**REPUBLIC OF SOUTH AFRICA**

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

**CASE NO: 2019/13913**

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

**12 MAY 2020**

**SIGNATURE**

In the matter between:

**MAKHOSONKE TSHABALALA N.O** **APPLICANT**
(In his capacity as Executor of the Estate
of the Late Simon Mavuso Tshabalala No: 19324/96)

and

**AMANULLAH MIA** **RESPONDENT**
(ID NO: 630523 5266 084)

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**JUDGMENT**

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**THOMPSON AJ**

[1] The Applicant is the executor of the Estate Late Simon Mabuso Tshabalala. He has been duly appointed as the executor in the aforesaid estate late and there is no

dispute that he has been so appointed. The Respondent is the occupant of Erf 54 Emoyeni Section, Tembisa, more commonly known as 54 Emoyeni Section, Cnr Mokwetje and Twala Streets, Tembisa ("the property"). At the time that these proceedings were launched, the Respondent occupied the property by virtue of a written agreement of lease ("the lease") which was entered into by the Applicant with the Respondent in relation to the property.

[2] The lease was entered into on 20 February 2014 whereby the Respondent leased the property from the Applicant for a period of five years calculated from 1 February 2014 to 31 January 2019. The Respondent was liable to pay rental to the Applicant in the sum of R13 000,00 per month for the period 1 February 2014 to 31 January 2015, whereafter the rent would escalate at 9% per annum. The rental was payable by the Respondent to the Applicant in advance on or before the first day of every month with effect from 1 February 2014 and thereafter on or before the first day of each successive month.

[3] The lease made provision therefore that the Applicant will be responsible for the provision of municipal services to the property in respect of water, electricity, sewerage removal and refuge removal. The lease does, however, provide that the Applicant will not be liable for any direct or consequential damages suffered by the Respondent as a result of the disruption of the services for whatsoever reason. This latter clause was due, as was submitted on behalf of the Applicant, to an oversight not relief upon by the Applicant in its application. The lease further provided that the Applicant will be liable for the payment of the municipal rates at the property and the Respondent will be liable for the payment of electricity and water consumed by it,

payable on the rendering of a statement by the local authority (for the electricity supply) and demand by the Applicant (for the water supply).

[4] The lease contains a rather peculiar clause which is not ordinarily found in lease agreements. Clause 5.4 of the lease provides that the Applicant is indebted in a substantial sum to the Ekhuruleni Metropolitan Municipality ("the municipality") in respect of arrear electricity, water, rates and taxes in respect of the property. These arrears, the clause reads further, resulted in the municipality terminating the supply of electricity to the property. The Applicant undertook and warranted in clause 5.4 of the lease that immediately upon payment by the Respondent of the sum of R62 000,00, which is an initial payment referred to in a settlement agreement between the parties, the electricity supply to the property will be restored. Clause 5.4 further provides that should the supply of electricity not be restored within three days of the initial payment being made by the Respondent to the Applicant in terms of the settlement agreement, that is to say the R62 000,00 payment, or in the event of the electricity supply being terminated again by the municipality as a result of the Applicant's non-compliance with its payment arrangement with the municipality, then the Applicant shall be entitled to withhold payment of rentals until the electricity supply to the property and premises had been restored. I pause to point out that I am not called upon to determine the arrear rental sum in these proceedings.

[5] The lease contains further terms which is usually found in written lease agreements. It contains a breach clause whereby, should the Respondent be in breach of the lease by failing to pay rentals or any other amount which is due in terms of the lease on the due date the Applicant may cancel the agreement in which event the Applicant shall be entitled to immediate occupation of the property. This cancellation

the Applicant may do without the need for demand. The breach clause further provides that should there be any other breach then the Applicant will be required to place the Respondent *in mora,* giving him seven days after written notice to remedy the breach. The lease also contains an entire agreement clause whereby it is indicated that no amendments to the terms and conditions of the lease shall be of any force and effect unless it is reduced to writing and signed by all the parties. The entire agreement clause also provides that the lease serves to recall and replace any previous verbal agreements save as alluded to in the settlement agreement which relates to former rentals that is executed simultaneously with the lease.

[6] The settlement agreement referred to in the entire agreement clause has not been referred to in the founding papers nor is it attached to any of the affidavits submitted by either party. The Applicant places no reliance on the terms of the settlement agreement or on the former rentals alluded to in the entire agreement clause. Due to the aforesaid I therefore take no heed of the unnecessary allegation contained in the Applicant's heads of argument, with reference to the earlier settlement agreement and the lease that the Respondent "[*i*]*n the Respondent's signature style, he has once again breached the lease …*" In the absence of any reliance on the former rental in the settlement agreement this allegation is nothing more than an attempt at clouding this Court's judgment in relation to the Respondent and his conduct, therefore amounts to an attempt at entering character evidence into the record, which is in any event inadmissible.

[7] Without setting out how the quantum of the alleged arrear rental in the sum of R248 614,87 is arrived at, it is alleged that the Respondent is in arrears in the aforesaid sum. The Respondent does, to the assistance of the Applicant, admit that he did not

make payment of rentals for a considerable time. In this regard the Respondent relies on the provisions of clause 5.4 that he needed not pay rental in instances where the electricity supply to the property has been terminated. The Respondent, in advancing this version, goes further. He indicated that for a period up until two years prior to the signature of the answering affidavit, which answering affidavit was signed on 14 June 2019, the property had no electricity. According to the Respondent for approximately the last two years prior to the signing of the answering affidavit, he utilised prepaid electricity and therefore had a supply of electricity to the property for the last two years.

[8] The Respondent does not, as one would have expected him to do if he is not in arrears with the rental payments, to disclose to this Court the payments of rentals made for, at least, the last two years prior to the signing of the answering affidavit. The Applicant, in an attempt to gainsay the defence raised by the Respondent, annexes a schedule of rentals raised and payments made since 1 February 2014 until 1 April 2019. Having regard to the vague allegation by the Respondent as to when the electricity to the property, on his version, had been finally restored, I have, in particular, perused the schedule from 1 July 2017 up until 1 April 2019. It can be seen that no payments were received for July, August or September of 2017. A bulk payment of R45 000,00 was then made on the 21st September 2017. For the months of October, November, December 2017 and January 2018 no rentals were received. On 11 January 2018 a lump sum of R35 000,00 was received. A basic calculation of the rental sum of R16 835,38 for a period of seven months amount to the aggregate sum of R117 847,66. Taking into consideration the two bulk payments the arrear rental for that period amounts to the sum of R37 847,66.

[9] No rental was paid for February or March 2018. A sum of R15 000,00, which is lesser than the monthly rental sum and far less than the aggregate rental due for February and March 2019, was paid on 28 March 2018. No rental was paid for April or May 2018, however on 28 May 2018 a lump sum of R30 000,01 was paid by the Respondent. This latter sum does not equate to the aggregate rental due for the two months rental of April and May 2018. For the period June, July, August and September 2018, no rental payments were made. A lump sum payment of R30 000,00 was made during on 11 September 2019. Having regard to the schedule drawn up by the Applicant there is no instance whereby the Respondent had, in full, settled the arrears arising from the lease terms in relation to the payment of rental, between the period 1 July 2017 to 1 April 2019.

[10] The Respondent has not objected to the schedule annexed to the replying affidavit nor has the Respondent sought leave to file a further affidavit to deal with the contents of the schedule. I am in any event of the view that the schedule which is annexed to the replying affidavit constitutes nothing more than further corroborating facts[1] and as such regard can be had thereto. In my view the breach of the lease have been established by the Applicant.

[11] The Applicant, quite unnecessarily in my view, placed the Respondent *in mora* for the non-payment of the rental by way of a letter dated 8 February 2019 from his attorneys. This letter of demand was served by the Sheriff on 18 February 2019 at the property upon a cashier identified as Nizar Kahn. Although the *mora* letter was, in my view, unnecessary, no response thereto was received. As a result, the Applicant's attorneys caused a letter of cancellation of the lease, dated 26 February 2019, to be

[1] ***eBotswana (Pty) Ltd v Sentech (Pty) Ltd and Others*** 2013(6) SA 327(GSJ) at para 28

served on the Respondent at the property by way of service on a supervisor identified as Allendin Kahn. The Respondent indicates that he cannot not dispute that the letters may have been served on an employee at the property, but denies having received the letters. He does, however, dispute that Nizar Khan is employed by him at the property whilst, at the same time admitting that Nizar Khan is employed by him but at another business of his in Tembisa.

[12] It is a trite principle of law that a return of service by a Sheriff constitutes *prima facie* evidence of the matters therein stated.[2] As the return of service constitutes strong *prima facie* proof[3] of the contents thereof, I am of the view that the Respondent's denial that he did not receive the letter of cancellation is bald, vague and unsubstantiated. For example the return of service for the service of the cancellation letter indicates that the service was affected at 8:45 on 19 March 2019 and the Respondent was temporarily absent from the property at that stage. In order to overcome the *prima facie* prove, the Respondent could have explained at what time the business opened, why he would not have been absent from the property or, in the event of his absence, who he would have left in charge at the property on that particular day. This is of particular importance as he does not deny that Allendin Khan is employed by him. In my view, the termination of the lease was duly and properly communicated to the Respondent.

[13] Even if I am incorrect in the aforesaid, at the time that the application was before me the lease had, *ex facie* the amended terms of the lease, automatically terminated due to the effluxion of time. The Respondent contended that this was not so. According

[2] Section 43(2) of the Superior Court's Act 10 of 2013
[3] ***Pienaar v TLB Transport CC*** (10521/2017) [2018] ZAGPJHC128 (10 May 2018) at para 4

to the Respondent the lease made provision for the renewal of the lease for a further period of four years. The difficulty for the Respondent in this regard is that the entire portion dealing with the existence of the option was deleted and initialled by both parties to the agreement. According to the Respondent the only portion thereof that should have been deleted was the indicated period of five years and that it should have been substituted with the period of four years. At least three difficulties arise for the Respondent in this regard.

[14] Firstly there is no claim for rectification for the lease. In light of the entire agreement clause, the parties are bound by the express terms of the lease and, absent a claim for rectification, additional terms cannot be read into the lease. Secondly the Respondent does not deny that he signed the lease at the portion that was deleted. In this regard the Respondent does not explain why he signed where the entire portion had been deleted. Lastly the insertion of the number and word “four” appears nowhere at the deletion to remotely give credence to the allegation proffered by the Respondent.

[15] I must mention that the wording of the deleted portion is discernible. The deleted portion makes specific provision that the option to renew can only be exercised if the Respondent is not in breach of any material term of the lease. At the time that the option was purportedly exercised, 3 October 2018, the Respondent was already in breach and therefore precluded from exercising the option. The Respondent does not even begin to attempt to deal with this difficulty to his claim that he exercised the option.

[16] Ultimately, in the absence of a claim for rectification of the lease, I am bound to follow the express wording of the lease[4].

[17] This brings me to the next defence that has been raised by the Respondent which, in my view, is the high watermark of the Respondent's opposition to the relief claimed by the Applicant. It is undisputed that the deceased held the property in terms of a site permit conferred to him in terms of Government Notice R.1034 of 14 June 1968, but that he was not the owner of the property. In this regard the Respondent formulated his opposition in his answering affidavit as follows:

> *"It is trite that rights conferred on Black persons until the opening of a township register amounted to de jure a right of leasehold and not ownership. I submit that in the absence of any further evidential material, ownership in the property, vests with the State.*
>
> *I further submit that annexure "D" without further evidence, cannot and does not properly confer rights of ownership in the property to the Applicant."*

[18] The Respondent developed the aforesaid submission in the heads of argument filed on his behalf under the heading "***Ownership vesting with the State***". In this regard the Respondent undertook a short discourse of the history of legislation governing 'black' urban areas in the heads of argument filed on his behalf. Following upon the history of the relevant legislation, the Respondent formulated its opposition to the Applicant's title as follows:

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[4] ***Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*** (183/17) [2017] ZASCA176; 2018(2) SA314 (SCA) (1 December 2017) at para [23]

"*Although leasehold constituted stronger rights than the other permits, it remained a limited real right only and still did not confer ownership. Instead ownership of the land remained with the relevant local authority…*

*It follows then that if the property were not to fall into the estate of the* [the deceased] *the State would be the owner of the property and the authority to institute eviction proceedings would only vest with the State. …*

*The Respondent does not with respect challenge the Applicant's right to occupy the property as alleged, whether ownership vests with the State or the Applicant however is a pertinent dispute which may very well require the matter to be dismissed or oral evidence to be tendered"*

[19] It is therefore evident that the Respondent challenges the *locus standi* of the Applicant on the basis that the deceased is not the owner of the property and as a result the Applicant, as the custodian and person in control of the deceased estate, has no *locus standi* to seek the Respondent's eviction from the property as the property, so the dispute at the instance of the Respondent goes, does not necessarily fall within the deceased estate.

[20] This argument, in terms of settled law, is misplaced. It is common cause that the Respondent entered into the lease with the Applicant. That the Applicant could enter into a valid lease with the Respondent relating to the property does not rest on the Applicant having any title to the property. Unless a Lessor expressly agrees thereto, a Lessor does not warrant that he is entitled to let the property to a Lessee. This has the effect of the establishment of a rule in our law that when a Lessee is 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. The rule is clear. Ultimately, the

Respondent, as Lessee, cannot rely on the defence that the Applicant, as Lessor, lacks title in order to resist the eviction upon the termination of the lease.[5]

[21] In any event, despite the Applicant, in his founding affidavit, creating a heading termed "***OWNERSHIP****",* the Applicant at no stage alleges that either he or the deceased is the owner of the property. The Applicant does no more than allege that the deceased was the lawful holder of the property by virtue of the site permit that is attached to the founding affidavit. As further information the Applicant points out that the property is in the process of being transferred to the estate of the deceased by the Gauteng Department of Human Settlement. The Respondent in its opposition in his answering affidavit confines himself to a challenge to the ownership of the property, however the admission is made that the deceased had the *de jure* right of occupation of the property, which admission is reiterated in the Respondent's heads of argument.

[22] As the Applicant need not show that he is the owner of the property being let to the Respondent and the failure to do so will not affect the validity of the lease entered into between him and the Respondent[6] and, at the end of the lease, the Respondent is obliged to restore vacant possession of the property to the Applicant and further that as the Applicant has a contractual right to demand the ejectment of the Respondent at the end of the lease, irrespective of whether the Applicant has any real or personal right entitling it to occupation, I am of the view that the Respondent's opposition in this regard should fail.

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[5] ***Mighty Solutions CC t/a Orlando Service Station v Engine Petroleum Limited and Another*** (CCT211/14) [2015] ZACC34; 2016(1) SA621(CC); 2016(1) BCLR 2008 (CC) (19 November 2015) at para [28] and [33]
[6] ***Mpange and Others v Sethole*** (07/7063) [2007] ZAGPHC202 (22 June 2007) at para [24]

[23] Lastly the Respondent alleges that he has a claim for damages against the Applicant. The Respondent does not rely on a *lien* that would entitle him to seek the temporary prevention of his eviction until such time that security for the *lien* has been given. The Respondent also does not seek that these proceedings be stayed pending the institution and finalisation of an action for damages. In my view, should the Respondent be evicted that will not preclude him from pursuing a damages claim, if any, in due course.

[24] I am therefore of the view that the point *in limine* that the Respondent commenced his answering affidavit with, namely the existence of irresolvable disputes of fact on the papers cannot be sustained. I am of the view that the Respondent's version consists of bald and uncreditworthy denials and assertions, raises fictitious disputes of fact and is untenable to the degree that I am justified to rejecting the Respondent's opposition merely on the papers.[7]

[25] That leaves the issue of costs. The Applicant has prayed in his notice of motion that the Respondent is to pay the costs of the application on an attorney and client scale. This is permitted in terms of clause 14.3 of the lease. Clause 14.1 entitles the Applicant to institute proceedings in either the Magistrate's or Regional Court having jurisdiction over the Respondent whilst further providing that the Applicant is not obliged to so institute proceedings in either the Magistrate's or Regional Court. The

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[7] ***National Director of Public Prosecutions v Zuma*** [2009] ZASCA1; 2009(2) SA277 (SCA) at para [26]
"*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 affidavits, a final order can only be granted if the facts averred by the Applicant's affidavits, which have been admitted by the Respondent, together with the facts alleged by the latter, justifies such order. It may be different if the Respondent's version consists of bold or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, farfetched or so clearly untenable that the Court is justified in rejecting them merely on the papers.*"

Respondent has made no submissions as to why this application should have been brought in any Court other than this Court. As a matter of fact, taking into consideration the complexity of, at least, the ownership issue as raised by the Respondent, I am of the view that this matter was properly justiciable in this Court. There is no reason, in my view, why I should not enforce the contractually agreed term of attorney and client costs in this matter.

[26] In the premises I make the following Order:

1. Amanullah Mia (“the Respondent) is ordered to vacate Erf 54, Emoyeni Section, Tembisa, situated at 54 Emoyeni Section, Cnr Mokwetje and Twala Streets, Tembisa (“the premises”) forthwith;

2. The Respondent and all persons claiming any right or interest of occupation through the Respondent, be evicted from after 7 (SEVEN) days of the granting of this Order if the Respondent does not voluntarily vacate the property within such 7 (SEVEN) day period;

3. In the event that the Respondent and all persons claiming any right or interest of occupation through the Respondent fail to vacate the premises as ordered in paragraph 1 hereof, the Sheriff be and hereby is authorised and directed to evict such persons from the premises;

4. The Respondent is to pay the costs of the application on the attorney

and client scale.

**C E THOMPSON AJ**
**[Acting Judge of the High Court,**
**Gauteng Local Division,**
**Johannesburg]**

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| For the Applicant: | Adv. J C Viljoen |
| Instructed by: | McKenzie Van Der Merwe & Willemse |
| For the Respondent: | Adv. L Leeuw |
| Instructed by: | Sarlie & Ismail Inc. |
| Date of Hearing: | 11 May 2020 (matter decided on the papers) |
| Date of Judgment: | 12 May 2020 |

*****JUDGMENT DELIVERED BY UPLOADING ONTO CASELINES*****