*

dated 5 July 2019 is attached to the founding affidavit in his rescission application marked LD”.

8. Mr Hodes issued summons in the Johannesburg Magistrates Court on 8 January 2020, alleging conclusion of an oral “*monthly lease agreement*” with the applicant “*during or about 2013*”. Mr Hodes pleaded that the applicant was in arrears with payments in an amount of almost R40 000 and that he had breached the agreement, having apportioned part of the premises to a tyre shop, which it is said he was not authorised to do. According to the particulars of claim, “*As a consequence of the material breach, the Plaintiff is entitled to cancel the lease which he hereby duly does*”. The prayers included an order (i) cancelling the lease agreement; (ii) ordering the applicant to make payment of the arrears amount and interest thereon; and (iii) ejectment from the premises. (In answer to a rescission application of May 2021, Mr Hodes asserted on oath that the agreement was in fact a written one, but that the arrangement became an oral month-to-month arrangement after cancellation of the written agreement pursuant to the applicant not rectifying his default as set out in the July 2019 correspondence.)
9. When Mr Hodes sought judgment by default, the Magistrate raised queries in February 2020 and those were eventually answered on 8 October 2020. Mr Hodes obtained judgment by default against the applicant on 10 October 2020. The applicant was ordered to make payment and to vacate the premises, failing which a warrant of ejectment could be carried out.

10. Attached to the answering affidavit is a letter of 30 November 2020 from Mr Hodes' attorney to the applicant, (i) asserting that the applicant had entered into a lease agreement on a "*month-to-month*" basis and had failed to make rental payment timeously or at all; (ii) giving notice of termination of the lease agreement and (iii) advising the applicant to vacate the premises by 30 December 2020. The date of the alleged agreement (and whether reference is made to a written or oral agreement) is not revealed in the letter. No mention is made of any order.

11. The applicant accepts that an order was obtained by default for payment of money, cancellation of his lease and for his eviction. In the founding affidavit it is said that such order was obtained by the first respondent (Kings & Queens), but that is patently a mistake that derived from copying and pasting from the Magistrates' Court application where Mr Hodes was the respondent. He also accepts that a warrant of execution was issued on 26 January 2021, although apparently only served upon the Restaurant on 22 or 23 February 2021. According to an affidavit filed by Mr Hodes in the Magistrates' Court proceedings, the default judgment had been transmitted to the applicant's erstwhile attorney on 16 February 2021 (i.e some four months after it had been obtained and about two and a half months after the 30 November letter).

12. The applicant says that, during January 2021, "*the third respondent*" presented him with a new lease agreement, demanding that he should sign it. This must be taken to be an unidentified representative of the third respondent (Timer Estates). A copy of the new lease agreement to be

entered into with Timer Estates is also attached to the application. Apparently at the time when the lease agreement was presented to the applicant, the representative of Timer Estates also informed the applicant that the building in which the Restaurant is housed had been sold, although the respondents say Mr Hodes had told the applicant in December 2020. Whatever the case may be, according to the answering affidavit, at the time the affidavit was deposed to in March 2021, Kings & Queens was "*in the process of purchasing the building ... from Hodes in terms of an agreement dated 30 November 2020. Pursuant to the intended sale and transfer of the property, [Kings & Queens] was provided with occupation of the property prior to registration of transfer of the property occurring*".

13. The applicant refused to sign the new lease agreement because, on his version, he still had a valid lease agreement in place. Accordingly, so asserts the applicant, he continued to pay rentals under the existing lease agreement in the months of January and February 2021. Kings & Queens, however state in the answering affidavit that they had been assured at the time when the sale agreement was signed that the applicant did not have a written lease agreement. The deponent to the answer says that the applicant provided no reason for not signing the new lease agreement, but inconsistently with that allegation asserts that the applicant's then attorney contended that the "*previous written lease*" was valid on the basis of the principle "*huur gaat voor koop*", as is indeed evident from an annexure to the answer. Notwithstanding this, the respondents say that the applicant only made reference to a prior written lease agreement when he was requested to vacate the premises.

14. The deponent to the answering affidavit says that the respondents' attorney responded to this correspondence, asserting that the lease had been cancelled, resulting in the applicant being required to leave the premises. That correspondence is not attached to the answering affidavit.
15. Apparently, a warrant of execution was then served on the applicant's premises towards the end of February, prompting him to seek legal advice. He says this was when he learnt of the judgment by default obtained against him.
16. Then, according to the applicant's version, on 2 March 2021 about 15 security personnel employed by the second respondent (G3) came to the Restaurant and locked the premises. They apparently informed the applicant that they were "sent" by Kings & Queens, who instructed them to lock the premises. Considerable force is said to have been used in evacuating those persons then on the premises.
17. On 3 March 2021, a senior security staff member of G3 is alleged to have told the applicant that all of his property (stock, furniture, alcohol etc) with a combined value of about R500 000 would be moved onto the street by close of business on that day.
18. It is common cause that all of this was done without the benefit of a court order authorising any of the respondents to effect such ejection. That provided the basis for the urgent approach to this Court and the order of Kathree-Setiloane J on 3 March 2021.

19. On 9 March 2021, the applicant launched a related urgent application for stay of execution in the Johannesburg Magistrate's Court.

20. The respondents say that a letter from the applicant's attorney pursuant to without prejudice negotiations between the parties that followed this "*makes it clear that the Applicant has not in the past complied with and currently refuses to comply with either the written or oral agreement which he purports to rely upon in this matter*". What the letter in fact asks for is a rental statement from Kings & Queens or Timers Estates. The indebtedness to Mr Hodes is said to be an issue to be resolved with him, unrelated to the spoliation application. How the deponent to the answering affidavit reaches the conclusion pleaded, I am not sure.

21. On 11 May 2021, the applicant served a rescission application in respect of the default judgment on Mr Hodes. Mr Hodes filed an answering affidavit in the Magistrates' Court on 18 June 2021. In the meantime, Mr Hodes has sadly passed on. I am advised that the rescission application was due to be heard on 3 August 2021 (i.e. some 6 court days before the present application came before me). However, the matter was removed from the roll and remains pending in the Magistrates' Court. The respondents' counsel asserted before me that the removal from the roll in the Magistrates' Court formed part of the applicant's alleged "*Stalingrad approach*" to delay finalisation of the matter.

Pleadings and points *in limine*

22. As indicated hereinbefore, the application was launched on 3 March 2021.
23. Kings & Queens and Timer Estates gave notice to oppose on 8 or 9 March 2021, and filed their answer on 16 March 2021. G3 also gave notice of intention to oppose on 11 March 2021. It filed no answer.
24. The applicant replied on or about 19 March 2021.
25. In the answer, Kings & Queens and Timer Estates raised three “*points in limine*”, being (i) the non-joinder of Mr Hodes; (ii) the applicant approaching this Court in motion proceedings where disputes of fact exist; and (iii) the applicant having misled the Court.
26. In reply, the applicant raised as preliminary points (i) reference to the wrong case number in the resolution attached to the answering affidavit; and (ii) the commissioner of oaths administering the oath for the deponent to the answering affidavit sharing an address with the attorney for the respondents.
27. I shall deal with these matters first.

Non-joinder of Mr Hodes

28. A point *in limine* was raised on the basis that Mr Hodes had not been cited, even though the applicant relies on his lease agreement concluded with Mr Hodes. This was said to be a material non-joinder.

29. The question as to whether all necessary parties had been joined does not depend upon the nature of the subject matter of the suit, but upon the manner in which, and the extent to which, the court's order may affect the interests of third parties.¹ The test is whether or not a party has a “*direct and substantial interest*” in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court.²
30. The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea.³ The rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party.⁴
31. The present application was based in the spoliation effected by Kings & Queens, through the agency of G3. The relief sought concerned restoration of the applicant's occupation of the Restaurant and prevention of further efforts by the cited respondents to interfere with the applicant's occupation of the Restaurant.
32. It is true that Mr Hodes and his wife are the registered owners of the premises from which the Restaurant is operated. However, on the respondents' version, the Hodes' sold the property to Kings & Queens in terms of an agreement concluded on 30 November 2020 and Kings &

¹ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657. See also *Collin v Toffie* 1944 AD 456 at 464; *Tshandu v Swan* 1946 AD 10 at 24-5; *Home Sites (Pty) Ltd v Senekal* 1948 (3) SA 514 (A) at 521; *Benson v Joelson* 1985 (3) SA 566 (C) at 569F-570B; *Segal v Segil* 1992 (3) SA 136 (C) at 141A-C; *New Garden Cities Incorporated Association Not for Gain v Adhikarie* 1998 (3) SA 626 (C) at 631C; *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs* 2005 (4) SA 212 (SCA) at 226F-227F; *Davids v Van Straaten* 2005 (4) SA 468 (C) at 487B-C; *Sikutshwa v MEC for Social Development, Eastern Cape* 2009 (3) SA 47 (TkHC) at 561-57A.

² *Henri Viljoen (Pty) Ltd v Awerbuch Bros* 1953 (2) SA 151 (O) at 168-70.

³ *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA) at 176I-177A; *Lawrence v Magistrates Commission* 2020 (2) SA 526 (FB) at para 27

⁴ *One South Africa Movement v President of the RSA* 2020 (5) SA 576 (GP) at para 22.

Queens was given “*occupation*” of the property. Indeed, it appears to be on this basis that Timer Estates approached the applicant in January 2021 to request signature of the new lease agreement. On no version before me was Mr Hodes a party to the spoliation. I cannot conceive what legal interest he might have had in an order against the party in charge of the property that had effected the spoliation. The respondents assert that the legal interest lies in the effect upon the sale agreement, because apparently Mr Hodes had assured Kings & Queens that there was no written agreement between with the applicant. I find this point unpersuasive. Mr Hodes (or his estate, post him having passed on) may be impacted by any action that Kings & Queens elects to take if it is found that the position adopted by Mr Hodes in his negotiations with Kings & Queens was incorrect, but that does not mean that Mr Hodes (or his estate) has a legal interest in the relief sought. Any interest may at best be indirect. This case is about whether the spoliation was lawful, and given that Kings & Queens has been placed in control of the premises in consequence of the arrangements contained in the sale agreement and authorised the spoliation, it is the party appropriately cited, to the exclusion of Mr Hodes.

33. The point *in limine* based in the alleged material non-joinder of Mr Hodes falls to be dismissed.

Disputes of fact

34. The respondents assert that the applicant has come to this Court with “*disputes of fact*”, which he ought not to have done in motion proceedings, and therefore that the application falls to be dismissed.

35. It is trite that the *mandament van spolie* is intended to be a speedy and robust remedy, aimed at restoring the *status quo ante* pending determination of possessory rights. To suggest that the applicant ought not to have approached the Court on motion (or on an urgent basis) is wrong in the circumstances. The appropriate procedure to launch spoliation proceedings is to do so by way of application.
36. As to the treatment of disputes of fact, it is important to note that, if material facts are in dispute and there is no request for the referral to oral evidence, a final order may be granted on notice of motion if the facts stated by the respondent together with the facts alleged by the applicant that are admitted by the respondent, justify such an order.⁵ In the present case, the facts stated by the respondents include the facts stated by Mr Hodes in the affidavit in Magistrates' Court proceedings on which the respondents rely.
37. In every case the Court must examine the alleged dispute of fact and see whether in truth there is a real dispute of fact which cannot be satisfactorily determined without the aid of oral evidence.⁶
38. To put it plainly, the Court must take a "*robust, common sense approach*" to a dispute on motion and not hesitate to decide an issue on affidavit merely it may be difficult to do so.⁷

⁵ *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235.

⁶ *NDPP v Zuma* 2009 (2) SA 277 (SCA) at 290F.

⁷ *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154G; *Reed v Witrup* 1962 (4) SA 437 (D) at 433G; *Western Bankn Bpk v Trust Bank van Afrika Bpk* 1977 (2) SA 1008 (O) at 1017E-H; *Techmed (Pty) Ltd v Hunter* 2008 (6) SA 210 (W) at 217I – 218B.

39. No point *in limine* can be upheld on the basis that the process used was motion proceedings.

Misleading the Court

40. The third so-called point *in limine* taken is that the applicant has misled the Court, warranting dismissal of the application.
41. It is unfortunate that parties continue to make all sorts of assertions about their counter-parties misleading the Court, or perjuring themselves. The proper approach is to deny averments, set up positive facts that disprove the allegations of the counterparty and leave it to the Court to decide. That also serves the *decorum* of the Court. Be that as it may, I do not consider this issue appropriately to be raised or dealt with as a preliminary point. What is required of the Court is to engage with all of the facts placed before it in order to reach a conclusion on the veracity of the facts relied on by the parties as discussed under the previous heading.
42. No preliminary objection in this regard can be upheld.

Commissioner of Oaths at same address

43. In his reply, the applicant complained that the Commissioner of Oaths before whom the answering affidavit had been deposed to apparently has the same address as the attorneys for the respondents. He wanted the entire answer to be struck for that reason, apparently forgetting that the Commissioner who

administered the oath when he signed his founding papers were signed shares an address with his attorney.

44. There is no merit to this point. The Regulations Governing the Administration of an Oath or Affirmation⁸ provide in Regulation 7(1) that a “*commissioner of oaths shall not administer an oath or affirmation relating to a matter in which he has an interest*”. There is no prohibition on a commissioner of oaths having the same address as the attorney acting for a party. As a matter of practice and convenience, it may be expected that a commissioner of oaths having their business in the same building as a party’s attorneys may be approached when an affidavit is to be deposed to. There is nothing untoward unless that commissioner of oaths has an interest in the matter. If the applicant wanted to raise an objection, he had to make a positive averment that the commissioner of oaths had an interest in the matter. He did not. This point cannot be entertained.

Resolution

45. The applicant raises an objection to the authority of the deponent on the basis that the resolution attached to the answer refers to the wrong case number. The “*wrong case number*” is patently a typographical error, where “2021” was typed as “2020”. There is no good reason to take a point like this, where manifestly an honest mistake was made.

⁸ GN R1258 of 21 July 1972, amended by GN R1648 of 19 August 1977, by GN R1428 of 11 July 1980 and by GN R774 of 23 April 1982.

46. In any event, as Flemming DJP pointed out in *Eskom v Soweto City Council*,⁹ insistence on proof of authority is based in the fear that a person may deny that he was a party to litigation carried on in his name. Formal proof of authority avoids undue risk to the opposite party. However, with the advent of Rule 7(1) of the Uniform Rules, that risk is now differently managed:

“If the attorney is authorised to bring the application on behalf of the applicant, the application is necessarily that of the applicant. There is no need to say that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know that the attorney acts with authority.”

As to when and how the attorney’s authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1). Courts should honour that approach. Properly applied, that should lead to the elimination of the many pages of resolutions, delegations and substitutions still attached to applications by some litigants, especially certain financial institutions.”

47. In *Unlawful Occupiers, School Site v City of Johannesburg*¹⁰ one of the issues raised by the appellant was that the respondent had failed to prove

⁹ 1992 (2) SA 703 (W).

¹⁰ 2005 (4) SA 199 (SCA).

that the deponent to its founding affidavit had the requisite authority to institute the application on its behalf. The Supreme Court of Appeal (SCA) pointed out that the *Eskom* decision had been cited with approval in *Ganes v Telecom Namibia Ltd*,¹¹ and had held that the issue of authority as raised had been decided conclusively in *Eskom*. The import of that was that the remedy of a respondent who wished to challenge the authority of a person allegedly acting was now provided for in Rule 7(1).

48. The simple point is this: the respondents were not even required to attach a resolution. If the applicant wished to challenge authority, that ought to have been done by way of a Rule 7(1) notice challenging authority of the attorney to act. This was not done, and so no proper objection to authority is before this Court.

49. This preliminary objection falls to be dismissed.

Conclusion

50. None of the preliminary points raised by either of the parties are upheld in the circumstances. Accordingly, I proceed to deal with the merits.

Mandament van spolie: Principles

51. In *Sithole v Native Resettlement Board*,¹² it was held that:

¹¹ 2004 (4) SA 615 (SCA) at 624I – 625A.

¹² 1959 (4) SA 115 (W) at 117C-G.

“... the clear principle of our law is that, ordinarily speaking, persons are not entitled to take the law into their own hands to enforce their rights. There is a legal process by which the enforcement of rights is carried out. Normally speaking, it is carried out as a result of an order of Court being put into effect through the proper officers of the law such as the Sheriff, deputy sheriff, messenger of the magistrate's Court or his deputies, reinforced if necessary, by the aid of the police or some such authority; in most civilised countries there exists the same principle that no person enforces his legal rights himself. For very obvious reasons that is so; if it were not so, breaches of the peace, for instance, would be very common. It is clear, therefore, that if you want to enforce a right you must get the officers of the law to assist you in the attainment of your rights.”

52. In the recent decision of *Blendrite (Pty) Ltd and Another v Moonisami and Another*,¹³ the Supreme Court of Appeal (SCA) summarised the relevant principles as follows:¹⁴

52.1. The *mandament van spolie* relates to possession. Possession is the combination of the factual control or detention of a thing and the will to possess the thing.

¹³ Case no 227/2020 [2021] ZASCA 77 (10 June 2021).

¹⁴ See at paras 5 – 9 (references to case law relied on by the SCA is omitted).

- 52.2. Spoliation is any illicit deprivation of another of the right of possession which he or she has, whether in regard to movable or immovable property or even in regard to a legal right.
- 52.3. The *mandament van spolie* is designed to be a robust, speedy remedy which serves to prevent recourse to self-help.
- 52.4. The sole requirements are that the dispossessed person had possession of a kind which warrants the protection afforded by the remedy, and that he or she was unlawfully ousted. All that must be proved is: (1) the fact of prior possession and (2) that the possessor was deprived of that possession unlawfully (i.e. without agreement or recourse to law).
- 52.5. The *mandament* provides for the immediate restoration of possession regardless of, and before determining, the rights of the parties to the thing possessed. It is the fact of possession that is material, not the basis of possession. The prior lawfulness or otherwise of the possession is of no moment. The fundamental principle of the remedy is that no one is allowed to take the law into his or her own hands. The respective legal rights of the parties to possess the property in question does not enter into consideration.

53. The judgment must, however, be read with *Street Pole Ads Durban (Pty) Ltd & Another v Ethekewini Municipality*¹⁵ where Cameron JA held that:

"... good title is irrelevant: the claim to spoliatory relief arises solely from an unprocedural deprivation of possession. There is a qualification, however, if the applicant goes further and claims a substantive right to possession, whether based on title of ownership or on contract. In that case, 'the respondent may answer such additional claim of right and may demonstrate, if he can, that applicant does not have the right to possession which it claims'. This is because such an applicant 'in effect forces an investigation of the issues relevant to the further relief he claims. Once he does this, the respondent's defence in regard thereto has to be considered."

Discussion

Introduction

54. In the present instance, the applicant sought to rely on the *mandament*. He had no obligation other than to show possession and unlawful dispossession at the hands of the respondents. However, he elected to raise in his founding affidavit a lengthy description of the basis upon which he possessed the property. This may have been the consequence of him using the same material as had been used in the stay application that was ostensibly prepared on the same day, given the urgency of the matter and his desire to reach the Court without delay.
55. In his reply the applicant asserts that he "*merely mentioned*" the lease agreement to show the Court that he had a right of access to the Restaurant.

¹⁵ 2008 (5) SA 290 (SCA).

But therein lies the rub: the applicant essentially claimed a substantive right to possession. In doing so, he spoilt for a fight over whether he had such a substantive right, and he activated the entitlement of the respondents to dispute such substantive right. The respondents accepted the applicant's invitation to engage with his substantive rights, and therefore this Court must, in addition to consideration of the ordinary requirements of possession and unlawful deprivation of possession also engage with the issue of the applicant's substantive rights.

Possession and unlawful deprivation of possession

56. There is no dispute before me that the application had undisturbed possession of the Restaurant prior to the events that gave rise to these proceedings.

57. On the facts before this Court, it cannot be disputed that Kings & Queens had instructed G3 to lock the Restaurant and so deprive the applicant of possession without having taken any steps lawfully to allow it to eject the applicant. It is true that Mr Hodes had obtained a judgment by default and had secured a warrant of execution in January 2021, which was served upon the applicant in the latter part of February 2021. However, G3 was not acting for Mr Hodes, it was acting for and on behalf of Kings & Queens, an entity that enjoyed no legal right to evict. As the applicant points out in his replying affidavit, no warrant of ejectment was obtained in consequence of the Court order granted in favour of Mr Hodes. Even if it had, it would have

not been within the province of Kings & Queens or G3 to evict the applicant. The dispossession was unlawful.

Substantive right to possession

58. Given the pleading in this matter, and the judgment in *Street Pole Ads*¹⁶ I have no choice but to engage upon the question of the applicant's substantive rights. In essence, that boils down to the question whether the written agreement concluded in October 2015 was still extant or whether it had been terminated.
59. In making the evaluation, this Court must rely on the versions put up by the applicant and the respondents, respectively. In the present case, the applicant relies on the second written lease agreement and his version in relation to that. The respondents do not have, nor can they be expected to have, personal knowledge of the engagements between the applicant and Mr Hodes. They must rely on what Mr Hodes tells them. Here, they have the benefit of versions presented by Mr Hodes in the Magistrates' Court in his particulars of claim and also in an answering affidavit in the rescission application. These papers form part of the papers before this Court.
60. It is a notable feature of the particulars of claim in the Magistrates' Court that Mr Hodes placed reliance on an oral agreement alleged to have been concluded in or about 2013. This date is before the period of the first lease agreement had run out and before the second lease agreement had been entered into. As I indicated in the summary of facts, Mr Hodes in answer to

¹⁶ *Supra*.

the rescission application then said on oath that the agreement was in fact a written one, but that the arrangement became an oral month-to-month arrangement after cancellation of the written agreement pursuant to the applicant not rectifying his default as set out in the July 2019 correspondence. That allegation is patently inconsistent with the version presented to the Magistrates' Court in the particulars of claim, which dated the oral arrangement back to 2013. Any oral agreement, as alleged, could only have hailed from after the July 2019 letter.

61. This begs a different question: how and when was the second lease agreement cancelled?
62. It is true that Mr Hodes purportedly sent a letter on 5 July 2019, demanding payment, failing which he would proceed to court to seek payment and also eviction. As I indicated in the summary of facts, Mr Hodes has not told the Court how and when that letter was delivered, and the applicant denies receipt.
63. But even if I proceed on the assumption in favour of the respondents that the letter was indeed received on 5 July 2019 or shortly thereafter, the letter does not say anything about cancellation of the agreement, and Mr Hodes did not in the Magistrates' Court answer purport to suggest that this letter constituted cancellation. What is said by Mr Hodes in the affidavit in the rescission application is that, "*Pursuant to the applicant's breach and his failure to rectify his breach the written lease was cancelled orally once the time allowed for him to rectify his breached had lapsed*".¹⁷ That presents a

¹⁷ Emphasis supplied.

problem, because clause 7 of the second lease agreement is explicit: “Should the tenant fail to pay the rent by the 7th of each succeeding month, then the landlords are automatically entitled to cancel the lease forthwith by written notice served at the premises in question”.¹⁸ On the basis of Mr Hodes’ version, presented on oath, the terms of the second lease agreement insofar as they relate to cancellation, had not been complied with. The cancellation was invalid for that reason. Moreover, this Court takes notice that on 30 November 2020, purportedly in respect of an oral agreement for a “month-to-month” lease, Mr Hodes had gone to the trouble of issuing a written notice of cancellation in stark contrast to allegedly cancelling the second lease agreement orally, despite its terms requiring written notice.

64. In *Truter v Smith*¹⁹ it was held that “*The Court requires the act of cancellation of an otherwise valid agreement to be clear and unambiguous*”. In our law, a party to a contract who exercises his right to cancel must convey his decision to the other party and cancellation does not take place until that happens.²⁰ Where, as here, the contract requires such cancellation to be in writing, cancellation cannot be said to have been clear and unambiguous when it is said to have been done orally. Even if Mr Hodes had said to the applicant that he intended to, or was cancelling the second lease agreement, the applicant would have been entitled to expect confirmation in writing of that fact, in terms of the agreement that he signed. Mr Hodes, who in life was an advocate upon whom senior counsel status had been conferred, would surely have known that a valid cancellation under the written

¹⁸ Emphasis supplied.

¹⁹ 1971 (1) SA 453 (E).

²⁰ *Miller and Miller v Dickinson* 1971 (3) SA 581 (A) at 587H-588A.

agreement and in accordance with the principles applicable to cancellation of contract demanded of him to make cancellation in writing.

65. The other difficulty that this Court has is that, on Mr Hodes' version, he cancelled the written agreement as a result of breach in the form of failure to pay. It is odd, then, for Mr Hodes to have entered into an oral agreement with the same tenant on the same terms immediately thereafter, with the only alteration being to change the long-term agreement to a "*month-to-month*" arrangement. Surely, a lay person like the applicant in the circumstances could not be said to have been clearly and unambiguously informed of cancellation of the written agreement? Put differently, Mr Hodes' conduct in allowing the applicant to remain as a tenant is inconsistent with a clear and unambiguous intention to cancel the then existing arrangement between the parties, on the basis of non-payment and other alleged breaches.
66. The issue of summons – assuming in favour of the respondents that the summons was indeed received – might have been taken to constitute cancellation of the agreement. But the problem is this: Mr Hodes did not seek cancellation of the written agreement, he sought cancellation of an oral agreement purportedly entered into in 2013, before the applicant had entered into a written agreement with Mr Hodes, so that the issue of summons in the Magistrates' Court in January 2020 equally could not have constituted a clear and unambiguous intention to cancel the second lease agreement which, on the face of it, was concluded only in 2015. Mr Hodes' about-turn in the answering affidavit to the rescission application that the oral

agreement was actually concluded after the cancellation of the second lease agreement does not alter this conclusion.

67. Since the cancellation sought and granted in the Magistrates' Court was of an oral agreement allegedly concluded in 2013, the Order of that Court (even if not rescinded) cannot constitute cancellation of the second lease agreement.
68. The only other potential source of cancellation was the 30 November 2020 letter from Mr Hodes' attorney to the applicant. However, that purports to be a cancellation of a "*month-to-month agreement*" that is not identified. I am of the view that, on no construction, that letter can constitute clear and unambiguous notice of cancellation of the second lease agreement. Indeed, Mr Hodes did not intend it to be so, given his adopted stance (on affidavit) that the second lease agreement had been cancelled more than a year before. This letter equally cannot stand as a valid cancellation of the second lease agreement.
69. The bottom line is, I find no evidence of a clear and unambiguous cancellation of the second lease agreement, and most certainly no such cancellation in the written form required in terms of the agreement. That means it is still extant.
70. The "*huur gaat voor koop*" principle ensures that any contract with a tenant, whose lease has not yet expired must be honoured if and when the property is sold. This applies whether or not the purchaser knew of the lease when he

signed the deed of sale. That means that the applicant does lawfully occupy the premises on which the Restaurant is situated.

71. In the circumstances, I come to the conclusion that the applicant remains lawfully entitled to occupy the premises under the second lease agreement and that the unlawful dispossession of his undisturbed possession cannot be sanctioned.
72. Unless the second lease agreement is validly cancelled, and the appropriate procedures followed, the respondents cannot deprive the applicant of possession. The respondents ought to refrain from taking the law into their own hands.
73. A word of caution to the applicant, however. The judgment herein and the order that I propose to make do not insulate the applicant from valid cancellation for breach, and steps pursuant to such valid cancellation. The applicant cannot expect to be and remain in default without consequences. The judgment herein is no sanction of the applicant's breach of contract. The Court is not here to dispense advice, but it does seem to me to be undesirable, if the applicant wants to continue operating the Restaurant from which he derives his livelihood, that he should take a hard stance in law and decline to engage with those now controlling the premises. The costs devoted to endless litigation could be better employed towards satisfying the judgment debt and payment of current rental obligations.

Costs

74. Costs must follow the result. There is no reason to depart from this general principle. There is however no basis in the present case to award costs on a punitive scale.

Conclusion

75. In the circumstances, I make the following order:

75.1. That the rule *nisi* granted by this Court on 3 March 2021 be and is hereby confirmed.

75.2. That the first respondents pay the applicant's costs in this application.

**MJ ENGELBRECHT
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 13 AUGUST 2021.

Date of hearing: 11 August 2021

Date of judgment: 13 August 2021

Appearances

For the applicant: Mr V.O.M Seloane

Instructed by: Seloane Vincent Attorneys

For the respondents: Ms Teneille Govender

Instructed by: RHK Attorneys