IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 25461/2021

DELETE WHICHEVER IS NOT APPLICABLE

- REPORTABLE: **NO**
- OF INTEREST TO OTHER JUDGES: **NO**
- REVISED

[redacted]

22 March 2022
DATE

L.B. Vuma

Heard on: 12 October 2021
Delivered on: 22 March 2022

In the matter between:

DEY STREET PROPERTIES (PTY) LTD **Applicant**

and

SALENTIAS TRAVEL AND HOSPITALITY CC **Respondent**
t/a VAN HOBBS DRY CLEANERS

JUDGMENT

VUMA, AJ

INTRODUCTION

[1] On 20 July 2021 the applicant moved an urgent application which was filed on 24 May 2021 for an order in the following terms:

"*1. That this matter is enrolled and dealt with as one of urgency as contemplated in Rule 6(12) of the Uniform Rules of court.*

2. The respondent is evicted from Shop 4 and any such other portion of the commercial building situated in the immovable property known as Erf 167, Nieuw Muckleneuk Township, Registration Division IR, Province of Gauteng and located at the corner of Dey and Middle Streets, Nieuw Muckleneuk, Pretoria ("the Property") occupied by the respondent.

3. The Sheriff of this Court or his lawfully appointed Deputy is authorized and directed to evict the respondent and all entities occupying the Property by, through or under it.

4. The respondent is directed to pay the costs of this application on the scale as between attorney and client.

5. Further and/or alternative relief."

[2] The application was struck off the roll for lack of urgency with no order as to costs.

[3] In regard to the parties' description, Dey Street Properties (Pty) Ltd **("**the applicant") approaches this court for relief in terms of the *rei vindicatio* as the registered owner of the immovable property situated at 256 Dey Street, Nieuw Muckleneuk, Pretoria ("the property"). The property is improved by the rection of, *inter alia*, a commercial building comprising a number of shops.

[4] Salentias Travel and Hospitality CC t/a van Hobbs Dry Cleaners ("the respondent") is a lessee who carries on business as a dry cleaner from shop 4 ("the shop") on the property.

FACTUAL BACKGROUND

[5] The following are the background facts in *casu*:

5.1. The parties entered into a written 5-year written lease agreement which commenced on 1 March 2013.

5.2 The written lease agreement lapsed in March 2018.

5.3. To date there is no written extension lease agreement between the parties.

SUBMISSIONS ON BEHALF OF THE APPLICANT BY MR PULLINGER

[6] Mr Pullinger contends that the applicant, as the owner of the property which is in the respondent's possession, is entitled *ex debito justitiae* to the order sought. He submits that

the respondent is engaged in a vexatious strategy to delay and frustrate the applicant in vindicating the shop.

[7] It argues that the respondent has not paid rent since October 2018 (almost three years to the day of the launching of this application). On 5 October 2020 it demanded that the respondent vacate the property, which demand was repeated on 26 March 2021. The respondent refused to accede to the applicant's demands to vacate the property. It argues that the irrelevant and immaterial alleged factual disputes and other litigation raised by the respondent through unmeritorious and unsustainable points are unmeritorious and unsustainable and that none of the respondent's contentions give rise to a right of occupation of the shop which trumps the applicant's right as the owner to be in possession. This, despite not paying rent or any consideration for the shop since October 2018, the respondent clings to possession of the shop.

[8] The applicant argues that considerations of justice and equity do not apply considering that the issue purely falls on substantive law which only concerns the question whether the respondent has proved a right in law that is stronger than the applicant's right to be in possession of its own property. The applicant further argues that the alleged payment of the rent by the respondent into the applicant's attorney trust account does not discharge the respondent's obligation to pay, which conduct in any event amounts to self-help.

[9] The applicant contends that whereas the respondent relies on the alleged extension of the lease agreement, such reliance, as already alluded to above, is bad for two reasons,

firstly, the right was not extended timeously and secondly, the process to determine the amount of rent payable under 'the extended lease' was not followed and no agreement in regard thereto was reached.

[10] The applicant further contends that section 25 of the Constitution recognizes that a property owner should ordinarily be entitled to possession of his/her property and that for all intents and purposes section 25 of the Constitution entrenches the common law as set out in ***Chetty*** below.

[11] The applicant argues that the respondent has not adhered to the salutary rules of drafting in that they have failed to aver the primary facts that are sufficient to support the defence they seek to make out. Given the respondent's concession of the applicant's ownership of the property and its possession of same, it thus bears the onus to prove a stronger right than that asserted by the applicant.

[12] The applicant argues that the respondent relies on the correspondence dated October and November 2017, thus resting its entire case on the bald conclusion that

> "*However, and despite proper notice for the extension and despite acknowledging and confirming the said notice, have neither the previous landlord nor the applicant provided the respondent with the required new lease*."

[13] The applicant thus argues that the respondent's reliance on the correspondence dated October and November 2017 is nothing more than a bald conclusion which does not even pass muster in terms of ***Swissborough*** and ***Die Dros*** below. The applicant further contends that the respondent does not even plead clause 6, let alone compliance therewith, arguing that this means that the "defence" fails on application of the principles in ***Hart*** and ***Quatermark*** below. The applicant further argues that despite the respondent relying on the lease agreement and the timeous extension thereof, it does however fail to demonstrate compliance with the express provisions of the lease agreement.

[14] The applicant argues that the only question before this court therefore concerns whether the respondent has proved, as a matter of substantive law, with regard to the principles set out, that it has the right to occupy the shop and to carry on business therefrom. It further argues that the respondent has failed to demonstrate that it complied with express requirements of the right to extend contained in the lease agreement and that in the circumstances, the respondent has failed to demonstrate a substantive right of occupation of the shop on its own version.

[15] It argues that everything else pleaded by the respondent is a red herring given its irrelevance which have been intended to misdirect this court. The applicant argues that whatever happens in the litigation between the applicant and the Wilrus Trading CC ("Wilrus"), the fact that the applicant is the registered owner of the property on which the shop is situated will not change. The applicant further argues that the alleged factual dispute by the respondent in regard to rent calculation or utilities consumption calculation are not what this court is asked to try or deal with and therefore every such superfluous

evidence identified by the applicant in its replying affidavit is irrelevant and thus fall to be struck out.

[16] The applicant further denies that the respondent's attack on the deponent's founding and replying affidavit, arguing that the respondent conflated the competence of a witness to give evidence with that of authority, citing the court's decision in ***Ganes*** below and further the respondent did not file rule 7 notice which thus make the challenge the alleged incompetence.

[17] In regard to the application for condonation by the respondent, the applicant argues that that the respondent failed to file an affidavit satisfactorily to explain and cover the entire period of delay. It argues that the respondent failed to pass this threshold and that consequently its application falls far below the standard required in ***Hart***, ***Swissborough***, ***Die Dros*** and ***Quartermark*** below.

SUBMISSIONS BY MR DU TOIT ON BEHALF OF THE RESPONDENT

[18] In her answering affidavit, the respondent refers to the several court applications and actions instituted between the parties in the previous year, including the respondent's two successful spoliation application of January and March 2021. The appeal noted by the applicant in this regard is still pending. She also refers to the pending eviction application between the applicant and another tenant on the subject property, being Shell Garage operated by Wilrus Trading CC.

[19] In her answering affidavit the respondent further alleges that the applicant and another company colluded and concluded a sale of shares agreement to circumvent the clear and unambiguous terms of a Court Order granted on 19 November 2018 in this Court by the Honourable Justice Tuchten. Wilrus Trading CC, subsequently brought a counter application, *inter alia*, aimed at setting aside the sale of share agreement concluded between the applicant and that other company. From these the respondent argues that should the counter application succeed it will in effect change the ownership of the subject property. There is accordingly a pending dispute in respect of the ownership of the subject property, which should first be resolved before this application can be adjudicated given that at the foundation of the applicant's case is its alleged rights as owner of the subject property, the respondent argues.

[20] The respondent argues that the applicant has failed to provide a legal basis for the respondent's eviction and that its application should be dismissed with costs.

[21] On the merits of the application, the respondent argues, *inter alia*, the following:

21.1. <u>In re the Extension of the lease</u>:

21.1.1. That the respondent expressed and negotiated its intention to extend the lease as way back as in 2017 with the applicant's erstwhile shareholder.

21.2. <u>In re Dispute in respect of the alleged arrear rent and utilities</u>:

21.2.1. There is a factual dispute in respect of the utility charges. Summons for the debatement of the utility accounts was issued and served on the respondent on 15 April 2021 and prior to this application.

21.3. In re Factual dispute:

21.3.1. The respondent argues that there is a factual dispute in regard to the question whether the respondent provided proper notice for the extension of the lease agreement which lapsed during March 2018 and whether there is an existing lease agreement between the parties, which renders respondent in lawful occupation of the property. The foreseeable factual disputes thus render the applicant's motion proceedings approach untenable, instead of going the action route.

21.4. In re Dispute in respect of ownership of the subject matter:

21.4.1. The respondent contends that there is another pending eviction application between the applicant and another tenant, namely, the Shell Garage operated by Wilrus Trading CC to which Wilrus brought a counter application. In its counter application, Wilrus seeks the following order:

> "*That a declaratory order be granted declaring the sale agreement concluded between Perele Investments (Pty) Ltd in terms of which the shareholding in the Applicant was sold and transferred, to be invalid*."

21.4.2. Wilrus' counter application is premised on the fact that an order was

[22] Mr Du Toit argues that despite the fact that the respondent has been in occupation of the shop for 8 years the applicant wants to evict her nevertheless. The applicant's founding affidavit does not contain essential grounds to sustain it except the one sentence where the applicant simply states that the respondent does not have a right in law nor its (the applicant's) to occupy the property. Neither did the applicant plead that there was a breach of the lease agreement whereas the respondent shows in a great deal that there is a lease. Even in its letter to the respondent dated 15 October 2020 wherein the applicant alleges that the respondent is in breach of the lease agreement, it (the applicant) failed to deal with the lease agreement. It was only in its 26 March 2021 correspondence to the respondent that the applicant stated that the lease had terminated by effluxion of time, despite the applicant being made aware of the respondent's version since 2020. The respondent argues that just on the applicant's papers, the application stands to be dismissed. Even in its founding affidavit the applicant states three different amounts. Neither did the applicant deal with the lease agreement in its founding affidavit.

[23] The respondent further argues that the lease agreement was renewed by the applicant's former directors / shareholders and not the current ones which means therefore the applicant's current shareholders cannot doubt the respondent's version in this regard. The respondent argues that to the extent that motion proceedings are not decided on the balance of probabilities and given that the facts herein are so far-fetched and clearly untenable, this court should therefore rely on the ***National Scapmetal v Murray***. The respondent reiterates the email dated 30 October 2017 by the applicant's former

shareholder asking if the respondent wanted to renew the lease by another 5 years and the respondent accepted to extend the lease. In that email Roney committed to have the lease delivered the following week for the respondent's perusal and that at this stage their submission is that there was the meeting of the minds between the parties. Even the applicant's former attorney referred to the lease agreement. The respondent argues that its version is not far-fetched but reasonable.

[24] Regarding the applicant's shareholding dispute, the respondent argues that same is important in light of Tuchten J's November 2018 order. So the respondent argues that the ownership of that property might change hands and that the outcome of the said pending hearing could have an effect in this matter. Should the counter-application succeed, the new owner might proceed to present the respondent with a lease.

[25] Another issue is in relation to the actual arrear amount *re* the detabement of an account for which the applicant issued summons. The respondent relies on ***Erasmus v Pienaar*** below where in an application for an ejectment where the landlord had repudiated the lease agreement, the court said that the tenant had no obligation to pay. The respondent contends for the dismissal of the applicant's case arguing that the applicant has failed to make its case in the founding affidavit and that even on the respondent's version, the application stands to be dismissed.

[26] In regard to costs, the respondent contends that considering the bullying the applicant is putting the respondent through and the fact that the applicant was forewarned

there is a factual dispute, this makes this application vexatious since the intention of the applicant is to simply destroy the respondent. So the court should grant the punitive costs in favour of the respondent. It argues that as way back as 14 October 2020 the respondent warned the applicant against instituting motion proceedings instead of trial given the foreseeable factual disputes. The respondent further questions why the application was only brought at the time the applicant did whereas the previous lease agreement lapsed on 28 February 2021. This is despite clause 7 of the lapsed lease agreement which deals with breach providing for 7 days within which the respondent is to pay in order to rectify the breach after having to first write to the respondent to bring notice to it (the respondent).

[27] The respondent further questions the personal knowledge of the applicant's deponent, arguing that during the aforesaid time period the shareholding of the applicant did not exchange hands.

[28] In the main the respondent further argues that it withheld the rent payment on account of a series of disputes and instead paid it into its attorney's trust account. The respondent contends that it extended the lease agreement in terms of clause 6 of the written lease agreement. It argues that the applicant must stand and fall by the case made out in its finding affidavit comprising of some 10 pages whereas the replying affidavit comprises of some 30 pages.

[29] On the merits, the respondent argues that there are foreseeable factual disputes and that the matter should be decided on its (respondent's) version. It denies all four

reasons relied on by the applicant for the relief it seeks, namely: (1) That the applicant is the owner of the property; (2) that there is no lease for the current alleged arrangement by the respondent; (3) that the respondent has failed to pay rent; and (4) that there are outstanding municipal charges. The respondent argues that these disputes make it clear that there are factual disputes that are incapable of being resolved in motion proceedings.

[30] In regard to the ownership of the property, the respondent contends that the applicant's representatives irregularly obtained ownership of the property, as evidenced by the court order obtained on 19 November 2018 by one of the other tenants occupying the property which states that the previous owners of the property are precluded from directly or indirectly disposing of the property. This notwithstanding, the respondent argues that the applicant's representatives acted in contempt and disposed of the property by way of a sale of shares agreement. The respondent submits that as a consequence of the above there was / is currently an application pending in this Court Division aimed at setting aside the sale of the shareholding agreement by virtue of which the applicant claims ownership. The respondent thus submits that there exists a clear factual dispute of the applicant's ownership, which forms the foundation of the applicant's case for the eviction of the respondent. The respondent argues that the question that needs to be asked is what would happen in the event the court were to declare the sale of shares agreement void and the applicant's ownership irregular (and where that would leave the respondent)?

[31] In regard to the lack of a lease agreement as alleged by the applicant in paragraph 12 of the founding affidavit that the respondent occupies the property without consent, the respondent submits that it should be remembered that the applicant's representatives only

procured ownership in 2020 whereas the respondent have been in occupation thereof for approximately 8 years. The respondent argues he has refuted the applicant's allegation with documentary proof that the lease agreement was duly extended during March 2018, before the applicant's representatives irregularly obtained ownership, arguing further that the doctrine of "*huur gaat voor koop*" certainly finds application.

[32] The respondent submits that in terms of the aforesaid lease agreement, it (the respondent) at least up until October 2018 paid its rent to the applicant's predecessor. The respondent argues that the absence of a written lease agreement does not signify the absence of the valid lease agreement which is confirmed by the two letters dated 23 October 2019 and 12 June 2020.

[33] The respondent states that the litigation between the applicant and Wilrus is the reason behind its failure to pay the rental. In its answering affidavit, the respondent states that once the dispute surrounding the ownership of the property and only upon the applicant providing it (the respondent) with the new lease, it (the applicant) will duly receive all the rental due to it.

[34] In regard to the respondent's failure to pay, the respondent argues that it would be unreasonable of anyone to expect it to pay rent into the applicant's account in circumstances where:

34.1. The applicant's ownership and position as landlord forms the subject matter of pending litigation; and

34.2. The applicant seemingly refuses to acknowledge the respondent as a tenant occupying in terms of a valid lease agreement.

[35] The respondent submits that it is punctually paying its rent into its attorney's trust account, pending the finalization of the aforesaid disputes.

[36] In regard to the outstanding municipal charges, the respondent argues that this is nothing more than a red herring. The respondent contends that the historical municipal charges form the subject matter of an action of which the applicant is fully aware. This action was instituted before this application was issued. The current utility charges are being paid as the respondent has installed a pre-paid meter. The current water consumption is being paid by the respondent to the applicant.

[37] In regard to the acceptance of the respondent's version and foreseeable factual disputes, the respondent argues that the factual disputes were known to the applicant and thus foreseeable. In deciding to approach this court on motion proceedings, the respondent argues that the applicant did so at its peril since motion proceedings are not designed to determine disputes on a balance of probabilities.

[38] ***Citing the National Scrap Metal (Cape Town)*** and ***National Director of Public Prosecutions*** and the Plascon Evans rule below, the respondent contends that its version should be accepted by the court, further arguing that because of the foreseeable nature of the factual disputes, the matter should not be referred to trial or for oral

evidence, but simply be dismissed with costs against the applicant on a punitive costs scale.

RELEVANT CLAUSES OF THE WRITTEN LEASE AGREEMENT

[39] Clause 6 provides:

> *"6. <u>RIGHT TO EXTEND LEASE PERIOD</u>*
>
> *The lessee is entitled to extend the lease period by a further period of 5 (five) years by complying with the procedure hereinafter described in this clause, Should the lessee wish to extend the lease period it will be obliged by not later than 8 (eight) months prior to the expiry of the initial lease period to notify the lessor in writing of its said intention. The said notification is hereinafter referred to as the "notice of intention". Should the lessee give the notice of intention then the lessor and lessee shall during a period of 14 (fourteen) days after the date on which it is received by the lessor use their best endeavours to reach agreement in writing on the rental payable during each year of the extended lease period. If by effluxion of the said period of 14 (fourteen) days they shall not have reached such an agreement and reduced it to writing and signed it then the rental payable during each year of the extended lease period shall be determined by agreement between two independent persons (the "experts") who are both registered valuers and registered estate agents operating in the area in which the property is situated. They will be obliged to determine the rental as the then current market related for the premises. Should the parties fail within seven days of one of them requesting the other to agree to the*

identity of the experts, the experts will be appointed at the request of either party the then incumbent chairman of the South African institute of Valuers and his appointment will be final and binding on the parties. The experts appointed by agreement between the parties or by the aforesaid chairman shall act as experts and not arbitrators and their decision shall be final and binding on the parties and not subject to appeal. Should they differ on the amount to be charged as rental the average of the amounts proposed by them shall be utilized as the rental figure. The experts will be obliged to notify the lessor and lessee of the amount of the rental during each year of the extended lease period, by no later than twenty-one days after they shall have been appointed. The lessee will then be entitled to exercise its right to extend the lease period by written notice to the lessor given by not later than fourteen days after the experts shall have informed the lessor and lessee of the amount of the rental to be charged, provided this date is at least six months prior to the expiry of the initial lease period."

[40] Clause 27 provides:

"27. <u>NO RIGHT TO WITHDRAWAL RENTAL</u>

Provided that the lessor within a reasonable time commences any required remedial action which it is obliged to take in terms of the provisions of this lease and continues uninterrupted with it, the lessee shall not be entitled to withhold the payment of rental or other amounts by virtue of the premises or any fittings or fixtures therein or any services in or to the premises being effected by the

lessor or if any services to the premises are interrupted or repairs not being effected by the lessor or if any services to the premises are interrupted or for any other reason whatsoever.

[41] Clause 34 provides:

"34. <u>RESTRICTION IN RESPECT OF NEW LEASE OR EXTENSION OF PERIOD</u>

The parties specifically agree that:

34.1. subject to the other provisions of this agreement, the period of the lease determined in this document shall not be extended; and

34.2. they are not entitled to enter into a new lease, option to lease, or extend the period of this lease, right of first refusal to lease or other agreement with each other in respect of the occupation of the premises or any part thereof with regard to a period after the termination date of this agreement, otherwise than in a written document which has been signed by both parties."

LEGAL PRINCIPLES

[42] Section 25(1) of the Constitution provides:

"*No one may be deprived of property excerpt in terms of law of general application and no law may permit arbitrary deprivation of property*."

[43] In ***<u>Chetty v Naidoo</u> 1974 (3) SA 13 (A) at 20A – E*** the court held that:

> "*It is inherent in the nature of ownership that possession of the res should normally be with the owner and it follows that no other person may withhold it from the owner un less he or she is vested with some right enforceable against the owner. The owner, in instituting a rei vindicatio, need do no more than allege and prove that he is the owner and that the defendant is holding or in possession of the res. The onus is on* ***the defendant to allege and establish a right to continue to hold against the owner***."

[44] In regard to certain principles applicable to affidavits, in ***Hart v Pinetown Drive-In Cinema (Pty) Ltd 1972 (1) SA 464 (D) at 469C*** the court held:

> "*It must be borne in mind, however, that where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to file an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound*."

[45] In relation to setting out a proper case and discharging the onus, in ***Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 (T) at 324D***, the court held:

"*The facts set out in the founding affidavit (and equally in the answering affidavit and replying affidavit) must be set out simply, clearly and in chronological sequence and without argumentative matter: see* ***Reynolds NO v Mecklenberg (Pty) Ltd 1996 (1) SA 75 (W)*** **at 781**." A distinction is drawn between primary facts and secondary facts:

> '*Facts are conveniently called primary when they are used as the basis for inference as to the existence or non-existence of further facts, which may be called, in relation to primary facts, inferred or secondary facts*.'

See ***Willcox and Others v Commissioner for Inland Revenue 1960 (4) SA 599 (A) at 602A. In the absence of the primary fact, the alleged secondary fact is merely a conclusion of law****.*

[46] In ***Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others 2003 (4) SA 207 (C) at [28]***, the court held:

"*it is trite law that the affidavits in motion proceedings serve to define not only the issues between the parties, but also to place the essential evidence before the court for the benefit of not only the court, but also the parties. The affidavits in motion proceedings must contain factual averments that are sufficient to support the cause of action on which the relief that is being sought is based. Facts may either be primary or secondary. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are called secondary facts.* ***Secondary facts, in the absence of the primary facts on which they are based, are***

nothing more than a deponent's own conclusions and accordingly do not constitute evidential material capable of supporting a cause of action."

[47] The above principles were endorsed by the Supreme Court of Appeal in ***Quartermark Investments (Pty) Ltd v Mkhwanazi and Another 2014 (3) SA 96 (SCA) at [13]*** where it held:

"*…It is trite that in motion proceedings affidavits fulfil the dual role of pleadings and evidence. They serve to define not only the issues between the parties but also to place the essential evidence before the court.* ***They must therefore contain the factual averments that are sufficient to support the cause of action or defence sought to be made out****. Furthermore, an applicant must raise the issues as well as the evidence upon which it relies to discharge the onus of proof resting on it, in the founding affidavit*."

[48] In regard to the application for condonation, in ***Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA) at [6]***, the Supreme Court of Appeal stated:

"*One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the*

responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out."

[49] Still on the issue of application for condonation, in ***Grootboom v National Prosecuting Authority 2014 (2) SA 68 (CC) at paras 20 – 23 & 28***, the Constitutional Court held:

"[20] The respondents were late in filing their answering affidavits as well as their written submissions. This delay put a serious hurdle in the way of their quest to be heard in this Court: they had to apply for condonation. It is axiomatic that condoning a party's non-compliance with the rules of court or directions is an indulgence. The court seized with the matter has a discretion whether to grant condonation.

[21] The failure by parties to comply with the rules of court or directions is not of recent origin. Non-compliance has bedeviled our courts at various levels for a long time. Even this Court has not been spared the irritation and inconvenience flowing from a failure by parties to abide by the Rules of this Court.

[22] I have read the judgment by my colleague Zondo J. I agree with him that, based on Brummerand and Van Wyk, the standard for considering an application for condonation is the interest of justice. However, the concept "interests of justice" is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect

of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasize that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but ut is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

[23] It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.

[28] The applicant opposed the condonation application. The nub of his submission is that the respondents, having failed to offer an adequate explanation for their non-compliance, have failed to make a case for condonation."

[50] In ***Ganes v Telecom Namibia Limited* 2004 (3) SA 615 (SCA)**, the SCA stated:

"*[18] In their heads of argument the appellants asked that leave be granted to them to appeal against the finding of Oosthuizen AJ that the proceedings were duly authorized….*

[19] There is no merit in the contention that Oosthuizen AJ erred in finding that the proceedings were duly authorized. In the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorized to depose to the affidavit. In his answering affidavit the first appellant stated

that he had no knowledge as to whether Hanke was duly authorized to depose to the founding affidavit on behalf of the respondent, that he did not admit that Hanke was so authorized and that he had put the respondent to the proof thereof. In my view, it is irrelevant whether Hanke had been authorized to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorized by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorized. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings was duly authorized. In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided."

[51] In ***National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA)** at paragraph [26] the Court stated:

"*[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 Plascon-Evans Rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the*

Applicant's (Mr Zuma's) affidavits, which have been admitted by the Respondent (the NDPP), together with the facts alleged by the latter, justify the order. It may be different ***if the Respondent's version*** *consists of bald or uncreditworthy denials,* ***raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the Court is justified in rejecting them merely on the papers***."

[52] In ***National Scrap Metal (Cape Town) v Murray & Roberts 2012 (5) SA 300*** at paras [21] to [23], it is stated that:

"*[21] These factors – particularly collectively – do cast a measure of doubt on the Appellants' version, which is certainly improbable in a number of respects. However, as the High Court was called on to decide the matter without the benefit of oral evidence, it had to accept the facts alleged by the Appellants (as Respondents below), unless they are 'so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.' An attempt to evaluate the competing versions of either side is thus both inadvisable and unnecessary as the issue is not which version is the more probable one but whether that of the Appellants is so far-fetched and improbable that it can be rejected without evidence.*

[22] As was recently remarked in this Court, the test in that regard is 'a stringent one not easily satisfied.' In considering whether it has been satisfied in this case, it is necessary to bear in mind that, all too often, after evidence has been

led and tested by cross-examination, things turn out differently from the way they might have appeared at first blush….

[23] Moreover, it is also necessary to guard against approaching a case such as the present on the assumption that businessmen will act in a businesslike manner or with meticulous concern for the keeping of accurate records. All too often they do not. As Harms JA has pointed out:

'Businessmen are often content to conduct their affairs with only vague or incomplete agreements in hand. They then tend to rely on hope, good spirits, bona fides and commercial expediency to make such agreements work.'."

THE ISSUES FOR DETERMINATION

[49] The following are, *inter alia*, issues for determination:

49.1. Ownership of the property;

49.2. Lack of a lease agreement;

49.3. Failure to pay rent;

49.4. Outstanding municipal charges; and

49.5. Whether there are factual disputes.

ANALYSIS

[50] It is common cause that for the relief that the applicant seeks, it relies upon, *inter alia*, its alleged ownership of the property and the unpaid rent by the respondent.

[51] Foremost the respondent confirms that there is no signed lease agreement. In considering the entire defence mounted by the respondent, I am of the view that same has got nothing to do with this application and that shareholding of the applicant is entirely irrelevant to this case. Despite the respondent's contention that the lapsed lease agreement was as a matter of fact extended to 28 February 2023, it nevertheless could not adduce any evidence, documentary or otherwise, to that effect other than its say-so. I am therefore satisfied that the respondent's conclusion in this regard is wrong both in law and factually. The only reasonable conclusion this court can draw therefrom is that that assertion can therefore only be factually incorrect. Furthermore, despite the respondent's contentions, I am further satisfied that this application has got nothing to do with the statement and the debatement account of arrear levies, *etc.*

[52] In my considered view and as correctly argued by the applicant, anything that does not talk to the applicant's ownership and the respondent's onus is irrelevant and that is exactly where the respondent's defence is hinged. As already stated above, it cannot be gainsaid that this application rests on two elements, namely; the jurisdictional fact relating to the applicant's ownership of the property) and the thing (*res*) which the applicant seeks to vindicate. Given this fact it therefore follows that the considerations of justice and equity do not apply in *casu* as was held in ***Shetty*** above. It is on the above basis, *inter alia*, that

the onus to prove the right to continue to hold the *res* rests on the respondent. In my view, the fact that despite the respondent bearing the burden to prove its right to hold the *res* and yet failing to do even the basic it should have, namely, to plead clauses from the lapsed lease agreement, to cite the terms of the lease on which it relies, including the agreement on rent, makes its defence all the more untenable. Of further importance is the fact that as a matter of law there cannot be any lease agreement since the respondent failed to plead the *essentialia* of the alleged new lease. What compounds the issue for the respondent is its withholding of the rental payment and informing the applicant on 14 October 2018 through its attorneys that it has since November 2018 been paying the rental into its attorney's trust account.

[53] In my further considered view, the alleged expression by the respondent of its intention to extend the lease agreement as way back on 30 August 2017 should have been accompanied by the respondent's payment of the 'agreed' rental, despite the alleged failure by the applicant to provide it with the lease agreement which would have lapsed in February 2023. In my further view, the uninterrupted rental payment should and would have by and large signified the existence of the dispute extended lease, especially in the absence of any evidence regarding the disputed extension agreement. How the failure by the applicant to produce the written or signed lease extension could in a commercial sense justify the respondent's continued occupation of the property yet deferring and neglecting in the same breadth its rental payment obligations is illogical. The two seem to be irreconcilable despite the multiple litigations going on which by the way have no bearing whatsoever in the applicant bidding to enforce its rights through this application.

[54] When regard is had to the respondent's defence, namely, the alleged factual disputes and the ownership of the property, I find that to be irrelevant and more of a red herring which can only be a subject to a separate litigation. As regard the ownership, the applicant remains the registered owner of the property and even if ownership was to change, it would not change the respondent's liability to the applicant since this would be bad in law.

[55] In regard to the applicant's deponent's authority, I am satisfied that he had the requisite authority to depose to the relevant affidavits.

[56] In regard to the entire period pertaining to the respondent's delay in its affidavit, that the delay is condonable in the interest of justice.

[57] When one considers the generality of the respondent's submissions, they are indeed emotive and speculative despite this being a purely commercial dispute. Despite the respondent arguing that the applicant failed to make out a case in their founding papers, the however does not deal with the *rei vindicatio* whereas the Supreme Court of Appeal says they should only deal with two *essentialia, namely*: (1) that the applicant is the registered owner and (2) that the respondent is in occupation of the said property. When further regard is had to the respondent's defence, even the factual disputes it alleges do not flow from the papers but from correspondences. Under the circumstances I could not agree more with the applicant that this is not an application about shareholders and arrear rental. Even the submission by the respondent that the new shareholders could give the respondent a lease agreement is not part of their case in their papers. It is indeed so that

it does not matter who the shareholders are: you pay your landlord. Even the ***Erasmus*** decision above relied on by the respondent, it is distinguishable from this case in that in ***Erasmus*** it was not in dispute that there was an existing lease but for its repudiation.

[58] I am satisfied that the Plascon-Evans rule does not apply here *re* material disputes of fact. Even the previous litigations referred to by the respondent's counsel is irrelevant and thus immaterial because it is not referred to in the respondent's answering affidavit. Furthermore, the question raised by the respondent as to why the application was only brought now was not raised by the respondent in her answering affidavit. I am persuaded by the applicant's submission that it is in fact entitled to bring this application any time for as long as it is still the owner. There is also no confirmatory affidavit from the applicant's former shareholders that they concluded another extended lease with the respondent which makes it another unsubstantiated claim by the respondent. Mr Pullinger argues that the respondent case must make its case in the answering affidavit whereas the submissions by Mr Du Toit do not appear anywhere on the papers. Even the annexures the respondent's counsel refers to have not been attached.

[59] To the above Mr Du Toit for the respondent submitted that he agreed that a bare denial is not enough but that they did not do a bare denial.

[60] In summary, not only did the respondent fail to plead the clause of the lease agreement on which it relies, it also did not give timeous notice and neither is there the agreement as to the rent payable. The absence of an agreement on the *quantum* of rent

payable for the use of the shop renders the alleged dispute which led the respondent to act in the manner it did entirely unsustainable. Based on these reasons alone, the respondent's claim of any right fails as firstly, the "right to extend" was not timeously exercised nor was the procedure followed, nor is there any agreement on rent. In light of the fact that rent is an *essentialia* of the lease agreement, if there is no agreement on rent, it follows that there cannot be a lease agreement. Furthermore, the respondent has failed to discharge the ***Chetty*** principle above in respect of the onus to allege and establish a right to continue to hold the property or the shop against the applicant.

[61] On the conspectus of the facts before me, I am satisfied that the respondent has failed to discharge its onus to prove and show any right in law it has to continue to occupy the shop and to it possess it. In the premises I am satisfied that the respondent is not in lawful occupation of the property. Accordingly I find that the respondent has failed to make out a case to remain in the property.

[62] Conversely I am satisfied that the applicant has made out a case entitling it to the relief it seeks, including costs, considering the trite approach that costs should follow the result.

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

ORDER

1. The respondent is evicted from Shop 4 and any such other portion of the commercial building situated in the immovable property known as Erf 167,

Nieuw Muckleneuk Township, Registration Division IR, Province of Gauteng and located at the corner of Dey and Middle Streets, Nieuw Muckleneuk, Pretoria ("the Property") occupied by the respondent.

2. The Sheriff of this Court or his lawfully appointed Deputy is authorized and directed to evict the respondent and all entities occupying the Property by, through or under it.

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

Livhuwani Vuma
Acting Judge
Gauteng Division, Pretoria

Head on: 14 October 2021
Judgment delivered: 22 March 2022

Appearances

For Applicant: Adv. A.W. Pullinger
Instructed by: Millers Attorneys

For Respondent: Adv. P.R Du Toit
Instructed by: Rudman and Associates Inc.