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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG HIGH COURT DIVISION, PRETORIA

Case No: 38864/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

(Signed)

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Signature Date : 11 June 2020

In the matter between:

ELARDUSPARK SHOPPING CENTRE SHARE BLOCK (PTY) LTD Applicant

and

GHG SPECIALISED ENGINEERING SOLUTIONS (PTY) LTD

t/a DEBONAIRS First Respondent

SEAN JOSEPH KOEBERG Second Respondent

JUDGMENT

GW GIRDWOOD, AJ

1 The applicant seeks an order *inter alia* declaring that the lease entered into between it and the first respondent on 12 October 2015 has been cancelled and that the first respondent be ejected from the premises occupied by it at which it trades as "Debonairs" at Elarduspark Shopping Centre, Elarduspark, Pretoria East. The second respondent was cited *qua* surety for and co-principal debtor together with the first respondent for *inter alia* the due fulfilment and performance by the first respondent of all of its obligations which it owed to the applicant. Both respondents oppose the relief sought.

In limine

2 A point *in limine* is raised by the respondents to the effect that by virtue of the applicant being a juristic person, a resolution must be passed by its directors authorising the institution of the proceedings, calling in aid *Mall,*[1] *Yellow Star,*[2]

[1] *Mall (Cape) (Pty) Ltd v Merino Kooperasie Bpk* 1957 (2) SA 347 (C).
[2] *Business Partners Ltd v Yellow Star Properties 1061 (Pty) Ltd* 7188/2011 [2012] ZAKZDHC 96. This case is not authority for the proposition.

Royal Worcester[3] and *Langeberg*[4] as authority for the proposition. The absence of such a resolution, so it was argued, was fatal to the application.

3 In the founding affidavit the deponent, Ms Govender, states as follows:

> *"1.1 I am an adult female Legal Advisor in the employ of [….], Pretoria, Gauteng;*
>
> *1.2 My employer, [….], is the Applicant's duly authorised agent and handles and facilitates, inter alia, the administration of all the Applicant's properties;*
>
> *1.3 As such, I am duly authorised to depose to this affidavit;*
>
> *1.4 The file pertaining to the 1st and 2nd Respondents as well as the leased premises, which is the subject of the present application, falls under my direct control. I have acquainted myself with the contents of the file and the facts of the matter;*
>
> *1.5 Consequently the facts set out hereinafter fall within my personal knowledge unless the contrary appears from the context hereof and are both true and correct."*

4 In response to these allegations the following is said in paragraph 1.3 of the answering affidavit:

> *"The contents hereof are denied. There is no resolution attached to the application authorising the Deponent to act on behalf of the Applicant."*

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[3] *Royal Worcester Corset Co. v Kesleris Stores* 1927 CPD 143.
[4] *Langeberg Ko-Operasie Bpk v Folscher & Another* 1950 (2) SA 618 (C).

5 The practice of unnecessarily challenging the authority of an individual to bring applications has been decried.[5]

6 In applications it is the institution of the proceedings and the prosecution thereof which must be authorised. It is irrelevant whether the deponent has been authorised to depose to the founding affidavit.[6] Where there is a representative of a corporate entity, it is often alleged that the representative is authorised to represent the corporate entity. That does not prove any authority, but if the authority is challenged, the attorney signing the notice of motion is required to produce authority in the form of a resolution with or without a supporting power of attorney.[7] Moreover, the absence of authority is not fatal and can be overcome with ratification.[8]

7 The respondents thus ought to have invoked Uniform Rule 7(1) which provides a remedy for a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant.[9]

8 It has been held[10] that the sub-rule is, in essence, merely a means of achieving production of the ordinary power of attorney in order to establish the authority of an attorney to act for his client.

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[5] *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705 C and 705 H-I.
[6] *Ganes v Telkom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624 G-I.
[7] *Unlawful Occupiers: School Site v City of Johannesburg* 2005 (4) SA 199 (SCA).
[8] *Hyde Construction CC v Deuchar Family Trust & Another* 2015 (5) SA 388 (WCC) at para 29; *Baeck & Co. SA (Pty) Ltd v Van Zummeren* 1982 (2) SA 112 (W). This is to be distinguished from cases where, for example, trustees profess to act in their representative capacities on behalf of a trust which suffers from a capacity-defining condition.
[9] *Unlawful Occupiers, supra* at 206 H.

9 In any event, in the replying affidavit a resolution is put up which includes a ratification, which puts to rest any contention on the papers that the deponent is not authorised to depose to the founding affidavit.

10 In the face of the aforegoing documentary evidence in the replying affidavit, which is permitted,[11] I am accordingly satisfied that the application is thus properly before me. The point *in limine* must accordingly fail.

Merits

11 In the answering affidavit the respondents put up a letter from their attorney to City Property dated 10 May 2019. In that letter the respondents' attorney records that they "*act on behalf of GHG Specialised Engineering Solutions (Pty) Ltd ("our client") with Joe Koeberg acting as its representative*". Joe Koeberg is the second respondent's father. The following statements are recorded in that letter on behalf of the first respondent with Joe Koberg acting as its representative, namely :

11.1 that on or about 18 March 2019 the first respondent received a letter of demand for arrear rental in the amount of R227,022.14;

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[10] *SA Allied Workers' Union v De Klerk NO* 1990 (3) SA 423 (E) at 436 J – 437 A; *Gainsford NNO v Hiab AB* 2000 (3) SA 635 (W) at 640 D.

[11] See *Moosa and Cassim NNO v Community Development Ward* 1990 (3) SA 175 (A) at 180 H – 181 C; *Fairways Mall v SA Commercial Catering and Allied Workers' Union* 1999 (3) SA 752 (W) at 758 C-H.

11.2 that on or about 15 April 2019 the first respondent received a letter "*Confirmation of Termination*" requiring the first respondent to vacate the premises with immediate effect;

11.3 the first respondent proceeded to immediately make contact with its franchisor, Famous Brands, with a view to reaching agreement on the outstanding arrears;

11.4 an offer was made by Famous Brands on behalf of the first respondent, which was rejected by the applicant.

12 There is no dispute regarding the terms of the written lease agreement. The express terms of the lease provide that :

12.1 a "*material breach*" is defined as including the failure to make payment of any amount payable, when due;

12.2 if either party commits any material breach of the lease, or commits any other breach of the lease and fails to remedy such breach within 7 calendar days after receipt of written notice calling upon it to do so, then the other party (ie the applicant) shall be entitled without prejudice to its other rights to terminate the lease and reclaim possession of the premises.

13 There is no dispute that as of 15 April 2019 the first respondent had failed to make payment of amounts payable to the applicant when due.

14 The answering affidavit raised as a defence, for the first time, the contention that because the second respondent is the sole director of the first respondent,

and due to the fact that the second respondent was at all material times *non compos mentis* due to a drug addiction, he was not aware of any breach of the lease but that his father (Joe Koeberg) "*was trying to take care of my business matters*", apparently in his stead.

15 The respondents do not complain that the terms of the lease or the implementation thereof in respect of the relief sought is manifestly unreasonable or unfair to the extent that it is contrary to public policy. Such considerations are thus irrelevant to the issues for determination.

16 Privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily.

17 Clause 5.6 of the lease provides that all payments must be received by the applicant on the commencement date (of the lease) and on the first day of each and every month thereafter. The commencement date was 1 August 2015 with an expiry date of 31 July 2020. Evidently, the first respondent had no difficulty with making payments as might have been due from the commencement date until March - April 2019.

18 In support of his alleged condition, the second respondent relies upon a letter from Dr Venter, a psychiatrist, dated 21 January 2020. All that letter states is that Dr Venter treated the second respondent from 30 April 2019 when he had been admitted to Zwavelstream Clinic until being discharged on 17 May 2019 and that the second respondent had not attended any follow up visits since being discharged. By 30 April 2019, the time of the second applicant's

admission to the clinic, the first respondent had already received the applicant's written notice terminating the lease.

19 More fundamentally, however, the mental state of the second respondent, insofar as the first respondent is concerned, is not relevant. While the first respondent might have been left at sea adrift without a navigator, it matters not that its sole director was allegedly *non compos mentis*. The terms of the lease are clear. Rental was not paid when due and the applicant was entitled to exercise its rights against the first respondent as it did. To suggest otherwise would mean that the first respondent's obligations became suspended by virtue of its sole director's mental incapacity. This is untenable. The defence is accordingly without merit.

20 Finally, it was contended that because arrear amounts due had been paid (evidently by 17 May 2019 – after the notice of termination) and that the applicant had continued to invoice the first respondent for rental in terms of the lease, that the applicant had tacitly consented to the continuation of the lease. The difficulty with this that by the time of the arrears allegedly having been paid, the lease had already been cancelled. Furthermore, in terms of clause 10.4 of the lease where, notwithstanding termination of the lease, the tenant remained in occupation of the premises then it was obliged to continue to pay all amounts due to the landlord in terms of the agreement on due dates and that the landlord would be entitled without prejudice to its rights to accept those payments.

21 The first respondent thus remains in unlawful occupation of the premises and an order for ejectment will ensue. As for costs, the lease agreement provides that the applicant would be entitled to recover its costs on the attorney and client scale.

An order is granted in the following terms:

1. It is declared that the lease agreement entered into between the applicant and the first respondent on 12 October 2015 has been validly cancelled.

2. Evicting the first respondent and all other occupants from the premises situated at Shop 0036 Elarduspark Shopping Centre, 837 Barnard Street, Elarduspark, Pretoria East ("the premises") together with any movable property that is on or in the premises.

3. To the extent necessary, authorising and directing that the sheriff or his lawful deputy take such steps as are necessary to evict the first respondent from the premises.

4. The first and second respondents are to pay the costs of the application, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.

(Signed)

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GW GIRDWOOD

Acting Judge of the High Court

Appearances:

For the Applicant:	Adv Z Schoeman Instructed by: Savage Jooste & Adams Applicant's Attorneys King's Gate 5, 10th Street Cnr Brooklyn Road & Justice Mahomed Street Menlo Park, Pretoria Tel. 012 – 452 8200 Email: Tinak@savage.co.za & yolandaa@savage.co.za Ref: Mrs Kartoudes/yva/79306
For the Respondent:	A Ruszkowska (Attorney) Hefferman Attorneys 1007 Saxby Avenue Eldoraigne Centurion Tel. 012 – 653 1048 Email: aneta@sdhattorneys.co.za & wander@sdhattorneys.co.za Ref: Aneta/HA0052
Date heard:	4 May 2020
Date of judgment:	11 June 2020