



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Not Reportable

Case no:2732/2021

In the matter between:

SOUTH PARADIGM (PTY) LTD

Applicant

and

MQUQO ATTORNEYS

First Respondent

KHAYA EDGAR MQUQO

Second Respondent

JUDGMENT

Govindjee J

[1] The applicant and the first respondent entered into a written lease on 18 March 2020. The commercial property, situated at 6 Mantis Business Centre, Cambridge, ('the property') is owned by the applicant and utilised by the respondents for the

purpose of operating a law firm. The second respondent signed the lease agreement on behalf of the first respondent.¹

[2] The applicant seeks the ejectment of the respondents from the property and requires undisturbed possession to be restored. In terms of the lease agreement, the property was let for a period of three years, commencing on 1 March 2020. It is accepted that the property is a commercial and / or business premises and that the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 do not apply.²

[3] The lease agreement provided that the agreement could be terminated in the event of breach, including cases where rental had not been paid timeously. The first respondent allegedly breached the agreement by failing to pay rent between May and August 2020 and was given written notice to rectify the breach within seven days. The first respondent did not respond to this notice and did not pay the arrear rental demanded. The applicant cancelled the lease agreement on 28 September 2020, informing the first respondent that it should vacate the premises on or before 30 September 2020. No response was received. The respondents continue to occupy the property and utilise it for business purposes despite not making any payments towards rental or other charges since November 2020.

[4] The respondents did not deny the cancellation of the lease agreement in their papers.³ They dispute the extent of the arrears claimed and that issue has been referred to arbitration. The respondents raise two points *in limine* in opposition. The first is *lis alibis pendens* and the second is the jurisdiction of this court. The

¹ The second respondent is the sole practicing attorney under the name and style of the first respondent, conducting his practice from the property and liable jointly and severally together with the first respondent for the debts and liabilities of the first respondent in terms of s 34(7)(c) of the Legal Practice Act 28 of 2014.

² Act 19 of 1998. Likewise, the relevant provisions of the Consumer Protection Act appear to be inapplicable when considering the nature of the parties, alternatively do not prevent the cancellation of the agreement in the manner in which this occurred: s 14 of the Consumer Protection Act 68 of 2008 ('CPA'). Importantly, 'juristic person' is defined, in s 1, to 'include' a body corporate, a partnership or association or a trust, and the lease was entered into with 'Mquqo Attorneys', described as 'a firm of attorneys with business address at ...' That description is noted in the answering affidavit, which does not detail any argument based on the provisions of the CPA.

³ Para 30 of the answering affidavit.

respondents, during argument, raised question marks over the validity of the cancellation.

[5] The lease agreement included an arbitration clause.⁴ Both points *in limine* stem from the following portions of this clause:

‘Any dispute at any time between the parties hereto about this agreement or its interpretation, rectification, breach, termination or cancellation, as well as its validity, shall be submitted to and decided by arbitration in terms of rules, conditions and terms of The Arbitration Act, 1965. The arbitration shall be initiated by either party demanding such arbitration by way of written notice to the other party ...

This arbitration clause shall not preclude a party from seeking urgent relief in a court of appropriate jurisdiction where grounds for urgency exist.

The parties agree that the magistrate court where the property is situated will have jurisdiction to hear any dispute arising between the parties in terms of this agreement.’

[6] It is trite that arbitration is a method for resolving disputes and that a disputed claim is sent to arbitration so that the dispute may be determined. No purpose can be served by arbitration on an undisputed claim as there would be nothing for the arbitrator to decide.⁵ It is thus unsurprising that clause 16 of the lease agreement refers specifically to ‘Any dispute ...’.

[7] In this case, the agreement provided that ‘Any dispute ... about this agreement or its interpretation, rectification, breach, termination or cancellation, as well as its validity ...’ would be submitted to arbitration, barring instances where urgent relief was sought.

[8] Importantly, however, an arbitration agreement does not deprive a court of its ordinary jurisdiction over the disputes which it encompasses.⁶ It has been held that arbitration is ‘... far from an absolute requirement, despite the contractual provision for it. If either party takes the arbitrable dispute straight to Court, and the other does not protest, the litigation follows its normal course, without a pause. To check it, the objector must actively request a stay of the proceedings. Not even that interruption is decisive. The Court

⁴ Clause 16 of the lease agreement, p 26 of the index.

⁵ *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others* 1980 (1) SA 301 (D) at 304E-F.

⁶ *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 333G-H.

has a discretion whether to call a halt for arbitration or to tackle the disputes itself. When it chooses the latter, the case is resumed, continued and completed before it, like any other. Throughout, its jurisdiction, though sometimes latent, thus remains intact.⁷

[9] A party seeking to utilise, or to insist upon the utilisation of, arbitration proceedings instead of court proceedings should lodge a substantive application under the Arbitration Act, 1965⁸ for the requisite stay, or file a special plea asking for a stay in terms of the common law.⁹

[10] In this case, the respondents, seemingly having accepted that the lease had been cancelled, did not apply for a stay of proceedings, either relying on s 6 of the Arbitration Act or on the common law, pending the outcome of an arbitration.¹⁰ A respondent wishing to invoke the arbitration agreement has both methods available to it to stay the court case and allow the arbitration to proceed.¹¹ They also failed to refer any suggested dispute about the lawfulness of cancellation on the strength of disputed rental amounts to arbitration, as they may have chosen to do.

[11] Instead of invoking the arbitration agreement to seek a stay of proceedings pending the finalisation of the arbitration, or to refer a dispute about the lawfulness of the cancellation, the respondents seize upon the applicant's referral to arbitration, to which I will return, to argue, firstly, that the present application is *lis alibis pendens* and should be dismissed.

[12] Such a plea is based on the proposition that the dispute (*lis*) between the parties is being litigated in another forum (arbitration) so that it would be inappropriate for it to be litigated in this court. Courts seek to avoid the situation where the same issue is pronounced upon by different courts, coupled with the associated risk that different

⁷ *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others* op cit at 305E-H.

⁸ Act 42 of 1965.

⁹ *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others* op cit at 306B-C. See *Nick's Fishmonger Holdings (Pty) Ltd v De Sousa* 2003 (2) SA 278 (E) para 10.

¹⁰ See *Nick's Fishmonger Holdings (Pty) Ltd v De Sousa* ibid para 3, for an illustration of the appropriate plea *in limine*, with specific reference to referral to arbitration coupled with a stay of the proceedings.

¹¹ *Nick's Fishmonger Holdings (Pty) Ltd v De Sousa* ibid para 10.

conclusions will be reached by each.¹² Fundamental to the plea is the requirement that ‘ ... the same plaintiff has instituted action against the same defendant for the same thing arising out of the same cause ...’¹³

[13] It is the applicant that has referred the issue of the disputed unpaid rental amount to arbitration.¹⁴ The respondents, without disputing the cancellation of the lease agreement on the papers, dispute the extent of the indebtedness to the applicant and the obligation to pay rental for March, April and May 2020.¹⁵ It is that dispute that forms the basis of the applicant’s arbitration referral.

[14] It is, in other words, immediately apparent from the papers that the referral to arbitration relates solely to recovery of arrear rental, a matter placed in dispute by the respondents. Interpreting the arbitration notice, the reference to referral of ‘ ... the matter ...’ to arbitration in paragraph 2 of the arbitration notice, can only relate to the subject matter referred to in paragraph 1 of the arbitration notice, which relates to demand for payment.

[15] The present application is concerned with a different matter, namely the ejectment of the respondents from the premises following cancellation of the lease agreement. Placed in the language of *Hassan and another v Berrange NO*,¹⁶ while the parties may be the same, the two proceedings cannot be said to ‘ ... arise out of the same cause ...’ The referral to arbitration does not deal with the respondents’ continued unlawful occupation of the property or with the matter of eviction. As such, it would in any event have served no purpose for the respondents to seek a stay of these eviction proceedings pending the outcome of arbitration proceedings focused on the issue of non-payment of arrear rental. It follows that the first point *in limine* must be dismissed. In any event, and to the extent that it may be necessary for this court to express itself further on the point, the court considers it appropriate to

¹² *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and others* 2013 (6) SA 499 (SCA) para 2.

¹³ *Hassan and another v Berrange NO* 2012 (6) SA 329 (SCA) para 19.

¹⁴ On 8 April and 30 June 2021, pp 42 and 48 of the index. Both arbitration notices commence with reference to the applicant’s ‘ ... demands for payment from yourselves ...’

¹⁵ Paras 17,4; 17,5 and 25 of the answering affidavit, pp 36 and 38 of the index.

¹⁶ *Hassan and another v Berrange NO* op cit para 19.

exercise a discretion to proceed and deal with the dispute, rather than call a halt to proceedings and refer this particular matter to arbitration.

[16] Regarding the court's jurisdiction, the SCA held in *Standard Bank of South Africa Ltd and others v Mpongo*, that s 29 of the Magistrates' Court Act is, along with sections of other legislation, premised on the High Court having concurrent jurisdiction with magistrates' courts.¹⁷ Leaving aside the possibility of interim applications for ejectment in the magistrate's court pending final determination of an action for ejectment,¹⁸ s 29(b) of the Magistrates' Courts Act, 1944¹⁹ limits the magistrate's court to jurisdiction, in respect of causes of action, to *actions* of ejectment against the occupier of any premises or land within the district or regional division. The word 'actions' in s 29(1) has the narrower meaning of proceedings initiated by summons and it is accepted that an application for the delivery of property or for permanent final ejectment, leaving aside PIE applications, may not be brought in the magistrate's court.²⁰ There is also a proviso linked to a ministerially determined amount.

[17] It must be remembered that High Courts exercise the original authority of the state to resolve all disputes, of any kind, that are capable of being resolved by a resort to law, unless that authority has been assigned to another court.²¹ There is, as a result, a strong presumption against the ouster of the High Court's jurisdiction, and the mere fact that this statute has vested jurisdiction in the lower court for an ejectment action is insufficient to create an implication that the jurisdiction of the High Court has been ousted.²²

[18] The High Court must entertain matters within its territorial jurisdiction that fall within the jurisdiction of a magistrate's court, if brought before it, because it has

¹⁷ *Standard Bank of SA Ltd v Thobejane and Others and The Standard Bank of SA Ltd v Gqirana NO and Another* [2021] ZASCA 92; 2021 (6) SA 403 (SCA) ('*Standard Bank*') paras 75, 76.

¹⁸ *Jordan and another v Penmill Investments CC and another* 1991 (2) SA 430 (E).

¹⁹ Act 32 of 1944.

²⁰ *Jordon and another v Penmill Investments CC and another* op cit at 435H.

²¹ See *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) paras 24, 25 and 27; *Standard Bank* op cit para 16.

²² *Standard Bank* op cit para 68;

concurrent jurisdiction with the magistrate's court.²³ The magistrate's court is a creature of statute with limited jurisdiction. Reading the arbitration clause in a way that compels the applicant to proceed before a magistrate's court would elevate its jurisdiction to include applications for ejectment, in parallel with the High Court, in circumstances where the legislature has limited its scope of authority and did not contemplate this outcome.²⁴ In addition, it would trample on the right of an applicant to choose a court of competent jurisdiction to commence litigation.²⁵ As the SCA held in *Standard Bank*, there is long-standing authority that even when a High Court has a matter before it that could have been brought in a Magistrate's Court, it has no power to refuse to hear the matter.²⁶ There can, in addition, be no suggestion that the applicant is instituting these proceedings in this forum for an extraneous or improper purpose.²⁷ The second point *in limine* must consequently also be dismissed.

[19] The applicant has made out a case for an eviction order to be granted in its favour. It is the lawful owner of the premises and the respondents are in occupation against its will.²⁸ The first respondent has not vacated the premises and has not demonstrated any acceptable basis for doing so subsequent to its lease being terminated. That termination was based on the lessee's breach in failing to make payment of rental, which amounts to a material breach of an essential term, even though the respondents may have disputed their payment obligations for a few months.²⁹ Clause 8.4 of the lease agreement provides:³⁰

'The Lessor can immediately terminate this agreement should The Lessee be in breach of this agreement in any manner such as but not limited to failure to timeously make payment of the rental due...'

²³ *Standard Bank* ibid para 88: the High Court is obliged to entertain matters that fall within the jurisdiction of a magistrate's court because the High Court has concurrent jurisdiction. See s 169 of the Constitution.

²⁴ *Botha v Andrade and others* [2009] 1 All SA 436 (SCA) para 14.

²⁵ *Standard Bank* op cit para 25.

²⁶ *Standard Bank* ibid para 27. If the matter could be dealt with less expensively in a Magistrate's Court, the High Court could discourage litigation before it by way of an appropriate costs order: para 30.

²⁷ *Standard Bank* ibid para 48.

²⁸ See G Glover *Kerr's Law of Sale and Lease* (4th Ed) (LexisNexis) p 480.

²⁹ On the obligations of a lessee to pay rent, in general, see Glover op cit pp 416-417.

³⁰ Clause 8.4, p 23 of the index.

[20] This is precisely what occurred, with clear and unequivocal communication having followed.³¹ Lessors enjoy the right to claim supplementary remedies in addition to cancellation.³² This includes claiming arrear rental for the lessee's use and enjoyment of the leased property (including triggering the arbitration clause, in this instance), as well as damages. The basis upon which the respondents claim an entitlement to remain in occupation of the premises is not apparent from the answering affidavit. The suggestion that this entitlement might result from a minor spat regarding remote control access is insufficient. Similarly, it cannot be argued that non-payment of rental was justified in order to prevent eviction because any payments might have been accepted by the applicant for the months in dispute.

[21] Given the nature of the dispute, the monthly rental amount, and the circumstances, I consider a costs award on the Magistrate's Court scale to be appropriate.

[22] In the circumstances, the following order will issue:

1. The respondents' late filing of heads of argument is condoned.
2. The first respondent, and all those who occupy by, through or under the first respondent, are ordered to vacate the commercial premises situated at No. 6 Mantis Business Centre, 14 Byron Street, Cambridge, East London, Eastern Cape, and to give applicant undisturbed possession thereof, within 7 days of the date of this order.
3. The Sheriff of the above Honourable Court, or its deputy, with the assistance of the South African Police Service, if necessary, is authorised to execute and give effect to the order in terms of paragraph 2, above.
4. The first respondent is ordered to pay the costs of this application on the Magistrate's Court scale.

³¹ On the lessor's power to cancel a lease contract for non-payment of rent on the basis of a cancellation clause in the contract, see Glover op cit pp 429; 432-433. As Glover notes, if a lease contains a cancellation clause which relates to prompt payment of rent, then on the first occasion on which the lessee fails to pay on due date or within the period of grace allowed, if there is one, the lessor has an opportunity to cancel the lease, an opportunity which the court is not empowered to take away from it: p 432.

³² Glover op cit p 452.

A. GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 24 March 2022

Delivered: 14 April 2022

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