REPUBLIC OF SOUTH AFRICA

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

CASE NO: 31670/19

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

25 February 2021 _____
DATE **SIGNATURE**

In the matter between:

MICHAEL BRIAN MATTHEWS
(ID NO: 640804514083) Plaintiff

and

DOUGLASDALE DAIRY (PTY) LTD
REG NO: 2002/007084/07 Defendant

JUDGMENT

COWEN AJ

1. On 9 September, 2019, the plaintiff, Michael Brian Matthews instituted an action against the defendant, Douglasdale Dairy (Pty) Ltd for payment of the amount of R6 355 200.00 plus interest and costs. Douglasdale Dairy has excepted to the claim in terms of Uniform Rule 23 and further objected to it on the basis of a failure to comply with Uniform Rule 18(6). Douglasdale Dairy has also raised an issue of non-joinder of a Mr Rowan Matthews.

2. The matter came before me on the opposed roll on 23 November 2020. Mr Hellens SC (with him Mr Amm) appeared for the defendant excipient and Mr Eloff SC appeared for the plaintiff.

3. The plaintiff's claim is formulated as a claim for "damages for unlawful holding over". Douglasdale Dairy excepts centrally on the basis that the plaintiff does not have a claim for damages for "holding over" in circumstances where the plaintiff is a subsequent owner of property, is not a party to a terminated lease agreement and does not otherwise enjoy any contractual right to claim the damages acquired via cession, assignment or other transfer. The claim for damages for "holding over", it is said, is in law premised on a breach of the contractual right to vacant possession at the termination of a lease. The excipient further complains that the co-owner of the property, Mr Rowan Matthews, who is the plaintiff's brother, must be joined to the proceedings as a necessary party.

4. The two central issues in the case are:

   4.1. Whether the plaintiff's pleadings disclose a cause of action for damages for "holding over".

4.2. Whether the joint owner of the property Mr Rowan Matthews must be joined to the proceedings as a necessary party.

Do the plaintiff's pleadings disclose a cause of action for damages for "holding over"?

5. There is no dispute between the parties that the plaintiffs' pleadings do not disclose a claim for damages for "holding over" formulated in either contract or unjustified enrichment. The question rather is whether the pleadings disclose such a cause of action in delict that is available to the plaintiff.

6. An excipient must satisfy the court that the conclusions of law pleaded by the plaintiff cannot be supported by any reasonable interpretation of the particulars of claim.[1] The exception must be decided on the basis that the court accepts, as true, the factual allegations pleaded by the plaintiff.[2]

7. In summarizing the relevant factual allegations, I refer to some individuals mentioned in the particulars of claim using their first names. In doing so, I depart from what I regard as the more respectful approach of using an individual's title and surname. I do this to avoid confusion that would otherwise result in the context of this case, and because this is how the individuals concerned are referred to in the particulars of claim.

8. On this approach and in short:

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[1] *Stewart and another v Botha and another* 2008(6) SA 310 (SCA)

[2] For this trite proposition, both parties referred to the useful summation by Makgoka J of the general principles applicable to exceptions in *Living Hands (Pty) Ltd and another v Ditz and others* 2013(2) SA 368 (GSJ) at para 15. See too *Stewart and another v Botha and another* 2008(6) SA 310 (SCA) at para 4.

8.1. Under his Will, the late Armour Brian Hatherly Matthews (Brian) bequeathed Portion 8 of the farm Douglasdale 195, Registration Division IQ, Province of Gauteng (the immovable property) to Elizabeth Anne Matthews (Elizabeth) in terms of a *fideicommissum*. The Will provided that upon Elizabeth's death, the property would devolve to Rowan Wauchope Matthews (Mr Rowan Matthews) in a 60% undivided share and the plaintiff in a 40% undivided share. Brian died on 21 January 2000 and in July 2006, the immovable property was then transferred to Elizabeth under the *fideicommissum*.

8.2. On 25 March 2009, Elizabeth and the defendant, Douglasdale Dairy, concluded a written lease agreement in terms of which Douglasdale Dairy would lease the property for a period of 60 months expiring on 28 February 2014. Douglasdale Dairy let the property until the expiry of the lease agreement and thereafter remained in occupation of the property. Despite demand, the defendant failed, refused or neglected to vacate and remains in occupation. In May 2016, Elizabeth obtained an eviction order in this Court against the defendant.

8.3. Elizabeth died on 6 September 2016. In accordance with the provisions of Brian's Will, the property then devolved in undivided shares to Mr Rowan Matthews (60%) and the plaintiff (40%). The eviction order was not overturned following the defendant's appeal to the Supreme Court of Appeal, which appeal hearing occurred subsequent to Elizabeth's death.

8.4. The defendant continues to occupy the property without consent and against the express wishes of the plaintiff, pays no rental to the plaintiff, has never paid any rental to the plaintiff and has no valid lease agreement with the plaintiff. In the result, the plaintiff pleads, the defendant is in unlawful occupation of the property.

8.5. The plaintiff pleads that he is entitled to be paid 40% of a reasonable monthly rental in respect of the property from 6 September 2016 until the defendant vacates the property alternatively occupies with consent or in terms of a valid lease agreement with the plaintiff. A reasonable rental is alleged to be R400 000 monthly as at 6 September 2016 escalating by 10% annually. A table is provided showing the manner of arriving at the amount claimed. The claim is framed as "damages for holding over".

9. During the course of argument, Mr Hellens conceded that a subsequent owner of property that is the subject of a lease terminated prior to the acquisition of ownership and who otherwise has no contractual rights derived from such such has a claim in delict against the former tenant in circumstances where the former tenant continues in unlawful occupation of the property and does not pay rent. In my view, this concession was responsibly made:[3] continued occupation without a legal right to do so is *per se* a wrongful act.[4] Mr Hellens submitted, however, that the pleadings nevertheless do not disclose a cause of action centrally because they are framed as a claim for damages for "holding over".

[3] Hefer v Grundling 1979(4) SA (A) (Hefer's case)
[4] Hyprop Investments v NCS Carriers and Forwarding CC (Hyprop Investments) 2013(4) SA 607 (GSJ) at para 43.

10. The submission was premised on a contention that a claim of damages for "holding over" has a technical meaning in law which is confined to a claim grounded in a breach of contract by a lessee or erstwhile lessee to give vacant possession to a *lessor* on termination of the lease agreement. Absent a lessor ceding, assigning or otherwise transferring contractual rights, or some other vesting of contractual rights, the argument continued, a subsequent owner does not have any claim for damages for holding over. In advancing this submission, reliance was placed on *Hyprop Investments*[5] and *Sandown Park (Pty) Ltd v Hunter Your Wine & Spirit Merchant (Pty) Ltd.*[6]

11. Mr Eloff, relying on the principle that an excipient must satisfy the Court that the conclusion of law pleaded cannot be supported by any reasonable interpretation of the particulars of claim, submitted that term "damages for holding over" is not used in a technical sense in the particulars of claim. Rather, the reference to "holding over" should be understood as a reference to the act of continuing unlawfully in occupation. Mr Eloff further submitted that there is no reason in law to limit a claim for damages for holding over to a claim grounded in breach of contract where the claim is formulated in delict.

12. In my view, the exception cannot be upheld for three reasons.

13. First, I agree with Mr Eloff that the term "holding over" as used in context of the particulars of claim can reasonably and should be understood to refer to the defendant's act of continuing in unlawful possession of the property. In interpreting the language, I have not focused solely on the words "holding over" but have understood them in the context in which they are used in the pleadings

[5] Supra
[6] 1985(1) SA 248(W) (Sandown Park).

and their apparent purpose.[7] It may be that some of the historical background to how the plaintiff acquired co-ownership of the property is not strictly necessary, as Mr Amm submitted in reply, but even if this is so, this does not render the pleadings excipiable. Moreover, to ascribe the term "holding over" this meaning, is consistent with the following dictum of Spilg J in *Hyprop Investment*: "The term 'holding over' is no more than a convenient label attached to the conduct or act which affords a remedy in damages."[8] In this case, that conduct is the act of remaining in unlawful occupation of property co-owned by the plaintiff in circumstances where a prior lease with a previous owner has terminated and an eviction order has been granted and dishonored.

14. Second, as Mr Hellens conceded, an owner has a claim in delict for damages arising from unlawful occupation of property. The then Appellate Division held in *Hefer's case*[9] that an owner who has or had no possession of property has a claim against another who unlawfully possesses, holds (occupies) or uses the thing and can institute the *actio legis Aquiliae* if he has suffered patrimonial loss.[10] If the phrase "damages for holding over" is understood to refer to damages for continuing in unlawful occupation, as I hold it reasonably can and should be, then the exception must fail. There is no obvious defect in the pleadings when viewed as a claim by an owner under the *actio legis Aquilia* for patrimonial loss arising from unlawful occupation, and pertinently for present purposes, none has been raised in the exception before me.

[7] List v Gungers 1979(3) SA 106 (A) at 118, Christie's Law of Contract in South Africa (7 ed) p 244-5.
[8] Supra at para 54.
[9] 1979(4) SA (A)
[10] See p858G-H and 960C.

15. Third, a claim for damages for "holding over" of the sort in issue before the courts in *Hyprop Investment* and *Sandown Park* are not restricted to claims formulated in contract, or indeed unjustified enrichment. It is now established that a claim for damages for "holding over" can be formulated in contract, unjustified enrichment or delict.[11] It is settled law that the measure of damages that is usually claimed in a claim for holding over is the market rental of the premises,[12] although other damages if correctly alleged and proved are also competent. In this case the usual measure of damages is claimed. In Hyprop Investments, Spilg J noted that in the vast majority of cases this "accepted method of determining damages obviates the need of deciding whether to formulate the claim in contract or delict and to rely on a breach of wrongfulness respectively; nor are the damages reduced to the lesser of the benefit to the occupier or the loss to the landlord as would be the case under an enrichment action." One of the reasons for this, as Spilg J explained, is that where under contract the breach is a failure to restore possession on termination and damages arises because a landlord is deprived of the use and enjoyment of property because an erstwhile tenant is in occupation, under delict the continued occupation without a legal right to do so is *per se* a wrongful act and loss of a market related rental is reasonably foreseeable damages.[13] The court held:

> *"Accordingly, in the usual case where the landlord sues for a market related rental, the claim may be formulated either in contract or in delict. In both cases damages will be the market rental value (unless there is a rental survival clause in the contract.). Although viable, an unjust enrichment action is cumbersome because of the method for computing damages with the risk of recovering less than a market related rental."*

[11] Hyprop Investments supra at para 45 to 51.
[12] Sandown Park at 256I and Hyprop Investments at para 42.
[13] Hyprop Investments at para 42.

16. These dicta in *Hyprop Investments* also concern the usual case where *the landlord* sues for a market related rental, as occurred in that case. And as Mr Hellens pointed out, when characterizing the claim, the Court refers to it being "founded on a breach of the contractual obligation to give vacant possession on termination as required by the relevant clause in the lease agreement, or as an incidence of the common law."[14] However, the judgment is also clear that a claim is not a claim for rent, but a claim for damages, and that it can be formulated in contract *or delict.* Further, and as mentioned, the court also held that the term "holding over" is "no more than a convenient label attached to the conduct or act which affords a remedy in damages"[15]

17. I am not found a case and none was referred to in which a claim framed as "holding over" is instituted in delict by a subsequent owner rather than a person whose contractual right to vacant possession has been breached. However, I can see no reason why the claim in delict should be confined to a plaintiff in whom contractual rights to vacant possession vests. And in principle there appears to be no material difference between a case instituted by a subsequent owner in delict for "damages for holding over" and a claim of the sort recognized in *Hefer's* case, both being claims based on the *actio legis Aquilia*.

18. In the result, the exception as pleaded must fail. Although the excipient also raised non-compliance with Rule 18(6), it was accepted in argument that the alleged non-compliance is premised on the Court finding for the excipient on the above issues. I accordingly do not deal with that further.

[14] Hyprop Investments at para 42.
[15] Hyprop Investments at para 54.

Joinder of Mr Rowan Matthews

19. The second issue is whether Mr Rowan Matthews must be joined to the proceedings as a necessary party. As explained above, Mr Rowan Matthews co-owns the property with the plaintiff in undivided shares (60%/40%). In my view, he is not a necessary party to the proceedings.

20. During the course of argument, Mr Eloff pointed out that Mr Rowan Matthews is the controlling shareholder of Douglasdale Dairy. Mr Hellens did not object to this being drawn to the court's attention. In my view, however, these circumstances do not alter the legal question which must be decided, namely whether a co-owner of an undivided share in a property must be joined in a claim in delict for damages for patrimonial loss instituted by one co-owner against an unlawful occupier. In circumstances where Mr Matthews is not a co-plaintiff, the submissions is that he should be joined as a co-defendant with a legal interest in the subject matter of the litigation. Mr Hellens submitted that this is necessary because, as a co-owner, he has an interest in the questions of law and fact which are decided by the Court in the action. Before he is bound on these issues, either by virtue of legal precedent or issue estoppel - the submission continued – Mr Rowan Matthews has a right to be heard.

21. The Constitutional Court held in *Matjhabeng Local Municipality*: 'The law on joinder is well settled. No court can make findings adverse to any person's interests, without that person first being a party to the proceedings before it.'[16]

[16] *Matjhabeng Local Municipality v Eskom Holdings Ltd* 2018(1) SA 1 (CC) at 33E-F.

And in *SARDA*,[17] in which a lessee applied to join proceedings under the Restitution of Land Rights Act 1994 in which the Land Claims Court had ordered restitution of state-owned land which was leased to the applicant for joinder in its absence, the Constitutional Court held:

"If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a pre-decision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation."

22. A party is a necessary party and a plea of non-joinder should be allowed 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.[18] A party can waive their right to be joined but the question of waiver is not before me.[19]

23. Mr Hellens submitted that it is well established that joint owners must be joined in legal proceedings relying on *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd.*[20] In *Rosebank Mall*, Cilliers AJ held: "Where a right sought to be enforced vests in parties jointly, or an obligation sought to be enforced rests on parties jointly, joinder of the joint creditors or joint debtors is generally necessary. Such joint contracting parties are in a similar position to joint owners and partners. (Compare *Morgan and another v Salisbury Municipality* 1935 AD 167 at 171.)"

24. In turn, in *Morgan's case*, De Villiers JA stated: "The position may therefore be broadly stated to be that by South African practice the only cases in which a

[17] SA Riding for the Disabled Association v Regional Land Claims Commissioner 2017(5) SA 1 (CC) (SARDA).
[18] SARDA, supra. *Amalgamated Engineering Union v Minister of Labour* 1949(3) SA 637 (A)
[19] The issue of non-joinder was raised on exception and the arising questions thus must arise *ex facie* the particulars of claim. Erasmus *Superior Court Practice* D1-127. The issue or waiver or the impact of any prior notice to Mr Rowan Mattews can still be raised should the issue of joinder be revisited as it still can be.
[20] 2004(2) SA 353 (W).

defendant has been allowed to demand a joinder as of right are the cases of joint owners, joint contractors and partners, in all of which cases there exists a joint financial or proprietary interest, but that in other cases a defendant, as a general rule, has not been allowed to demand such joinder. Now it is not necessary or advisable to formulate here any general statement as to the principles on which the practice, hitherto so narrowly confined, ought to be based in future, or as to the directions (if any) it ought to be extended or enlarged." This statement must however be understood in light of a prior statement of De Villiers JA which appears earlier in the same paragraph following his consideration of Mason J's decision in *Muller's Executors v Small Farms*:[21] "South African practice must therefore be looked to, and according to that practice the position is (I think correctly) stated by Mason J in the above-mentioned case, viz, that the cases in which a plea of non-joinder has been allowed, have usually been those in which one of two co-owners, or one of two joint contractors, or one of two partners, was the sole plaintiff or the sole defendant in the action. (Even in such cases there are many exceptions in which joinder is not necessary; see 1910 TPD at p200 and Beck on Pleadings pp 10-19.)."

25. What is important to appreciate is that these dicta should not be understood as authority for any proposition to the effect that joint owners must always be joined in legal proceedings. Thus, in *Mullers*, Mason J distinguished between cases where "other parties have such an indivisible interest that the judgment must necessarily affect them notwithstanding the principle of *res inter alios acta,* and those in which other parties may have similar rights depending on a similar title,

[21] 1910 TPD 199 *(Mullers)*

but not necessarily affected by any judgment in an action in which they were not parties."[22] The case before Mason J was an illustration of the former class where co-owners of a dam were regarded as "absolutely necessary parties" in a suit where an order directing the destruction of the dam could be granted. While the Court acknowledged that the cases where joinder is regarded as necessary are usually those involving two co-owners or two joint contractors or two partners, it also acknowledged the existence of numerous exceptions. Importantly, in *Amalgamated Engineering,* Fagan AJA, after considering *Mullers* and *Morgan's case*, and their identification of cases in which a plea of non-joinder is "usually" allowed, holds that: "The question of joinder should surely not depend on the nature of the subject-matter of the suit, as some of the head-notes I have referred to would seem to imply, but – whether the suit relates to a will, an aqueduct, a partnership, or anything else – on the manner in which, and the extent to which, the Court's order may affect the interests of third parties."[23]

26. In my view, the case before me falls into the second class identified by Mason J. While Mr Rowan Matthews and the plaintiff are joint owners, and may both have a claim for damages arising from such title, it is difficult to see how Mr Rowan Matthews' rights or interests would be adversely affected by the order sought by the plaintiff if he is not joined to the proceedings. The joint owners' proprietary rights are not affected by the order sought. To the extent that a co-owner such as Mr Rowan Matthews may himself wish to pursue a damages claim to restore his own patrimony, there is nothing precluding him from doing so or indeed from applying to join this case as a co-plaintiff. And if he does not pursue that route,

[22] See p 199.
[23] At 657. See Erasmus at D1-124.

and subject to the principles of notice and waiver (which are not before me), he cannot be bound by findings of fact that the Court may make in his absence. While he may be affected by legal precedent that may or may not be established in the case, no such imminent precedent was identified and, in any event, this alone does not give rise to a necessary joinder. If legal findings are made by this court in one case that are clearly wrong, they can be departed from by another and if need be rectified on appeal.

27. I conclude that Mr Rowan Matthews is not a necessary party to the proceedings.

Costs

28. There is no reason why costs should not follow the result. To avoid any doubt when costs are taxed, I have concluded that the main issues raised in this exception were sufficiently complex to warrant the appointment of senior counsel.

Order

29. The following order is made:

    29.1. The exception is dismissed.

    29.2. The defendant is ordered to pay the costs of the exception on a party and party scale which costs shall include the costs of senior counsel.

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COWEN AJ

Date of hearing: 23 November 2020

Date of judgment: 25 February 2021

Appearances:

Excipient: MR Hellens SC and GW Amm instructed by Livingstone Crichton Attorneys.

Plaintiff: C Eloff SC instructed by Schindlers Attorneys