

✓ 15/11/2017

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 67432/13

In the matter between:

FIRSTRAND BANK LTD NO

First Applicant

STRATEGIC REAL ESTATE MANAGERS (PTY) LTD Second Applicant

EMIRA PROPERTY FUND LTD Third Applicant

and

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

14/11/17
DATE


SIGNATURE

DAMELIN (PTY) LTD

Respondent

JUDGMENT

Tuchten J:

- 1 The first applicant (the trustee) is the trustee of the Emira Property Fund, a portfolio in terms of the Collective Investment Schemes Act, 45 of 2002 (CISA). Emira Property Fund owned some non-residential premises in Pretoria (the premises) which formed part of its portfolio. Under a written lease concluded on 13 June 2013, Emira Property Fund leased the premises to the present respondent (the defendant).

- 2 By summons under the present case number which bears the date stamp of the Registrar of 22 October 2013 (the action)¹, the trustee sued the defendant for rental, damages of various kinds and ejectment. The trustee alleged that it had entered into the lease with the plaintiff.
- 3 In its plea, while admitting the conclusion of the lease as such, the defendant denied that the trustee had been a party to the lease and alleged that the defendant had concluded a lease with Emira Property Fund and that Eris Property Group (pty) Ltd had represented Emira Property Fund in concluding the lease. The defendant admitted having had beneficial occupation of the premises since March 2014.
- 4 Underlying these deceptively simple pleadings was a statutory scheme pursuant to CISA.² Section 1³ defines a collective investment scheme (a scheme) to mean certain schemes pursuant to which the public are invited or permitted to invest in a portfolio. A portfolio is defined as a group of assets in which the public is invited or permitted

¹ In the court file, there is a summons reflecting an action brought by the trustee against the defendant under case number 27703/14 and bearing the date stamp of the Registrar for 7 April 2014. There was no explanation for the presence or the existence of this summons and it played no part in the proceedings before me.

² In what follows, references will be to CISA unless some other statutory measure is indicated.

³ Subject to context indicating otherwise.

to acquire by a manager pursuant to a scheme a participatory interest as specified.

- 5 The second applicant (the manager) is the manager of the scheme.
- 6 The *manager* of a scheme is defined in s 1 as a person authorised to administer a scheme. Under s 68, a manager must appoint a trustee or a custodian for the manager's scheme. The duties of this trustee are set out in s 70. Broadly, the manager must operate the scheme and the trustee must exercise oversight over the manager.
- 7 But, in addition, the trustee has the power vested in a trustee by common law to vindicate the property over which, by virtue of the trustee's office, the trustee holds ownership. This is so even though the content of that ownership may be nothing more than mere legal ownership or bare dominium.⁴ It seems to me, therefore, that except to the extent that CISA limits the powers of a trustee of a scheme, such a trustee must enjoy all the powers of a trustee at common law.

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Yarram Trading CC v/a Tijuana Spur v ABSA Bank Ltd 2007 2 570 SCA para 13.

- 8 Those powers are commonly found in a trust deed. In the present case, the powers of the trustee arise from a deed between the manager and ABSA Bank Ltd dated 25 August 2003. The trustee was appointed as such at some time before 16 November 2012. The powers conferred on the trustee are wide and include all powers necessary to protect the interests of investors and to receive from the manager a wide range of the monies accruing from the assets held in the portfolio.
- 9 The factual position is further complicated by a written amalgamation agreement concluded on or about 17 March 2015 between the trustee and the third applicant (the cessionary). Under the amalgamation agreement, the cessionary purportedly acquired all the rights and assumed all the obligations of Emira Property Fund as from 1 July 2015. These rights, counsel agree, include all the rights which the trustee sought to assert against the defendant arising from the lease.
- 10 With this background in mind, I turn to the present application. The three applicants seek the joinder of the manager and the cessionary to the action. The joinder is sought as of convenience. It is said on behalf of the applicant that the cession pursuant to the amalgamation agreement took place after *litis contestatio* and that the Emira Property Fund was therefore entitled to continue with its action as the

cession had not in these circumstances divested it of its right of action.⁵

- 11 The reason for the joinder of the cessionary was said to be that the applicants did not want a situation to arise in which there was uncertainty as to which party, ie Emira Property Fund or the cessionary, was the correct party to bring the action.
- 12 In my judgment, the joinder of the cessionary is convenient, in the sense contemplated in relation to joinder of plaintiffs where the identity of the party entitled to sue is uncertain.⁶ The interests of justice are not served by allowing a situation to arise in which the real disputes between the parties recede into the background and are obscured by such procedural matters.
- 13 Regarding the position of the manager, as counsel for the defendant correctly pointed out, there is no explanation in the applicant's founding affidavit why the joinder of the manager was sought. Indeed, it is the applicants' case as presented by counsel, that the correct party to sue was indeed the trustee and that the applicants did not assert that the manager had any right of action against the defendant.

⁵ Referred to loosely as its *locus standi*.

⁶ Erasmus, *Superior Court Practice*, looseleaf ed, D1-128

14 But the answer to this apparent deficiency is to be found in the defendant's answering affidavit. The defendant contends that the right party to sue is the manager. For the same reason as given in paragraph 12, the joinder of the manager is therefore convenient.

15 This does not end the enquiry. Joinder of a party as plaintiff will not be permitted where the claim to be asserted by that party has prescribed. Counsel for the defendant submitted that the claims of the manager and the cessionary had indeed prescribed, because the period of three years, the operative prescription period under s 11(d) of the Prescription Act, 68 of 1969 applicable to the money claims had elapsed before the present application was brought. I need not deal with the eviction claim because it seems to be common cause that the defendant has already vacated the premises.

16 Of course, the fact that the prescriptive period has elapsed is not necessarily the end of the prescription enquiry. There remains for consideration whether completion of prescription has been delayed or prescription has been interrupted.⁷ Although no allegation was made in this regard by the applicants in their replying affidavit, as counsel conceded they should have, it emerges from other material before me that the applicants allege that the defendant made a payment of

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Sections 13, 14 and 15 of the Prescription Act.

R1,5 million on 14 November 2014, which the applicants allocated toward the indebtedness of the defendant which they allege. It seems to me therefore that despite the deficiency in the applicants' papers in this regard, there is good reason to believe that the applicants may have an answer to the reliance on prescription.

17 This brings me to a further point of counsel for the defendant. The argument in this regard is that the applicants have not sought to amend the present particulars of claim to reflect any right of action as vesting in the cessionary or the manager.

18 However, the applicants have put up a draft particulars of claim which they say they will seek by amendment to instal in place of the present particulars. It does seem to me that this draft is in some respects flawed but the amendment is not presently before me. What I find significant is that the applicants have sought in the draft particulars to lay a basis for and justify the joinder in the amendment they say they will seek. While the amended particulars of claim may not pass scrutiny when the amendment is sought, I think they are adequate for present purposes in the sense that the particulars broadly describe the case which the applicants seek to make against the defendant.

19 Counsel for the defendant submitted, correctly, that I should not grant a joinder which might prejudice the defendant in any defence of prescription which it might seek to raise or otherwise. I intend to ensure that my decision in this interlocutory application does not prejudice the defendant by issuing a declaratory order to that effect.

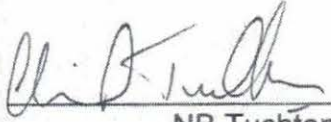
20 It may be, ultimately, on a proper ventilation of the legal issues raised at a trial or on exception, that the arguments of the defendant prevail. I express no opinion on that score one way or the other. But I do not consider the position to be so clear cut that I should rule finally on any of those issues in an interlocutory context. Interpretation of statutes and other documents in modern times requires a consideration not only of language but also of purpose and context in a unitary exercise.⁸

21 As to costs: the applicants are seeking an indulgence and their papers in this regard were subject to legitimate criticism by the defendant. The defendant was therefore entitled to oppose the application and present its views to the court. I shall therefore award the costs of the application to the defendant.

⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 SCA paras 18 and 25-26

22 I make the following order:

- 1 The second and third applicants are hereby joined as second and third plaintiffs respectively to the action in this court under case no. 67432/13.
- 2 Neither the fact of this order nor its contents shall in any way prejudice the respondent in this application, the defendant in the action, from raising any defence, whether prescription or otherwise, to the claims made against it in the action.
- 3 The applicants, jointly and severally, must pay the costs of the respondent.


NB Tuchten
Judge of the High Court
14 November 2017

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