

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

CASE NO: 024533/2023

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
25/03/2024	[REDACTED]
DATE	SIGNATURE

In the matter between:

ACCELERATE PROPERTY FUND LIMITED

Applicant

And

JEWEL MAYA CC

Respondent

(Registration No. 1986/000904/23) t/a WOMAG

JUDGMENT

LOXTON AJ

1. The applicant is the owner of a shopping complex known as the Leaping Frog Shopping Centre, situated at the Cor. of Winnie Madikizela Drive and Mulbarton Road, Fourways, Gauteng (*"the Property"*).
2. In January 2017 the applicant and the respondent concluded two agreements of lease. In terms of the first lease, the applicant let to the respondent, who leased from the applicant, certain premises within the property, described as shop No. G053A (*"the leased premises"*). In terms of the second lease, the respondent leased a storeroom from the applicant. This application concerns primarily the first lease (*"the lease"*).
3. The applicant alleges that the respondent breached of the terms of both leases in that it failed to pay the agreed monthly rental and charges. In consequence, the applicant cancelled the leases and instituted action against the respondent for the payment of arrear rentals and for damages. Those proceedings remain pending.
4. On 1 September 2023, Ms Buys, the manager of the property, noticed that the respondent had loaded various items onto trucks and was in the process of removing them from the property. The applicant's representative then prevented the trucks, which had been loaded with some of the goods which had been situated on the leased premises, from leaving the property.
5. The applicant brought an urgent *ex parte* application to enforce what it alleged was its landlord's hypothec over the goods which were being removed and the goods remaining on the leased premises, and 1 September 2023 Moorcroft AJ granted an order in the following terms:

"1. The respondent and/or any person acting for and on behalf of the respondent is interdicted and restrained from removing any and/or content of the leased premises referred to hereunder and to return items already moved pending the final determination of this matter.

*2. A Rule Nisi is issued calling upon all interested parties and show cause before this Honourable Court at **10:00 on 30 October 2023** as to why the following order should not be made final:*

*2.1 The applicant's landlord's hypothec in relation to the respondent and the movable property of the respondent located at **Shop No. G053A Leaping Frog Shopping Centre, Corner William Nicol Drive and Mulbarton Road** ("the premises") is confirmed.*

*2.2 The Sheriff of the Court is ordered and required to access the premises and to attach so much of the movable property found upon the property in order to satisfy the respondent's indebtedness in the amounts of **R1,460,317.48; R2,459,748,63; R372,672.10 and R443,873.59.***

2.3 The Sheriff of this Court shall execute this Order by recording the movable property under attachment with sufficient particularity in an inventory.

2.4 Upon security being given to the satisfaction of the Sheriff of the aforesaid Court for the amount of the applicant's claim and costs of the application for attachment, the

aforesaid property shall be released from attachment and upon such security be given, the Order for attachment shall ipso facto be discharged.

3. That this Order shall serve as the Sheriff's warrant of execution.

4. Respondent, in terms of Rule 6(12)(c) is entitled to, in terms of the provisions thereof, approach this Court to anticipate the order.

5. The costs of this application shall be reserved for determination on the return date."

6. The return date was extended and the matter was heard before me on 13 March 2024.
7. In the event, the confirmation of *rule nisi* was opposed not by the respondent, but by World of Marble and Granite 2000CC ("*Womag*"). That appears from the fact that, although the opposing affidavit and supporting affidavits were, according to the filing notice, delivered by "*the Respondent*", it is apparent from those affidavits that the confirmation of the *rule nisi* was in fact opposed not the respondent but by Womag.
8. The confusion between the separate identities of the respondent and Womag is apparent from the affidavit delivered by one Matityahou Sachs – entitled "*affidavit opposing ex parte application*"- who is both the sole member of the respondent and a member of Womag. A supporting affidavit was filed by one Oren Sachs, (the son of the main deponent), who states that he is the managing member of Womag and that he is also involved in the administration and management of the affairs of the respondent. Thus,

despite the fact that the respondent and Womag are notionally two separate companies, they seem to be controlled by the same family members.

9. In argument, counsel for Womag advanced the following bases upon which the confirmation of the *rule nisi* ought to be refused:

- 12.1 The goods which were attached belong to Womag and not to the respondent and were marked as being the property of Womag.
- 12.2 Certain of the goods had been sold to a third party prior to their attachment and were accordingly owned by the third party.
- 12.3 The goods were attached after they had left the leased premises and were in trucks parked in another area of the property.
- 12.4 The applicant acted unlawfully in preventing the goods from leaving the property, prior to the issue of the *rule nisi*.


I shall deal with these defences below.

10. As regards the defence that the goods were, at the time of the hypothec incepted, owned by Womag and marked as such, the difficulty is that both Womag and the respondent sought to blur entirely the distinction between the two entities. I have already, in this regard, adverted to the common membership of the respondent and Womag and the lack of distinction between the two entities apparent from the affidavits delivered on behalf of Womag.
11. Furthermore, in the lease of shop No. G053A, the lessee is described as "*Jewel Maya CC ... trading as 'Womag & Mobelli'*".
12. There was accordingly in the lease a representation by the respondent that Womag was not an independent juristic entity, but simply the trading name

of the respondent. Because of the common membership of the respondent and Womag, it is not open to Womag to contend that the applicant ought to have appreciated, because the goods were labelled as belonging to Womag, that the goods were owned by a third party. That disposes of the first ground of opposition raised by Womag.

13. The second ground of opposition, namely that the goods had been sold to a third party and were therefore owned by a third party at the time the hypothec was exercised is bad in law because, absent a special arrangement between the purchaser and the seller, ownership only passes on delivery, which did not take place.
14. That leaves the final two grounds of opposition, namely that at the time the hypothec was sought to be exercised, the goods were not on the leased premises but in a different area which formed part of the property, and the applicant acted unlawfully by physically preventing Womag from removing the goods from the property, without the authority of a court order. That argument has some merit and I do not believe that the applicant's counter-argument, namely that the area where the trucks were parked formed part of common property, is persuasive.
15. Womag's difficulty however is that there is no evidence as to which goods were in the trucks at the relevant time and which remained on the leased premises. Since the onus is on Womag to demonstrate which of its goods ought to be released from the hypothec because Womag was unlawfully prevented from removing them from the property, this ground of opposition must also fail.
16. In the circumstances, the *rule nisi* must be confirmed. I accordingly grant the following order:

- 16.1.1. The *rule nisi* granted by Moorcroft AJ on 1 September 2023 is confirmed.
- 16.1.2. The costs of the application, which were reserved by Moorcroft AJ, are to be paid by the respondent.
- 16.1.3. Womag is to pay the costs occasioned by its opposition to the *rule nisi*.



C.D.A. LOXTON AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 15 March 2024

Date of judgment: 25 March 2024

Appearances

For the plaintiff: Adv S Aucamp

Instructed by: Reaan Swanepoel Inc

For the first defendant: Adv S J Martin

Instructed by: Smith Tabata Buchanan Boyes Attorneys