

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 2388/2020

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

.....
SIGNATURE

.....
DATE

In the matter between:

AIRPORTS COMPANY OF SOUTH AFRICA (SOC) LTD

Applicant

And

TSWELOKGOTSO TRADING ENTERPRISE CC

Defendant

JUDGMENT

WINDELL, J:

[1] This is an opposed application for an order to eject the respondent and all other persons occupying the premises described as ITB Piazza Building, OR Tambo International Airport, also known as the Wellness Centre ("the premises"). The relief sought in paragraphs 4 and 5 of the notice of motion was abandoned before the hearing of the matter. Therefore, the only issue for determination is whether the

respondent should be ordered to vacate the premises.

[2] In order for the applicant to succeed with the application for an eviction order, the applicant must allege and prove the right of the respondents to possess (in this instance the lease agreement), a valid termination of the right to possession, and the continued occupation by the respondents or someone holding through them.¹ The appellant must further prove that there was a breach of the lease agreement, and an accrued right to cancel, because the breach was material, or in the event that the agreement contains a cancellation clause, that its provisions have been complied with. The applicant must also prove that a clear and unequivocal notice of cancellation was conveyed to the other party, unless the agreement dispenses with such notice.

[3] The salient facts on which the applicant relies (in its founding affidavit) for the eviction are the following.

1. The premises belongs to the applicant and is currently occupied by the respondent.
2. The applicant and the respondent entered into a lease agreement on 19 July 2013 (hereinafter referred to as the first lease agreement). In terms of the first lease agreement the lease would endure for a period of five and a half years until 30 December 2019. In terms of clause 5 of this agreement the respondent had to pay rental each month.
3. The respondent failed to pay the monthly rental. The failure already occurred in January 2014 when the respondent was supposed to make its second payment in terms of the first lease agreement. As of January 2016,

¹ *Chetty v Naidoo* 1974 (3) SA 13 A at page 20

the respondent was in arrears in the sum of R2 603 020 and owed the applicant money for operational costs in the amount of R1 317 375.49.

5. On 27 January 2016, after several attempts to settle the disputes between the parties, the applicant terminated the first lease agreement.

6. During January 2016, the applicant locked the respondent out of the premises without a valid court order. On 8 August 2019, a court order was granted against the applicant. In terms of the court order, the applicant had to restore the respondent's possession of the premises. The court did not pronounce on the lawfulness or unlawfulness of the respondent's continued occupation of the premises nor did the court decide on the validity of the applicant's termination of the first lease agreement.

7. The applicant restored the respondent's possession of the premises in August 2019 after the order was granted. The lease was now on a month to month basis (second lease agreement).

8. On 27 August 2019, the respondent was notified of the termination of the month to month lease. The respondent was required to vacate the premises on or before 21 September 2019.

9. Errors were adjusted which resulted in reversals of rental to the amount of R220 000 in favour of the respondent and the applicant offered to extend the lease agreement from December 2019 to June 2020. The lease period of the **first lease agreement** was subsequently extended by six months to terminate on 30 June 2020 (emphasis added).

10. The respondent refuses to vacate and remains in occupation of the

property without paying rent.

11. As a result the present application was launched on 29 January 2020.

[4] In *Mckenzie v Famers' Cooperative Meat Industries Ltd*,² the court held that "cause of action" meant, *".....every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact but every fact which is necessary to be proved"*. In paragraph 26 of the founding affidavit the applicant in the present matter summarizes its cause of action as follows: *"Considering that the applicant terminated the lease agreement because of the breach thereof by the respondent, it is necessary that the applicant satisfies the court that, first, the respondent breached the terms of the lease agreement and secondly, that the applicant terminated the lease agreement lawfully."*

[5] The applicant filed a supplementary founding affidavit on 21 October 2021. The reason for the filing of this affidavit was to bring certain material facts that arose subsequent to the launch of this application for eviction to the court's attention. In this affidavit the applicant averred three things: Firstly, it confirmed the cancellation of the first lease agreement on 27 January 2016; secondly, it confirmed that the same lease has since expired on 30 June 2020 and, thirdly, that consequent to the expiration of the first lease agreement, the applicant served a notice upon the respondent demanding that the respondent vacates the property by no later than 3 October 2021. It also set out the attempts that have been made by both parties since 2018 to November 2020 to settle the disputes between them.

² 1922 AD 16 at page 23.

[6] Despite the respondent's argument that the applicant's claim is based on the *rei vindicatio*, it is clear from the founding affidavit, the supplementary affidavit and the annexures attached to it, that the applicant's cause of action is based on the first lease agreement. It is averred that the first lease agreement was lawfully terminated in January 2016 as a result of the respondent's failure to pay the monthly rental. But, contrary to what is set out in the founding affidavit the applicant also makes mention of a second lease agreement in its founding affidavit that was entered into in August 2019, after the court order restoring the respondent's possession of the premises. This much is confirmed by the letter dated 27 August 2019 (annexure AC5) from the applicant's attorneys Salijee Govender Van der Merwe Inc, addressed to the respondent. The letter reads as follows:

1. *We act on behalf of ACSA ("our client").*
2. *We confirm that the order of South Gauteng High Court dated 8 August 2019 directed our client to restore possession and access in favour of Tswelokgotso Trading Enterprise ("Tswelokgotso") in respect of the premises known as Phela-Live Wellness Centre, situated at O.R Tambo International Airport ("the premises").*
3. *We remind you that the lease agreement that was entered into between Tswelokgotso and our client was cancelled on 27 January 2016. The Court order mentioned herein above does not resuscitate the cancelled lease. Your current lease is now on a month to month basis and our Client shall confirm with yourselves the appropriate rental amount payable.*
4. *Prior to the cancellation of the lease agreement, Tswelokgotso's account was in arrears in respect of rental amount totalling R5 820280.00 (Five Million Eight Hundred and Twenty Thousand Two Hundred and Eighty Rand) payable to our client. The aforementioned amount has not been paid, alternatively, no arrangements*

to pay such amount have been made by yourselves on behalf of Tswelokgotso.

5. *We hereby give notice to your company, Tswelokgotso, to vacate the premises on or before 21 September 2019 at 12 noon.*
6. *On failure to vacate as aforementioned, our client shall approach court for the necessary relief to have Tswelokgotso removed from the premises.*
7. *Our client's rights to seek any other remedy in this matter are reserved.*

[7] This letter from the applicant makes it clear that the first lease agreement dated 19 July 2013 was lawfully terminated on 27 January 2016 and that the court order dated 19 August 2019 “*did not resuscitate the cancelled lease*”. It further makes it clear that a new lease agreement on a month to month basis was entered into (presumably after the court order) and the applicant is yet to confirm with the respondent the appropriate rental amount payable. The applicant then confirms that prior to the cancellation of the (first) lease agreement, the respondent was in arrears in respect of rental amount totaling R5 820 280.00 (Five Million Eight Hundred and Twenty Thousand Two Hundred and Eighty Rand) and the applicant therefore gives notice to the respondent to vacate the premises on or before 21 September 2019 at 12 noon.

[8] No breach of the second lease agreement is averred in the founding affidavit and the founding affidavit is silent on this crucial issue. All that is stated in the founding affidavit is that a month’s notice was required to terminate the second agreement and that such notice was given on 27 August 2019. As a result of the contradictory allegations and the confusion it caused, this court cannot determine on the facts in the founding affidavit whether the applicant is entitled to rely on the first or the second lease agreement. This confusion is compounded by applicant’s

supplementary affidavit in which it no longer relies on the breach of the first lease agreement, but the fact that the lease has expired in June 2020.

[9] It is trite that an applicant must make out its case in its founding affidavit. In *Transnet Ltd v Rubenstein*,³ the Supreme Court of Appeal held that due to the nature of applications, the affidavit plays a dual role in the application in that they form both pleadings and the evidence upon which the applicant relies.⁴ An applicant's pleadings contain the legal basis of the claim under which an applicant has chosen to invoke the court's competence. In other words, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits must be interpreted to establish what the legal basis of the applicant's claim is.⁵ Consequently, the applicant must set out sufficient facts in the founding affidavit to disclose a cause of action, that is, the founding affidavit must be self-contained. The replying affidavit (and in this instance the supplementary affidavit) cannot be used to augment the applicant's case. In fact, in *Bowman NO v De Souza Roldao*,⁶ Cohen, J concluded:

"But none of these cases goes to the length of permitting an applicant to make a case in reply where no case at all was made out in the original application. None is authority for the proposition that a totally defective application can be rectified in reply. In my view, it is essential for applicant to make out a prima facie case in its founding affidavit."

[10] All that is expected of the applicant, having regard to the nature of the relief sought, was to establish a legal basis for its claim to evict the respondent from the

³ 2006 (1) SA 591 (SCA) par 28.

⁴ See also *Kham and Others v Electoral Commission and Another* 2016 (2) SA 338 (CC) par [46].

⁵ *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC).

⁶ 1988 (4) SA 326 (T) at 336B.

premises. The applicant is clearly confused as to what transpired between the parties and this confusion reflects in the founding affidavit and is amplified in the supplementary affidavit and the heads of argument.

[11] The position the applicant finds itself in, is unfortunately exacerbated by the respondent's answering affidavit and the defences raised therein. The respondent, *inter alia*, disputed the applicant's entitlement to cancel the lease agreement in January 2016 as it is alleged that the respondent did not owe any money to the applicant. (It is common cause that there is pending litigation between the parties in which the applicant has claimed against the respondent payment of the sum of R5 820 280, being the amount reflected in the founding affidavit. Such claim is opposed and respondent has filed a substantial counterclaim.) The respondent further disputed that the applicant was entitled to give notice to the respondent to vacate the premises in August 2019, and in fact insist on compliance with an agreement that was supposed to be incorporated in the lease agreement so as to enable it to fulfil its business model and contends for a 5 year agreement with immediate effect, alternatively with effect from 31 December 2019, further alternatively with effect from a new agreement being concluded. The respondent therefore contends that there should be a rectification of the first lease agreement to reflect the true intention of the parties. It is submitted on behalf of the respondent that there is a clear dispute of fact on the papers and it was foreshadowed in the correspondence attached to the founding papers. It is argued that the application should be dismissed on this basis alone.

[12] The correct approach to the assessment of evidence in motion proceedings was described in *National Director of Public Prosecutions v Zuma*,⁷ by Harms JA as

⁷ [2009] ZASCA 1; 2009 (1) SACR 361 (SCA) at paragraphs 26 and 27.

follows:

“Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP'S version. . . . In motion proceedings the question of onus does not arise and the approach set out in the preceding paragraph governs irrespective of where the legal or evidential onus lies. . . .”

[13] In light of the confusion created by the contradictory averments in the founding affidavit as well as the disputes of fact raised in the answering affidavit, which in my view cannot be described as palpably implausible, the application cannot properly be decided on paper. However, the circumstances present in this matter and the long protracted disputes between the parties, do not justify a dismissal of the application. In terms of Rule 6(5)(g) of the Uniform Rules of Court, where an application cannot properly be decided on affidavit, the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In

particular, but without affecting the generality of the afore-going, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness, or it may refer the matter to trial.

[14] A court will refer a matter to trial if the dispute of fact is incapable of resolution on the papers and too wide ranging for resolution by way of referral to oral evidence.⁸ In the exercise of my discretion this is one of those instances where the issues and disputes between the parties can only be properly ventilated by referring the matter to trial.

[15] In the result the following order is made:

1. The matter is referred to trial.
2. It is ordered that the notice of motion stand as simple summons and the answering affidavit as a notice of intention to defend.
3. The declaration shall be delivered within 15 days of this order and the Uniform Rules dealing with further pleadings, discovery and conduct of trials shall thereafter apply.
4. Costs in the cause.

L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

(Electronically submitted therefore unsigned)

⁸ Oblowitz v Oblowitz 1953 (4) SA 426 ©

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 10 May 2022.

APPEARANCES

Counsel for the plaintiff:	Adv. K. Mnyandu
Instructed by:	Saljee Govender van der Merwe Inc
Counsel for the defendant:	Adv. S.B. Friedland
Instructed by:	Beder Friedland Inc
Date of hearing:	14 March 2022
Date of judgment:	10 May 2022