IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION,

DURBAN

CASE NO: 14330/14

In the matter between:

HOOSEN MIA BADAT **APPLICANT**

and

DEEPAK BHARDWAJ **RESPONDENT**

ORDER

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[1] The respondent and all persons holding through the respondent are ordered to vacate the business premises identified as [2…..] [O……] [M……] [R….], [A…..] (the premises) within fourteen (14) days of the date of this order.

[2] In the event of the respondent and any persons holding through the respondent failing to comply with paragraph 1 hereof, the Sheriff of the above Honourable Court and/or his Deputy is authorised and directed to do all things as may be necessary to eject the respondent and all such persons holding through the respondent from the premises.

[3] The respondent is directed to pay the costs of the application on an attorney and client scale.

JUDGMENT

Date of hearing: 15 September 2015
Date of judgment: 09 October 2015

HENRIQUES J

Introduction

[1] This is an application for the eviction of the respondent from business premises situated at [2…..] [O…..] [M….] [R….] [A…..] (the premises).

Factual background

[2] The applicant and his deceased wife are the registered joint owners of the immovable property on which the premises are situated. On 8 December 2009, a written lease agreement, annexed to the papers as 'MA2', was concluded between the applicant and the respondent, both of them acting personally.

[3] The material terms of the lease agreement as alleged by the applicant were *inter alia* the following:

> '7.1 I would let the premises to the respondent with effect from 1 December 2009 until 30 November 2014, subject to an option to negotiate and to renew the lease;
>
> 7.2 The respondent would pay a base rental in respect of the premises as follows:
>
> 7.2.1 for the period 1 December 2009 to May 2010 the rental would be that of R12 500.00 per month;
>
> 7.2.2 for the period 1 June 2010 to 30 November 2014 the rental would be that in the sum of R15 000.00 per month.

7.3 Payment of rental was required in advance by the 30th or the last business day of the preceding month.

7.4 The respondent would have the right to negotiate the renewal of the lease with me or my nominee;

7.5 If the respondent wished to exercise such renewal, the respondent would be required to exercise his option to negotiate in writing by 30 September 2014, which notice had to be delivered to my *domicilium citandi et executandi* address being that of 9 Protea Road, Isipingo Hills, Durban, Kwazulu-Natal.

7.6 In the event that the respondent failed to pay rent or any other sums due to me promptly on due date, or commit any other breach, I would have the right to instruct an attorney with the view to recover such amounts due and to cancel the lease forthwith.

7.7 No arrangements at variance with the terms of the lease would be binding unless reduced to writing and appended to the lease in the hands of both the respondent and I.

7.8 The respondent agreed to pay any legal costs on the scale as between attorney and own client.'

Opposition

[4] The respondent has opposed the granting of the relief, as anticipated by the applicant, on the following grounds as set out hereinafter.

[5] The respondent has raised two points *in limine* namely that of *lis alibi pendens* and non-joinder. In so far as the point *in limine* of *lis alibi pendens* is concerned, the respondent contends that there is on-going litigation between the parties in the magistrate's court in which the relief sought is the same as in this application, being the respondent's continued occupation of the premises. The respondent submits 'that there is no distinction between what the applicant seeks in the magistrates court and what he seeks in the above Honourable Court and that no matter how nuanced a distinction may appear to be that this is merely illusory.'

[6] In so far as the issue of non-joinder is concerned, the respondent submits that the search works annexed to the papers 'MA1' reflects two owners of the immovable

property on which the premises are situated, being the applicant and one Hawa Bibi Mahomed Badat, his wife and that she ought to have been joined in the application. The failure to do so constitutes a fatal defect as she has a 'substantially direct registered right, title and interest in the property'. The respondent contends that the applicant cannot act on his own without involving the co-owner of the immovable property.

[7] In the replying affidavit the applicant confirms that the co-owner of the immovable property was his late wife and the executor has put up a confirmatory affidavit confirming this and ratifying the institution of these proceedings and the applicant's conduct in relation to the immovable property. The respondent objects to this being done in reply.

[8] In so far as the merits of the application is concerned, the respondent alleges that pursuant to the institution of the action in the magistrates court, the parties entered into settlement negotiations as the applicant did not want to undergo the rigors of cross-examination. Solly Badat (Badat) who incidentally is the executor of the applicant's wife's deceased estate, and applicant's nominee, negotiated the extension of the current lease agreement in terms of which the respondent would remain in the premises for a further nine year period and the terms of the old lease agreement would be extended.

[9] The respondent's version in that regard is set out in some detail from paragraphs 17-20 of the opposing affidavit at pages 66-70 of the indexed papers. Essentially, the respondent alleges that the parties would attempt to agree on a purchase price but in the event of them failing to do so, then an independent valuer would determine the purchase price, which determination they both agreed to be bound by.

[10] During the hearing of the matter, Mr *Winfred* who appeared for the respondent, made the following submissions:

10.1 In relation to *lis alibi pendens* he submitted that the relief which the applicant sought in the magistrate's court was substantially the same relief as he is seeking in the high court. He submitted that the issue which the magistrate's court had to decide

related to the cancellation of the lease agreement. This would thus effect the respondent's continued occupation of the premises.

10.2 The proceedings in the high court were instituted on the basis of a lease agreement being in place and having expired due to the effluxion of time. The applicant could not now in the high court proceedings, contend for the existence of a lease agreement which had expired due to the effluxion of time, as in the magistrate's court the applicant alleged that the same lease agreement had been cancelled and was no longer in force.

10.3 This submission goes further that until the magistrate's court ruled on the issue of cancellation, the proceedings in the high court were premature and were not sound as there was no longer a lease agreement in place and it was 'common sense' that the applicant could not rely on the same lease agreement for the proceedings in the high court justifying the eviction of the respondent.

10.4 In respect of non-joinder, the respondent contends that the failure to join the applicant's wife and/or the executor of her estate is fatal. The applicant cannot in reply deal with this as he must make out a case in the founding affidavit and establish *locus standi* and/or authority in the founding affidavit. For these reasons the respondent is entitled to have the application dismissed with costs.

10.5 In the alternative, should the points *in limine* not succeed, then to use the language of Mr *Winfred*, the respondent contends that it was always the intention of the parties that he remains in occupation of the premises. On the expiration of the current lease agreement the parties negotiated an extension for a further nine years on the same terms and conditions as applied in the previous lease agreement via an intermediary, Badat.

10.6 In addition, Mr *Winfred* acknowledged that the negotiations in respect of the sale of the immovable property were inextricably linked to the extension of the lease agreement for a further nine years. The parties intended concluding a written agreement in compliance with s 2 of the Alienation of Land Act 68 of 1981 (the Act) and even though

it is not specifically alleged in the opposing affidavit there are sufficient allegations in the papers from which one can glean this.

Lis alibi pendens

[11] I propose to deal with the first point in *limine* of *lis alibi pendens.* The respondent in raising the special plea of *lis alibi pendens* bears the onus of alleging and proving the following, namely that there is pending litigation, between the same parties, based on the same cause of action (my emphasis).

[12] There is pending litigation in the Durban magistrate's court between the applicant and the respondent who are the same parties in this application. Having regard to the pleadings in the magistrate's court, the applicant sued the respondent in terms of the written lease agreement for arrear rental and damages in respect of the unlawful holding over as a consequence of the respondent breaching the lease agreement and not paying rental. The applicant further alleges that the lease agreement has been cancelled as a consequence of the respondent's breach thereof. A prayer which is included in the particulars of claim in the magistrate's court is one for confirmation of cancellation of the lease agreement. The pleadings in the magistrate's court do not include a prayer for the eviction of the respondent.

[13] In this application, the applicant's cause of action is based on the written lease agreement and the applicant seeks the eviction of the respondent from the premises as a consequence of the lease agreement terminating due to the effluxion of time. There is no claim for arrear rental, unlawful holding over or cancellation of the agreement as a consequence of a breach thereof.

[14] To determine whether or not the litigation in the magistrate's court is based on the same cause of action in respect of the same subject matter, the test is whether or not the issues defined in the pleadings are the same. It does not mean that the form of the relief claimed must be identical or that the same evidence will be led in respect of both sets of litigation.

[15] In addition, if the respondent succeeds in proving that all the requisites for the plea of *lis alibi pendens* have been met, it still does not constitute an absolute bar to the proceedings in the high court continuing. The applicant can satisfy this court that despite this, the balance of convenience and equity are in his favour and that the application ought to proceed in the high court.[1] The appropriate order should the court find merit in the special plea of *lis alibi pendens* is for the proceedings in the high court to be stayed pending the finalisation of the proceedings in the magistrate's court. Unlike what is prayed for in the opposing affidavit the respondent would not be entitled to an order dismissing the application in the high court.

[16] This application involves the eviction of the respondent from the premises due to the lease agreement ending with the effluxion of time. In the action in the magistrate's court the relief which the applicant seeks is not the same. The subject matter of the action in the magistrate's court is a claim for arrear rental and damages for unlawful holding over.

[17] In my view, the respondent has not succeeded in proving that all the requisites for the plea of *lis alibi pendens* have been met. This is because the issues defined in the pleadings in both courts are not the same. Even if I am wrong in this regard, I still have a discretion to allow these proceedings in the high court to proceed, if I am of the view that the balance of convenience and equity are in the applicant's favour.

[18] The affidavits reveal that the proceedings in the magistrate's court have been protracted. The action was instituted in 2010 and the trial has been adjourned on several occasions. In addition the trial was adjourned on the last occasion for discovery of further documents. On the applicant's version the respondent continues to occupy the premises for which no rental is payable in circumstances where the lease agreement has ended through the effluxion of time. In my view, the balance of convenience and equity favour the applicant and in the exercise of my discretion the application ought to

[1] *Geldenhuys* v *Kotzê* 1964 (2) SA 167 (O); *Nordbak (Pty) Ltd v Wearcon (Pty) Ltd & others* 2009 (6) SA 106 (W); *Janse van Rensburg & others NNO v Steenkamp & another; Janse van Rensburg & others NNO v Myburgh & others* 2010 (1) SA 649 (SCA) para 35.

proceed in this court should I be wrong in my conclusion that all the requirements for the special plea of *lis alibi pendens* have not been met.

Non-Joinder

[19] I now turn to the issue of non-joinder. The respondent contends that the applicant has no *locus standi* to institute the proceedings and the application is fatally defective as the executor was not a party to the proceedings and has a direct and substantial interest therein. This issue was raised in the opposing affidavit filed by the respondent.

[20] In response thereto and in reply, the applicant filed an affidavit of the executor Badat who ratified the actions of the applicant in instituting the proceedings and further on oath indicated that the applicant was responsible for all matters relating to the immovable property.

[21] The respondent also takes issue with this and submits that the applicant ought not to be allowed in reply, to file the affidavit of Badat to ratify his conduct specifically the institution of these proceedings.

[22] The law requires the joinder of a party who has a direct and substantial interest in the outcome of litigation whose rights may be adversely affected thereby. One must however, distinguish between joinder of convenience and joinder of necessity.

[23] Ms *Beket*, who appeared for the applicant, referred in her supplementary heads of argument to the judgment of *Judicial Service Commission & another* v *Cape Bar Council & another*[2] in which the court stated the following:

> 'It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned ... The mere fact that a party

[2] 2013 (1) SA 170 (SCA) para 12.

> may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one.'

[24] The affidavit of the executor makes it clear that he has no objection to the granting of the relief sought and ratifies the conduct of the applicant in instituting these proceedings. Any interest which the estate of the applicant's late wife may have in the outcome of the litigation is taken care of by the affidavit of the executor. In any event, I do not agree that this was a joinder of necessity as contended for by the respondent as the interest of the estate would not be prejudiced by any judgment the court would grant, to the contrary it would benefit therefrom.

[25] The further objection raised by the respondent is that the applicant cannot deal with the issue of *locus standi* and authority in reply. Ms *Beket* referred to the judgment of Gorven J of this division in *ANC Umvoti Council Caucas & others* v *Umvoti Municipality*[3] in which it was held:

> 'where authority is challenged in the answering affidavit, it is permissible to make out a case in reply. It is further clear that, even if the authority was not in place when the litigation commenced, actions taken can be ratified subsequently.'

[26] I am in agreement with the view expressed. Having regard to the affidavit of Badat the conduct of the applicant in instituting the litigation has been ratified subsequently.

[27] Consequently, there is no merit in the points *in limine* of *lis alibi pendens* and non-joinder.

<u>The merits of the opposition</u>

[28] The respondent relies on an alleged oral agreement in respect of the sale of the immovable property for a reasonable price to be determined by a professional valuator. It is common cause no such valuation was obtained and therefore the purchase price

[3] 2010 (3) SA 31 (KZP) para 8.

was not agreed. The respondent's version envisages an agreement to agree which is not permissible.[4] This view has been endorsed in the subsequent decision *of Kwazulu-Natal Joint Liaison Committee* v *MEC for Education, Kwazulu-Natal & others.*[5]

[29] A further difficulty which the respondent faces is that for the parties to conclude a valid sale of the immovable property, the provisions of s 2 of the Act must be complied with. In light of the non-compliance with the Act any agreement is void *ab initio.*[6] Consequently, I do not agree with the submission that the parties intended to comply with the provisions of the Act and it must follow that there are insufficient allegations in the papers from which this can be gleaned.

[30] Mr Winfred conceded that the extension of the lease agreement was inextricably linked to the negotiations surrounding the sale of the immovable property. If, as the respondent contends, the terms negotiated for the extension of the lease were the same as that which existed in the written lease agreement, then the respondent was required to exercise the option to renew, which it is common cause on the papers he did not do, and consequently there cannot be a valid extension of the lease agreement as it has ended.

[31] A further matter which requires mentioning is should the matter be referred for the hearing of oral evidence. Mr *Winfred*, submitted that in light of the nature of the evidence in relation to the circumstances under which the parties allegedly negotiated the extension of the lease agreement and the sale of the immovable property, a dispute of fact exists and the matter ought to be referred for the hearing of oral evidence.

[32] In this regard Ms *Beket*, submitted that a determination of the legal issues between the parties would be decisive of the matter and consequently the matter need not be referred for the hearing of oral evidence. She submitted, in support of this, that if this court followed the approach in the judgment of *Fax Directories* (Pty) Ltd v *SA Fax Listings* CC,[7] then there would be no need to refer the matter for the hearing of oral

[4] *Shoprite Checkers (Pty) Limited* v *Everfresh Market Virginia Limited* 2010 JDR 0818 (KZP).
[5] 2013 (4) SA 262 (CC).
[6] *Thorpe & others v Trittenwein & another* 2007 (2) SA 172 (SCA) para 15.
[7] 1990 (2) SA 164 (D).

evidence as any finding in respect of the legal issues is definitive of the dispute between the parties. In the alternative, should the court not agree with the approach followed in *Fax Directories*, then the matter need only be referred for the hearing of oral evidence in respect of the alleged extension of the lease agreement and the sale of the immovable property.

[33] For reasons already mentioned in the judgment, I am of the view that the respondent cannot rely on the fact that there is an alleged dispute of fact on the papers which requires the matter to be sent for the hearing of oral evidence. The law is clear in this regard, there can be no agreement to agree. If on the respondent's version the lease was extended on the same terms then the respondent did not exercise the option to renew and consequently the lease agreement lapsed and any agreement in respect of the sale of the immovable would be void *ab initio* for want of compliance with s 2 of the Act.

[34] In addition I am of the view that in so far as the merits of the opposition are concerned the respondent has not succeeded in showing that he has a right to occupy the premises. Consequently, the existing lease agreement terminated with the effluxion of time. It is common cause on the papers that the respondent did not exercise an option to renew, it goes without saying that it must follow that the respondent has no legal basis to remain in occupation of the premises and the applicant is therefore entitled to the relief that he seeks.

Costs

[35] It is trite that the order of costs falls within the discretion of the court. Such discretion must be exercised judicially having regard to the facts and particular circumstances of a matter. The lease agreement made provision for the payment of costs on an attorney and client scale in the event of legal proceedings being instituted. There is no reason to depart from the normal rule that the successful party is entitled to its costs.

[36] In the premises the orders I grant are the following:

Order

[1] The respondent and all persons holding through the respondent are ordered to vacate the business premises identified as [2….] [O…] [M….] [R….], [A…..] (the premises) within fourteen (14) days of the date of this order.

[2] In the event of the respondent and any persons holding through the respondent failing to comply with paragraph 1 hereof, the Sheriff of the above Honourable Court and/or his Deputy authorised and directed to do all things as may be necessary to eject the respondent and all such persons holding through the respondent from the premises.

[3] The respondent is directed to pay the costs of the application on an attorney and client scale.

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Henriques J

Appearances

Counsel for the applicant	:	N Beket
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		Tel: (031) 467 3881
		Ref: M Leathers
Counsel for the respondent	:	N.G Winfred
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