

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: A5013/2022

DELETE WHICHEVER IS NOT APPLICABLE

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

In the application of:

FIGURES & CO (PTY) LIMITED AND 32 OTHERS

Appellant

and

URBAN REAL ESTATE (PTY) LIMITED

Respondent

Coram: Wepener et Mdalana-Mayisela et Dlamini JJ

Date of hearing: 22 February 2023

Date of judgment: 6 March 2023

This judgment is made an Order of Court by the Judges whose names are reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the

Parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his secretary. The date of this Order is deemed to be 6 March 2023

JUDGMENT

Wepener, J:

[1] This is an appeal against an order for eviction of the appellants from business premises. The matter was heard in the urgent court.

[1] The appellants were granted leave to appeal on four specific grounds of appeal after the court a quo granted an eviction order against the appellants. The appellants that remained before this court are: the first; the third; the fifth; the eleventh; twenty seventh, the twenty ninth and thirty second appellants ('the remaining appellants').

[2] Counsel appearing for the appellants did not persist with two of the four grounds of appeal. I consequently, only deal with the remaining two grounds. The first ground is that the court, by evicting the first respondent from the property, affected his s 9 constitutional rights. This ground only affects the first appellant. It was submitted that the first appellant should be protected from unfair discrimination as the court a quo 'targeted' the first appellant unfairly.

[3] This argument cannot be sustained. Firstly, this constitutional issue is raised for the first time on appeal. In *Prokureursorde van Transvaal v Kleinhans*,¹ Van Dijkhorst J said that, in his view, and for the proper arrangements of practice, it is vitally important that constitutional points not be shaken from a sleeve by advocates as a last point of debate, but such points should be pertinently raised as an issue in the papers so that it can be fully canvassed. It is common cause that no constitutional point was raised in the court a quo and therefore not dealt with on the papers or during argument.

¹ 1995 (1) SA 839 (T) at 849A-B.

[4] Secondly, the submission was that because the application for eviction against some tenants was postponed, the court discriminated by ordering the eviction of the first appellant. There is no merit in this submission. The matter was postponed against some of the tenants in order to allow them to make payment of amounts owing, if they so wished. The order was, nevertheless, granted and suspended pending such payment. The first appellant was in a different category. It was given notice on 10 August 2021 that it was in arrears. Due to non-payment, its contract was then cancelled on 25 August 2021. Its position was, thus, indeed different from those tenants against whom the order was suspended on condition of payment. There is, consequently, no evidence of any discrimination against the first appellant.

[5] The second remaining ground is relied upon on behalf of all the remaining appellants. It is that whether a letter of 18 August 2021 written by the appellants amounted to a repudiation of the lease which entitled the landlord (respondent) to resile from the lease. The difficulty with this ground is that it was not the letter of 18 August 2021 upon which the landlord relied. The landlord relied on a refusal to pay rental which constituted a repudiation of the lease agreements. This ground of appeal is consequently moot as the refusal to pay rental, which constituted a repudiation, which was accepted by the landlord, is not before us and the facts in relation thereto are uncontroverted.

[6] In the circumstances the two grounds of appeal do not assist the appellants and their appeal falls to be dismissed with costs.

W.L. Wepener

Judge of the High Court of South Africa

I agree.

M.M.P. Mdalana-Mayisela

Judge of the High Court of South Africa

I agree.

J.E. Dlamini

Judge of the High Court of South Africa

Counsel for the Appellants: N. Ralikhuvhana

Attorneys for the Appellants: Lungisani Mantsha Attorneys

Counsel for the Respondent: C. van der Merwe

Attorneys for the Respondent: Vermaak Marshall Wellbeloved Incorporated

