Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION - MAHIKENG

CASE NO.: M496/22

In the matter between:

G EN M MOTORS CC **Applicant**

and

ABDUL MABUD **First Respondent**

ILLEGAL OCCUPANTS
(of Shop 1, Sylvia Building, Erf 1476,
Joe Slovo Road, N12 Klerksdorp) **Second Respondent**

SHALALA PROPERTY MANAGEMENT **Third Respondent**

CORAM: PETERSEN J

DATE OF HEARING : 10 MAY 2024

The judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be **01 July 2024** at 12h00pm.

ORDER

1. The first and second respondents are ordered to vacate the property within thirty (30) days of service of this order by the Sheriff of the Court.

2. The Sheriff or his lawful Deputy are directed and authorised to take such steps as may be reasonably necessary to evict the respondents from the property if the respondents fail to vacate the property following compliance with paragraph 1 of this order.

3. The first respondent is ordered to pay the costs of this application on the scale as between attorney and client.

JUDGMENT

PETERSEN J

[1] This is an opposed application in which the applicant G en M Motors CC, (“G en M Motors”) seeks the eviction of the first respondent (‘Mabud’) and the second respondent (who are cited as all the illegal occupants from commercial property situated at Stand 1476, c/o Joe Slovo Road (“the “property”), geographically located parallel to Main Reef Road, N12 and Oosthuizen Avenue, Klerksdorp also known as Vooma Filling Station. The third respondent, Shalala Property Management (‘Shalala Property’), is the registered owner of the property. G en M Motors seeks such an eviction order to be effective within fourteen (14) days of date of order by this Court, failing which the Sheriff of the Court or his duly authorized Deputy is enjoined to take such steps as may be necessary to evict the first and second respondents from the property if the first and second respondents fail to vacate the property within the said fourteen (14) day period. The applicant further seeks an order as to costs on an attorney and own client scale.

[2] Mabud, save for seeking an audience on the virtual platform which remains the prerogative of the presiding Judge, failed to appear at the hearing of the application in open court. Opposing papers have been filed by Mabud, including heads of argument which were

delivered late, with no application for condonation. No papers were filed by the second or third respondents.

[3] The factual background to the application is briefly as follows. On 21 August 2013 at Lichtenberg G en M Motors, at that stage duly represented by its previous sole member Mr Muhammad Kaka ('Kaka'), and Shalala Property entered into a written lease agreement ('head lease'). In terms of the head lease, G en M Motors leased the entire property from Shalala Property. The property consists of a stand with improvements, including a filling station, parking area for customers and employees, and a building called Sylvia building. Sylvia building consists of various shops which are adjacent to each other. The head lease commenced on 1 January 2014 and would subsist for a period of five years. The head lease expired by effluxion of time on 31 December 2019.

[4] In terms of clause 11 of the head lease, G en M Motors was not entitled, except without prior written consent of Shalala Property, to cede any or of all its rights under the lease, or to sublet or give up possession of the property in whole or in part to any third party which is not an associate of G en M Motors.

[5] On 26 March 2018, whilst the head lease between G en M Motors and Shalala Property was still extant, Kaka (representing G en M Motors), and Mabud acting in person; contrary to clause 11 of the head lease, entered into a written sub-lease agreement ('sub-lease') in terms of which Mabud sub-leased a portion of the property being Shop 1 to be used for the sole purpose of conducting the business

of a general dealer/wholesaler to Mabud. The sub-lease was to commence on 1 April 2018 and expire on 31 December 2019. The invalid sub-lease as with the head lease expired by effluxion of time on 31 December 2019. The invalid sub-lease was not extended nor was a new sub-lease concluded.

[6] On 24 November 2020, Inaayat Hussain (‘Hussain’), the deponent to the founding affidavit, and Mrs Yasmin Alli (Alli’), purchased 100% of the members interest in G en M Motors from Kaka. G en M Motors (as represented by Hussain and Alli) leased the property from Shalala Property on a month-to-month basis in terms of a verbal agreement.

[7] G en M Motors contend that in the absence of a sub-lease in terms of which Mabud occupies the property, it has a clear right that entitles it in law to possession and use of the entire property, which includes Shop 1.

[8] According to Hussain he approached Mabud shortly after the purchase of 100% of the members interest in G en M Motors from Kaka, to vacate the property as Hussain and Alli (as new members of G en M Motors) were now the lessee of the property and needed Shop 1 for their own business. This request fell on deaf ears, as Mabud remained in possession of the property and continued conducting business.

[9] On 9 March 2021 the attorney of record for G en M Motors at the time Mr Imran Kaka, addressed a letter to Mabud instructing him to

vacate the property on or before 31 March 2021. During March 2021 and June 2021 settlement negotiations took place to avoid litigation. The parties were represented by Mr. Imran Kaka for G en M Motors and Mr. Cachet Loxton who at the time represented Mabud. Consequently, on 28 June 2021 and at Klerskdorp, an express verbal settlement was reached between the parties duly represented by the respective attorneys. In terms of the agreement, Mabud agreed to vacate the property on or before 31 August 2021. Despite the settlement agreement, Mabud and the second respondent remain in possession of the property and have failed to vacate the property. Whilst Mabud disavows any such agreement maintaining that he was not a party thereto, both attorneys have deposed to confirmatory affidavits confirming their respective mandates in settling the matter.

[10] On 22 September 2021 G en M Motors and Shalala Property approached the Magistrates' Court, Klerksdorp for an order evicting the first and second respondents from the property. The application was dismissed on a technical point predicated on short service of the application. The application was clearly not "dismissed" on the merits and the relief sought in the present application remains extant.

[11] Hussain asserts that the members interest in G en M Motors was purchased with the intention of renovating the property and to establish and conduct a convenience store to their benefit and that of G en M Motors.

[12] Mabud seeks condonation for the late filing of the answering affidavit which was filed two (2) days out of time. The application, unopposed, is granted in the interest of a proper ventilation of the issues, with no prejudice to G en M Motors.

[13] Mabud purports to raise two points *in limine*. First, he challenges the authority of Hussain and Alli to bring this application as the alleged new members of G en M Motors. Second, Mabud states he will argue that he not only entered into a lease agreement with Kaka, but an agreement of sale of a business as a going concern. To this end he appends a copy of the purported agreement of sale to his affidavit. Mabud relying on the purported agreement of sale contends that Hussain and Alli would be in breach of such agreement. For purposes of the present application, the very nature of the agreement of sale on the business as a going concern which is recorded at clauses 1, 3 and 6 is quoted:

"**1. SALE**

1.1. The Seller hereby sells to the Purchaser who purchases the hereinafter mentioned business as a going concern:

E10 CAFÉ

SHOP 1, SYLVIA BUILDING, STAND 1476, JOE SLOVE ROAD
KLERKSDORP
(hereinafter referred to as "the Business")
…
3. VALUE ADDED TAX
…
3.3.1 The Business constitutes an enterprise as defined in the Act and is sold as a going concern that will on the date of sale be an income earning activity capable of separate operation, ….

3.3.2 The assets, stock and shelving and all other aspects of the business that are necessary for carrying on the enterprise, are being disposed of to the Purchaser in terms of this Agreement.

...

6. DELIVERY OF THE ENTERPRISE

The Seller shall give The Purchaser ownership and control of the business on 1 April 2018.

6.1 The Seller warrants that:

6.1.1 He is, or by the effective date will be, the sole owner of the assets being sold and entitled to transfer them to the Purchaser;

6.1.2 The business complies with all the laws and requirements laid down by the local authority for the conduct of a business."

[14] In reply to G en M Motors case and in particular ad paragraph 15.1, Mabud contends that if the lease commenced on 1 January 2014 and was for a period of five years which expired on 31 December 2019, G en M Motors does not have legal standing to bring this application. Then, as to ad paragraph 15.2 of G en M Motors case, Mabud contends that Shalala Property is aware of the agreement of sale between himself and Kaka, and if there is any illegality in the occupation of the premises by himself, that Shalala Property has condoned same.

[15] In reply, Hussain contends that he is a member of G en M Motors and to that end has annexed the necessary proof from the Companies and Intellectual Property Commission (CIPC). As to the terms and conditions of the agreement between the Mabud and Kaka, Hussain contends that the sale of the business as a going concern agreement is irrelevant to this application. The sale of the

business as going concern he maintains does not make Mabud the owner of the immovable property on which he is conducting his business.

[16] As to the *locus standi* of Hussain and Alli to bring this application, they contend that G en M Motors has entered into a verbal agreement with Shalala Property, which entitles G en M Motors to possession and use of the property, which bestows *locus standi* for as long as the lease subsists.

[17] In a somewhat unprecedented set of heads of argument drafted by Adv. La Grange which traverses a single page, the following submissions are made:

"Eviction

1. This is an application for eviction of the first and second respondents from a business premises property.
2. The third respondent the lawful owner of the property does not oppose the relief sought.

Opposition bad in law

3. The first respondent a Bangladeshi national opposes the relief on the basis that:-

4. The applicant does not have *locus standi* to bring the application - which is bad in law considering the admission of the verbal lease agreement which grant the applicant the right to understand position.

5. The first respondent has bought the business ie a general dealership consisting of stock, shelves etc that was conducted on the property and is therefore entitled to the use of the property in perpetuity - which is bad in law and absurd.

Costs

6. In the premises, the opposition is bad in law more so as the first respondent admits that no sub-lease is in force, with no prospects of success and indisputably an abuse of the court and court process which applicants submit warrants are penalty cost order on an attorney-client scale."

[18] The heads of argument provided were unhelpful. It failed to deal with the principles applicable to the law of lease or any relevant case law on the point, to justify the relief sought or in opposition of the relief sought. The significance of heads of argument cannot be underemphasized for the important role it plays in the administration of justice. In regard to the importance and function of heads of argument , the following was stated *S v Ntuli* 2003 (4) SA 258 (W) at paragraph 16:

"Heads of argument serve a critical purpose. They ought to articulate the best argument available to the appellant. They ought to engage fairly with the evidence and to advance submissions in relation thereto. They ought to deal with the case law. Where this is not done and the work is left to the Judges, justice cannot be seen to be done. Accordingly, it is essential that those who

have the privilege of appearing in the Superior Courts do their duty scrupulously in this regard."

[19] Whilst *Ntuli* might be relevant to a criminal appeal, the principle enunciated equally applies to the civil proceedings. Mindful of the critical role served by heads of argument, the adage that they are for the convenience of the Court, does not absolve Counsel from assistance not only the client but the Court to whom Counsel owes fealty. The heads of argument left this Court to research the applicable law, to do justice to the parties. Undoubtedly, this lack of preparation may intrude on the presentation of the application and logically has an impact on costs in appropriate matters.

[20] A comparative analysis of the case law relevant to the relief sought in the present application vis-à-vis the status of G en M Motors as a sub-lessor brings the judgment of the Constitutional Court in *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another* (CCT211/14) [2015] ZACC 34; 2016 (1) SA 621 (CC); 2016 (1) BCLR 28 (CC) (19 November 2015), squarely within focus. The application for leave to appeal in *Mighty Solutions* raised questions on the content of the law of lease. It concerned an attempt by a petrol wholesaler (Engen) to evict a licensed petroleum retailer (Mighty Solutions) from premises in Soweto where Mighty Solutions conducted business under the brand of Engen.

[21] Engen leased a property from its registered owner. Engen therefore became a sub-lessor. G en M Motors presently leases the property from Shalala Property and is, as with Engen, a sub-lessor.

[22] After developing the property Engen entered into an operating lease with Mighty Solutions in September 2005. Mighty Solutions operated a service station on the site pursuant to this lease, which would be valid until the end of March 2008 and was cancellable at a month's notice by either party. The operating lease between Engen and Mighty Solutions expired at the end of March 2008. It then continued on a month-to-month basis until it was validly cancelled in July 2009. Following the cancellation, Mighty Solutions continued to occupy the site. It continued using Engen's equipment, signage and trademarks without paying rent to Engen or the registered property owner.

[23] In the present application, Mabud entered into an agreement of lease with Kaka of Shop 1 of the property. The only distinguishable feature from *Mighty Solutions* which Mabud does not proffer a reasonable explanation or any defence for that matter, is that the sub-lease agreement between Kaka (representing G en M Motors as its sole member at the time) and Mabud was in breach of clause 11 of the lease agreement between Shalala Property and G en M Motors. The sublease agreement was therefore void *ab initio*. Mabud does not dispute the void sublease agreement. For purposes of the present application, it must be accepted that Mabud after the effluxion of time of the void sublease agreement on 31 December 2019, has had no lease agreement either with G en M Motors as sub-lessor or Shalala Property. The only defence, if it can even be typified as such, is the belief of Mabud that he in fact bought the property or at the very least Shop 1 from Kaka who represented G en M Motors at the time. This brings to the fore the

question whether G en M Motors (presently represented by Alli and Hussain) have *locus standi* as sub-lessor of the property, which includes Shop 1 to bring the application for the eviction of Mabud and the second respondent.

[24] In *Mighty Solutions*, bearing in mind the distinction on the void sublease agreement *in casu*, Mighty solutions under the question whether Engen had standing to evict Mighty Solutions, argued that Engen lacks legal standing to seek its eviction because Engen's head lease with the site owner had terminated before the commencement of the eviction proceedings. The argument rested on the common law rule enunciated in *Boompret Investments (Pty) Ltd and Another v Paardekraal Concession Store (Pty) Ltd* 1990 (1) SA 347 (A) that a lessee has no right in law to question the right of a lessor to occupy a property.

[25] As stated in *Mighty Solutions*: *"Engen argued that the position of a sub-lessor would be untenable if it could not eject the sub-lessee at the termination of a lease without first demonstrating its title. If the head lease and the sub-lease expired at the same time, the sub-lessor would be bound contractually to the lessor under the head lease to restore vacant possession of the premises to it. If the sub-lessor did not do so because its sub-tenant remained in occupation it would become liable to pay damages for holding over to its lessor. At the same time, on Mighty Solutions' argument, it would have no legal standing to seek an ejectment order against the sub-tenant, which would be under no obligation to pay rental for its occupation of the premises. It would be unable to fulfil its own contractual obligations and unable to compel the sub-tenant to fulfil its obligations. That would be an untenable situation. It is no*

answer to say that the lessor under the head lease would have standing. It might choose to confine itself to a claim for damages against its tenant."

[26] The Constitutional Court on a question what the common law position is, found that as noted in *Boompret*, it is an established rule that when being sued for eviction at the termination of a lease, a lessee cannot raise as a defence that the lessor has no right to occupy the property. This flows naturally from the rule that a valid lease does not rest on the lessor having any title. In *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A) (*Frye's*) at 581A – for example – it was stated that there *"can be no doubt that neither a sale nor a lease is void merely because the seller or lessor is not the owner of the property sold or leased"*. Unless expressly agreed, a lessor does not warrant that it is entitled to let.

[27] The Constitutional Court observed that as far back as the 1893 Supreme Court of Transvaal decision in *The Salisbury Gold Mining Company v The Klipriviersberg Estate* (1893) Hertzog 186 (*Salisbury*) at 190 one finds abundant reference in our common law to the rule mentioned in *Boompret*. It found, for example, in *Loxton v Le Hanie* (1905) 22 SC 577 (*Loxton*) at 578 that the Supreme Court of the Cape of Good Hope held in 1905 that "it is not competent to a lessee to dispute his landlord's title". It was prepared to apply this rule in the context of a lessee attempting to resist eviction (though the summons in that case claimed only damages). In *Loxton* the claim was brought by the owners. The Constitutional Court further pointed out that in *Kala Singh v Germiston Municipality* 1912 TPD 155 (*Kala Singh*), that the Transvaal

Provincial Division in 1912 **directly applied the rule in the context of a sub-lessor seeking to evict a sub-lessee after the termination of the sub-lease**.

[28] **In a manner analogous to Mighty Solutions' defence, in the present application, the sub-lessee (whether lawful or not) attempted to resist ejectment on the basis that the sub-lessor's (G en Motors) head lease with the owner of the land was invalid**.

[29] The Constitutional Court found t**he facts of *Mighty Solutions* did not require it to consider – as the Court did in *Boompret* – whether a lessee can rely on a defence that the lessor lacks valid title in circumstances where the lessee asserts its own independent title to the premises. Mighty Solutions did not establish that it had acquired any independent title to the premises**. In the present application, albeit incorrectly so, based on Mabud's misconstrued belief that the Agreement of Sale of the Goodwill of an Ongoing Business, by Kaka to himself, constitutes him having bought a portion of the immovable property through that agreement. The very terms of the Goodwill agreement militates against that misconceived belief. Therefore in *Mighty Solutions*, The Constitutional Court noted that the Court in *Boompret* considered a scenario where the lessee might have obtained an "independent" right to remain in occupation, one "acquired *dehors* [outside the scope of] the lease". The existence of an enrichment *lien* against Engen – doubtful as this proposition may be – would anyway not give rise to independent title. It would not be a right against the

owner and would thus fall outside the circumstances contemplated in *Boompret*. Similarly, therefore, the "acquired right of ownership to a portion of the property, being Shop 1" whether on a misconceived belief of Mabud or disingenuous attempt at occupation of the property in perpetuity, did not give to him an independent title to the property, which is owned not by G en M Motors, but Shalala Property.

[30] The constitutional Court concluded in *Mighty Solutions*, that *"The rule is clear: a lessee or sub-lessee cannot rely on a defence that its lessor or sub-lessor lacks title in order to resist eviction upon termination of the lease. Mighty Solutions is a sub-lessee trying to do exactly that.* ***Under the common law Engen had standing to evict Mighty Solutions****."*

[31] It should follow axiomatically from the *ratio* decidendi in *Mighty Solutions* that points *in limine*, if they can be termed such are without merit and stand to be dismissed. G en M Motors (presently represented by Hussain and Alli) as its new members, have full title to launch this application. G en M Motors has *locus standi* as the present sub-lessor in terms of its agreement in terms of a verbal head-lease with Shalala Property (the lessor), to bring the application for the eviction of Mabud and the second respondent from the property. And, in the final analysis, save for his agreement where the goodwill of the business was sold to him by Kaka, Mabud has no other independent title to Shop 1, which forms part of the property.

[32] I am accordingly satisfied that G en M Motors has made a case for the eviction of Mabud and the second respondent from the property. The only issue to my mind being the period to be afforded to the respondents to vacate the property.

[33] On the question of costs, Mabud has frustrated the Court process in this Court since 2022, in circumstances where he has had no valid defence in law to remain in occupation of the property. Mabud in the face of confirmatory affidavits on oath regarding the agreement to vacate the property as far back as August 2021, elected unilaterally to ignore the agreement and continued his illegal occupation of the property. His conduct undoubtedly merits censure which would be achieved through a punitive cost order.

Order

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

1. The first and second respondents are ordered to vacate the property within thirty (30) days of service of this order by the Sheriff of the Court.

2. The Sheriff or his lawful Deputy are directed and authorised to take such steps as may be reasonably necessary to evict the respondents from the property if the respondents fail to vacate the property following compliance with paragraph 1 of this order.

3. The first respondent is ordered to pay the costs of this application on the scale as between attorney and client.

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A H PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

FOR THE APPLICANT : ADV. JG Le Grange

Instructed by : Nienaber & Wissing Attorneys
Office 1 First Floor
4204 Palmer Crescent
LEOPARD PARK

MAHIKENG

FOR THE RESPONDENT: ADV. I HUSSAIN SC

Instructed by : Russia Langa Attorneys

c/o GA Mokaa Attorneys

1495 Masisbi Street

MONTSHIWA

MAHIKENG