IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***21/02/2024*** Signature: _____

CASE NO: 2024-011267

In the matter between:

HI-Q AUTOMOTIVE (PTY) LTD Applicant

and

ERGA INVESTMENTS (PTY) LTD First Respondent

JUDGMENT

MAIER-FRAWLEY J:

[1]. This is an urgent application in which the applicant seeks an order for the

eviction of the first respondent from commercial leased premises, confirmation of its cancellation of a written sub-lease agreement concluded between the parties, and ancillary relief.

[2]. The respondent contended that the matter was not urgent. After hearing argument, I ruled that the matter was urgent and indicated that my reasons therefore would follow in this judgment. It is trite that commercial interest, like any other interest, may found urgency, given the circumstances of a particular case.[1]' In *CEZ Investment (Pty) Ltd v Wynberg Auto Body (Pty) Ltd* (41475/2018) [2021] ZAGPJHC 499 (29 September 2021) paras 22 & 23, the following was said:

"In dealing with a similar situation as that in the present matter concerning urgency in the circumstances where there was an offer to lease the property by a third party, Matojane J, in the unpublished judgment of *Elkam (Pty) Limited v Ferej, Tariku Nure trading as Magnum General Trading, The Occupants of Shop I, Cumberland Court, 9 Pretoria Street, Hillbrow, Johannesburg*, said:

> *'[18] In the circumstances, I find that the matter is urgent because by the time this application would be heard in the ordinary course the applicant could have lost Chicken Licken as a tenant*.'

The same approach was adopted by Adams J, in the unpublished judgement in *Silverbalde Investment (Pty) Ltd v Bay Tower Properties 247 (Pty) Ltd Lanoman and Others*, https://www.saflii.org/za/cases/ZAGPJHC/2021/499.html - _ftn5where the court in dealing with urgency said:

> *'[10] This then brings me to the issue of urgency. The first respondent contends that the applicant's urgent application should be dismissed due to non-compliance with practice directives applicable in this division. Closely linked to this contention is the first respondent's submission that the application should fail for lack of urgency. I do not agree with these submissions for the simple reason that the applicant's case for the eviction of the first respondent is overwhelming. It would not be in the interest of*

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1 See: *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586 (G)

justice not to grant the applicant the eviction order, especially if regard is had to the fact that, according to the uncontested evidence of the applicant that it stands to lose out on a new lease agreement with a new tenant, who has indicated that he would conclude a lease agreement with the applicant provided he be given occupation during January 2018.'

I align myself with the above authorities and thus in the circumstances, I was satisfied that this matter was sufficiently urgent to be enrolled and be heard as an urgent application."

[3]. The respondent had fallen into arrears with its rental payment obligations under a written sub-lease agreement concluded with the applicant, which prompted the applicant to cancel the sub-lease on notice to the respondent, as it was entitled to do in terms of the sub-lease. The terms of the sub-lease were not in dispute on the papers. The last time the respondent paid rental under the sub-lease was December 2022. As from January 2023, it fell into arrears. The applicant however remained obliged to pay rental and other charges to the Landlord under a written principal lease agreement concluded between the applicant and the Landlord. The essentially translated into a huge financial loss being incurred by the applicant monthly, given the amount of rental (excluding other amounts) which was payable monthly under the sub-lease (approximately R164,000,00 in 2023) and given that the applicant remained obliged to pay rental and other amounts monthly to the Landlord under the principal lease. The amount of the arrears increase incrementally each month that the respondent fails to pay rental whilst it continues to occupy the leased premises unlawfully pursuant to the cancellation of the sub-lease on 15 September 2023. This has led to the applicant essentially bankrolling the respondent's use and occupation of the leased premises, to its obvious financial prejudice. Moreover, the applicant stands to lose a potential paying tenant who had signed a written intention to lease the premises, subject to it being afforded vacant occupation. The loss of a potential paying tenant in similar circumstances has been recognised as a ground of urgency in several cases in this division, as is apparent from *CEZ Investment*, *supra.* In the circumstances, I considered the matter sufficiently urgent to be entertained on its merits, which overwhelmingly favour the applicant, as will appear from the discussion below.

[4]. Salient common cause undisputed or unrefuted background facts include the following: The applicant is the lessee under a written principal lease agreement concluded on 18 November 2021 with two companies as the Landlord. The principal lease was to endure for 5 years, commencing on 1 June 2021. In terms of the principal lease, the applicant leased certain premises comprising shop 17 in the Waterfall Ridge shopping centre, Ridge road, Vorna valley Midrand ("the leased premises"). Relevant terms of the principal lease include the following:

(i) in terms of clause 19 3 of the general conditions, the tenant was obliged to be open for business and trade 7 days a week during shopping hours;

(ii) in terms of clause 3.2, rental was payable monthly in advance on or before the 1st day of each calendar month;

(iii) in terms of clause 3.5, all rentals and other amounts payable under in terms of the lease were to be made without demand, free of exchange and without any deduction or set-off;

(iv) in terms of clause 28.1.1 read with clause 28.1.11.1, the lessor was entitled to cancel the lease on notice to the tenant in the event that the lessee failed to pay any amount due in terms of the lease;

(v) in terms of cl 28.2 read with cl 30, while in occupation, the tenant was obliged to pay all amounts due in terms of the lease irrespective of any dispute between the parties, including a dispute about the right to cancel the lease.

(vi) Cl 28.3 provides that a certificate 28.3. signed by a director, company

secretary, credit manager or internal accountant of the Landlord or the Landlord's quantity surveyor or agent shall be apparent proof of the amount of any indebtedness owing by the Tenant to the Landlord at any time and also of the fact that the due date of payment of the whole or, as the case may be, any portion of that amount has arrived.

(vii) in terms of cl 26 B of the Summary Schedule, in the event of the Applicant having been opened for trade but fails to comply with the Shopping Centre Hours as set out in clause 23 of the Summary Schedule, the Applicant will be liable for a penalty equal to R2 500.00 per day of non-trading,

[5]. On 11 November 2021, the applicant (as franchisor)) and the respondent (as franchisee) concluded a written franchise agreement for purposes, *inter alia,* of allowing the respondent to conduct a franchise business under the trade name 'H-Q' at the leased premises. In terms of the franchise agreement, the applicant warranted that it had concluded a lease agreement for the lease of the leased premises for a period of not less than 5 years. In terms of cl 17.1 read with 17.1.18 of the franchise agreement, the franchise agreement was terminable on written notice to the franchisee in the event that the franchisee's lease agreement in respect of the leased premises was terminated for any reason whatsoever.

[6]. On 12 November 2021 the applicant and the respondent concluded a written agreement of sub-lease in respect of the leased premises. In terms of clause 2.2 read with 1.7 thereof, the respondent was subject to and required to abide by all the terms and conditions of the principal lease, except in so far as they were expressly varied by the provisions of the sub-lease, in which event, the terms of the sub-lease were to prevail. As was the case in terms of the principal lease, monthly rental and service charges were payable under the sub-lease, monthly in advance and without deduction or set-off.[2] It was not in dispute in the answering affidavit that the sub-lease agreement was

[2] Clauses 6.5 & 6.6 of the sub-lease.

concluded with the consent of the landlord under the principal lease.[3] Such allegation was supported by the confirmatory affidavit deposed to by Mr Sean Harrison, the managing director of the applicant.

[7]. The applicant alleges that the respondent defaulted on its rental payment obligations as a result of which, on 15 September 2023, the applicant sent a letter to the respondent in which it notified the respondent of its election to cancel the lease, coupled with a demand for, *inter alia*, payment of arrear rental in an amount, which at that stage, exceeded R1.4 million. When the respondent failed to pay the outstanding rental demanded, on 23 October 2023, the applicant's attorneys despatched a further letter to the respondent in which it *inter alia* demanded that the respondent vacate the leased premises by 31 October 2023. This letter elicited a response from the respondent's attorneys on 31 October 2023, in which letter the respondent sought to off-set payments made by it in respect of certain development costs from the amount of the arrear rental earlier demanded by the applicant. The applicant was also therein urged to halt the institution of legal proceedings, pending the outcome of an investigation into the validity of the franchise agreement. In a letter dated 3 November 2023, whilst relying on the indisputable terms of the sub-lease, the applicant demanded that the respondent vacate the leased premises immediately. The date of vacation was later extended by the applicant to 31 January 2024.

[8]. The respondent's entitlement to use and occupy the leased premises carried a concomitant obligation on the part of the respondent to pay rent and other charges payable under the sub-lease. In terms of the standard conditions of the principal lease, which applied to the sub-lease, the latter could be cancelled on notice to the respondent in the event that the respondent failed to pay any amount due to the applicant under the

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[3] Clause 3.1 of the sub-lease, which reads: "*This Agreement is subject to and conditional upon the Landlord consenting to the sub- lease of the Leased Premises by the Tenant to the Sub-Tenant, in terms Agreement, within 60 (sixty) days of date of signature hereof*." The 'rental obligation date' in terms of the sub-lease was 1 November 2021. It is common cause on the papers that the respondent only defaulted in its rental payment obligations in January 2023 (until September 2023 when the sub-lease was cancelled).

sub-lease.[4],

[9]. No legally cognizable defence was raised in the answering affidavit. Instead, the respondent raised a plethora of unmeritorious technical points to avoid vacating the leased premises. I deal with these below. As far as the merits are concerned, on its own version, the respondent has failed to establish a legal entitlement to remain in occupation of the leased premises. It avers in its answering affidavit that the sub-lease '*was premised by fraudulent actions'* by authorized representatives of the applicant;[5] Such a dispute, even assuming its legitimacy, does not entitle the respondent to remain in occupation of the leased premises for free, whether pursuant to the cancellation of the lease, or at all.

[10]. The respondent avers in the answering affidavit that the franchise agreement was concluded by it a result of certain false representations that were made by authorised representatives of the applicant, which representations induced the respondent to enter into the franchise agreement and secure funding in the amount of R11, 634 504.11 from the Small Enterprise Funding Agency ('SEFA'), and which false representations were acted upon by the respondent to its prejudice. In par 23 of the answering affidavit, the respondent avers that the conclusion of the sub-lease would not have happened if it was not for the conclusion of the franchise agreement. It avers further that had the true facts been exposed to the respondent, it would not have entered into the franchise agreement and the sub-lease agreement. The respondent therefore reasons, on account of the alleged fraud perpetrated by the applicant, that 'It is a principle of our law that fraud vitiates everything'.[6] The respondent presumably had in mind the oft quoted words of the esteemed English judge, Lord Denning, in *Lazarus Estates Ltd v Beasley,*[7] namely, that:

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4 See par 4(iv) above read with par 6 above.

5 Par 6 of the answering affidavit.

6 Par 21 of the answering affidavit.

7 *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 (CA) at 712. Quoted with approval in *Esorfranki Pipelines (Pty) Ltd and another v Mopani District Municipality and others* [2014] ZASCA 21, para 25.

'No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever . . .'

[11]. Suffice it to say that the allegations of fraud were vehemently disputed in the applicant's replying affidavit.

[12]. Ultimately the respondent thus relies on fraud on the part of the applicant, which induced the conclusion of the franchise agreement, for an entitlement to set-aside and thus escape the consequences of the sub-lease. I agree with the applicant's submission that, as a matter of law, even if the respondent's version were to be accepted (which version the applicant disputes) and the agreements declared void,[8] the outcome would be a setting-aside of the sub-lease agreement, coupled with and an order for restitution. The effect of such an order vis-a vis the respondent would be that the leased premises would have to be restored to the applicant.

[13]. The respondent does not proffer any alternative basis on which it claims an entitlement to continue to occupy the leased premises. The point to be made is that on the respondent's own version, there is no legal basis on which it is entitled to be in possession and occupation of the leased property, and for that reason alone the applicant is entitled to an eviction order.

[14]. As mentioned earlier, various points *in limine* were raised by the respondent, namely:

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[8] As to whether or not the agreements would be void or only voidable on account of fraud, see the useful discussion in *Umgeni Water v Naidoo and Another* (11489/2017P) [2022] ZAKZPHC 80 (15 December 2022), paras 35 to 38.

(i) *Non-joinder* of the Landlord[9] under the principal lease;.

(ii) *Lis Pendens;*

(iii) That the applicant's case offends the 'once and for all rule'.

(iv) Invocation of the unclean hands doctrine and existence of disputes of fact warranting the matter being referred to trial;

(v) That the application is not urgent – this point was dealt with earlier in the judgment;

(vi) That the applicant does not have a right to eject the respondent on its own version.

[15]. As regards 'non-joinder', the point lacks merit. The applicant's case is based on a material breach by the respondent of the terms of the sub-lease, entitling it to cancel same on notice. The parties to the sub-lease are the applicant and the respondent. There is no *vinculum juris* or privity of contract between the Landlord under the principal lease and the respondent, as sub-tenant under the sub-lease. The principal lease will remain unaffected by the cancellation of the sub-lease. Moreover, no findings adverse to the Landlord's interests could be made in these proceedings,[10] as such, it cannot be said that the Landlord a necessary party;[11]

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9 The landlord being two companies, namely, Tadvest Commercial (Pty) Ltd and Pod property Fund (Pty) Ltd.

10 See *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Shadrack Shivumba Homu Mkhonto and Others v Compensation Solutions (Pty) Limited* [2017] ZACC 35, par 92.

11 See *Ekurhuleni Metropolitan Municipality v Erasmus* (2017/6617) [2017] ZAGPJHC 393 (12 December 2017), par 15.

[16]. As regards *lis pendens*, the point is based on action proceedings instituted in this court under case no. 121129/2023 by the applicant (as plaintiff) against the respondent (as defendant) for payment of arrear rental, based on the respondent's breach of the terms of the sub-lease agreement.[12] This point too lacks merit. Whilst the same parties may be involved in the action proceedings, there, a money judgment in respect of arrear rental owed by the respondent to the applicant was sought, whereas in the present proceedings, the respondent's ejectment is sought without any money judgment. It is trite that the requirements for the successful reliance on a plea of *lis pendens* are: (1) that the litigation is between the same parties; (2) that the cause of action is the same;[13] and (3) **that the same relief is sought in both.**[14] In *Nestlé (South Africa) (Pty) Ltd v Mars Incorporated*[15], the SCA (per Nugent JA) held as follows: - "*There is room for the application of that principle only where **the same dispute**, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of actions*.' It may be that the action proceedings and these motion proceedings are based on the respondent's breach of the same sub-lease agreement, however, this does not mean that the outcome of the action is or will be determinative of the outcome in the present matter or vice versa. In my view, therefore, the requirements for the invocation of the defence of *lis pendens* have not been met in

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[12] The particulars of claim filed in the action were not attached to the papers.

[13]This requirement was discussed in *Electrolux South Africa (Pty) Ltd v Rentek Consulting (Pty) Ltd* 2023 (6) SA 452 (WCC), par 14, where the following was said:

"As noted, the determination of the point *in limine* in this matter rests on the meaning of the term "cause of action". In ***McKenzie v Farmers' Co-operative Meat Industries Ltd*** Maasdorp JA approved the definition provided in the English case of ***Cook v Gill*** **L.R 8 CP.107** which defined the phase "cause of action arising in the City" as, "*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*". Later, in the case of ***Abrahmse & Sons v SA Railways and Harbours***, the court defined the expression "cause of action" as follows:

> "*The proper legal meaning of this expression 'cause of action' is the entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration to disclose a cause of action*". **"**(footnotes omitted)

[14] See *Grindrod Bank Limited v Culverwell and Another* (17343/2022 ; 17345/2022) [2023] JHC 876 (7 August 2023), par 19; .

[15] 1 Nestlé (South Africa) (Pty) Ltd v Mars Incorporated 2001 (4) SA 542 (SCA) at para 17.

casu. In any event, even if the requirements were met, this does not mean that the court is bound to stay the proceedings. In *Loader v Dursot Bros (Pty) Ltd,*[16] in considering the effect of *lis pendens, the court held that "It is clear on the authorities that a plea of lis alibi pendens does not have the effect of an absolute bar to the proceedings in which the defence is raised. The court intervenes to stay one or other of the proceedings because it is prima facie vexatious to bring two actions in respect of the same subject matter. The court has a discretion which it will exercise in a proper case, but it is not bound to exercise it in every case in which a lis alibi pendens is proved to exist . . . .*"

[17]. Regarding the 'once and for all rule', the respondent's counsel contended in his heads of argument that the applicant's claim should fail because it offends the once and for all rule. I do not agree. The once and for all rule provides that in claims for compensation or satisfaction arising out of a delict, breach of contract or other cause, the plaintiff must claim damages once for all damage allegedly sustained or expected insofar as it is based on a single cause of action.

[18]. The rule entails that a plaintiff may not bring more than one action for damages, insofar as this action is based on the same cause of action (Potgieter, Steynberg and Floyd Visser and Potgieter: Law of Damages 3ed (2013) 153).[17] Since the defendant's counsel relies on the case of *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) for his submission that the applicant should have instituted its claim for ejectment together with its claim for arrear rental, it is best to discuss what that case held. The Appellate Division found that the rule has particular significance for prospective loss because where a prospective loss is based on the same cause of action as past loss, the claim for the prospective loss has to be brought at the same time as the claim for past loss. At 835B-D the court held as follows: "*The object of this principle is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions, and the possibility of conflicting decisions (Caney, Law of Novation, 2nd ed., p 70). The principle of res judicata, taken together with the "once and for all" rule, means that a claimant for Aquilian damages*

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16 1948 (3) SA 136 (T) at 138.

17 See too: "(Mis)understanding the once-and-for-all rule" by André Mukheibir, published in OBITER 2019 at 252;

who has litigated finally is precluded from subsequently claiming from the same defendant upon the same cause of action additional damages in respect of further loss suffered by him (i.e. loss not taken into account in the award of damages in the original action), even though such further loss manifests itself or becomes capable of assessment only after the conclusion of the original action (Cape Town Council v Jacobs, supra, at p 620); cf. Kantorv Welldone Upholsterers, supra, at p 390-1). The claimant must sue for all his damages, accrued and prospective, arising from one cause of action, in one action and, once that action has been pursued to final judgment, that is the end of the matter. (at page 835 B-D)."

[19]. Neither the action proceedings or these proceedings involve claims for damages. As such, reliance on the principle is misplaced.

[20]. As regards the 'unclean hands doctrine', the respondent contends that the applicant has approached this court with 'dirty hands' in that it seeks to evict the respondent from the leased premises in circumstances where the applicant perpetrated a fraud upon the respondent, which 'lured' the respondent into entering into the franchise agreement (and sub-lease). The laconic allegations of fraud in the answering affidavit were hotly disputed in the replying affidavit for reasons given therein, not least of all because the respondent sought to rely on the inadmissible hearsay contents of a letter, annexure "C" to the answering affidavit, wherein the extent of the applicant's alleged fraudulent activity was allegedly 'laid bare', in circumstances where the author of the letter did not provide a confirmatory affidavit. In any event, a cursory inspection of the document reveals that no conclusive findings were made therein. Reliance was also placed on a 'draft forensic report' by Naledi Advisory Services, from which conclusions of fraud were sought to be drawn, but which report was not provided in the answering papers, resulting in allegations of fraud remaining unsubstantiated and unproven.

[21]. Reliance was placed on cases such as *J.K v E.S.K*,[18] where the court stated that *"The doctrine of unclean hands concerns the honesty of a party's conduct. It holds that where a party seeks to advance a claim that was obtained dishonestly or mala fide, that*

[18] *J.K v E.S.K* (15912/2023) [2023] ZAWCHC 317 (29 November 2023), par 37.

party should be precluded from persisting and enforcing such a claim", and *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH,*[19] where the Constitutional Court stated that "*'...An abuse of process can occur in a variety of ways. The litigation may be frivolous or vexatious. A litigant may seek to use the legal process for an ulterior purpose or by recourse to conduct that subverts fundamental values of the rule of law. The behaviour of the litigant may be so tainted with turpitude that the court will not come to such a litigant's aid. The unclean hands doctrine references this latter type of abuse. It is the abusive conduct of the litigant that, **in a proper case**, may warrant the exercise of the court's power to non-suit such a Iitigant. The court does so even though the litigant claims a right that that they would vindicate in the court proceedings.* For this reason, the power is to be exercised with great caution*...*". (emphasis added)

[22]. In my view, a proper case has not been made out for the invocation of the unclean hands doctrine. It is trite that fraud is not easily inferred by a court. A party that relies on fraud is required to plead and prove it clearly and distinctly. And, any finding as to fraud can only be made on the strength of admissible evidence. Reliance on hearsay evidence cannot avail the respondent, as it is inadmissible.[20] Neither can conclusions of fraud be drawn from unsubstantiated allegations and reports which do not form part of the papers. In any event, it is inappropriate to determine the issue, given that a material dispute of fact in relation to allegations of fraud - that is incapable of resolution on the papers, has manifested. This dispute cannot avail the respondent to escape the consequences of its persistent failure to pay rent and the resultant cancellation of the lease.[21]

[23]. It is common cause that the Respondent has been occupying the Leased Premises and has been trading from the Leased Premises since entering into the sub-lease agreement. The Respondent's belief that it has been the victim of fraud

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19 Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH 2024 (1) SA 331 (CC), paras 77-78.

20 See *Rautini v Passenger Rail Agency of South Africa* (Case no. 853/2020) [2021] ZASCA 158 (8 November 2021)

21 See par 4(v) above, read with par 6 above.

perpetrated by the Applicant (which is vehemently denied in the replying affidavit), has not deterred the Respondent from enjoying beneficial occupation of the Leased Premises, whilst at the same time, failing to meet its obligation to pay the monthly rental in terms of the sub-lease agreement. After the cancellation of the sub-lease, the respondent was afforded an opportunity to pay its arrears and to reinstate the lease. It did not. There is no basis in law for it to occupy premises without having to pay for such occupation. And there is no basis for it to unlawfully occupy the leased premises after cancellation.

[24]. I could understand the invocation of the doctrine if the litigation was wholly and obviously frivolous or unsustainable in law,[22] (which, in the present case, it is not), or if the sole purpose in launching it was to bring the respondent to its financial knees by burdening the proceedings with an enormous range of unnecessary interlocutory procedures.[23]

[25]. In *Mostert*, the Supreme Court of Appeal cautioned that "*While courts are entitled to prevent any abuse of process it is a power that should be sparingly exercised. The starting point is the constitutional guarantee of the right of access to courts in s 34 of the Constitution. That right is of cardinal importance for the adjudication of justiciable disputes. But where the procedures of the court are being used to achieve purposes for which they are not intended that will amount to an abuse of process."*[24]

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[22] *L. F. Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v L. F. Boshoff Investments (Pty) Ltd* 1969 (2) SA 256 (C) at 275B-C

[23] *Mostert and Others v Nash and Another* (604/2017 and 597/2017 [2018] ZASCA 62 (21 May 2018), paras 24-26.

See too: *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* 2024 (1) SA 331 (CC) at paras 77-78, where the Constitutional Court pointed out that :

"*An abuse of process can occur in a variety of ways. The litigation may be frivolous or vexatious. A litigant may seek to use the legal process for an ulterior purpose or by recourse to conduct that subverts fundamental values of the rule of law. The behaviour of the litigant may be so tainted with turpitude that the court will not come to such a litigant's aid. The unclean hands doctrine references this latter type of abuse. It is the abusive conduct of the litigant that in a proper case may warrant the exercise of the court's power to non-suit such a litigant. The court does so even though the litigant claims a right that they would vindicate in the court proceedings. For this reason, the power is to be exercised with great caution*... "

[24] Id, par25, Footnotes excluded

But that is not the complaint in *casu*. Here the complaint was about alleged fraudulent conduct on the part of the applicant, which, as I have already found, has not been established on the papers.

[26]. There appears to have been a concerted effort on the part of the respondent to cloud the issues in the hope that it would be able to defeat the applicant's claim for eviction, in circumstances where the grounds upon which the claim for eviction are based on the express terms of the sub-lease (including the terms of the principal lease that were not varied by the sub-lease), which are indisputable.

[27]. The final point taken in the respondent's heads of argument is that the applicant has no right, on its own version, to claim ejectment. This point likewise lacks merit. In paragraph 12.6 of the founding affidavit, the applicant set out the contents of clause 18.1 of the summary schedule to the principal lease, which *inter alia* provides that the tenant (applicant) under the principal lease shall not sub-let the premises or any portion thereof without the Landlord's prior written consent. The respondent submits that as no prior written consent from the Landlord was attached to the papers, the applicant was not entitled to sub-lease the leased premises to the respondent.

[28]. There are various difficulties with the respondent's broad proposition. Firstly, the conclusion of the sub-lease, the terms of the sub-lease and its implementation by the parties were not disputed in the answering affidavit. Nor was the allegation in par 21 of the founding affidavit, namely, that the Landlord had consented to the sub-lease, disputed in the answering affidavit. But aside from what was not disputed, the proposition seems to suggest that the failure to produce the Landlord's written consent somehow rendered the sub-lease unenforceable, or anything performed thereunder, a nullity. If so, this would surely amount to a novel proposition in law for which the respondent has put up no authority. Secondly, as earlier mentioned, the sub-lease provides that the Respondent "is subject to and shall abide by all the terms and conditions contained in the Principal Lease Agreement, as if it were the tenant in terms

of the Principal Lease Agreement, except insofar as any such terms and conditions are expressly varied by the provisions of the Sub-Lease Agreement." (clause 2.2 read with 1.7 of the principal lease). Clause 3.1 of the sub-lease expressly and unequivocally provides that "This Agreement is subject to and conditional upon the Landlord consenting to the lease of the Leased Premises by the Tenant to the Sub-Tenant, in terms of this Agreement, within 60 (sixty) days of date of signature hereof.".*Cadit quaestio*. This point too, must fail.

[29]. One further issue requires mention. During the course of oral argument, the respondent's counsel indicated that a supplementary affidavit was being prepared on behalf of the respondent in this matter. After oral arguments were concluded on 14 February 2024, I reserved judgment. I was alerted by the applicant's representatives in a letter dated 15 February 2024 that The Respondent had subsequently delivered and uploaded to Case Lines a supplementary affidavit at approximately 17h11 on 14 February 2024, at section 7, being the "correspondence section". Reliance was placed on what was stated in *Standard Bank of SA Ltd v Sewpersadh and another* 2005 (4) SA 148 (C), at paragraphs [12]to [13] for the submission that the further affidavit ought not to be received but should be regarded as *pro non scripto*.

[30]. A glance at the contents of the supplementary affidavit reveals that it deals primarily with the issue of the applicant's alleged fraudulent conduct, which, as alluded to earlier, does not constitute a defence or assist the respondent's cause in these proceedings. In so far as reference is made to a summary judgment application brought by the applicant in the 'main action', same was not attached to the affidavit. Moreover, it is unknown what '*main'* action is being referred to. If it relates to the action instituted for arrear rental, same has been dealt with hereinbefore. I am therefore not inclined to have the supplementary affidavit received.

[31]. I am satisfied that the applicant on the papers before me has made out a case for an order for the relief sought in the notice of motion. The applicant seeks an order that

the respondent vacate the leased premises by 28 February 2024. In view of the fact that judgment was reserved, it would be just and equitable for the date of vacation to be extended to 15 March 2024. In determining this date, I have taken into account the extended period in which the respondent has unlawfully occupied the leased premises, despite the lawful cancellation of the lease.

[32]. As regards the question of costs, the applicant has been successful in this application. This means that, applying the general rule, it is entitled to its costs. I am not persuaded that a punitive costs order is warranted in the matter.

Order

In the result, I make the following order:-

1. The draft order attached hereto, as revised by me, is made an order of court.

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AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

Date of hearing:	14 February 2024
Judgment delivered	21 February 2024

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 21 February 2024..

APPEARANCES:

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