IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case number: **1876/2021**

In the matter between:

MADI TRADING (PTY) LTD t/a BRA MOS **Applicant**

and

CAPITAL PROPFUND (PTY) LTD **1st Respondent**
Registration number 2013/226575/06)
(Formerly Fortress Income 2 (Pty) Ltd)

BROLL PROPERTY GROUP (PTY) LTD **2nd Respondent**
(Registration number 2008/027519/07)

JUDGMENT BY: MOLITSOANE, J

HEARD ON: 7 MAY 2021

DELIVERED ON: 11 MAY 2021

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[1] This is an application brought on urgent basis for a declaratory and interdictory relief. The applicants seek the following relief:

1. That, non-compliance with the Rules of this Honourable Court relating to notice, service and/or time limits, be condoned and that this matter be heard as a matter of urgency in terms of the provisions of Rule 6(12).

2. That **a rule nisi is issued** requiring the Respondent to show cause, on the 29th of April 2021, why an order should not be made on a final basis:

    a. Declaring that the 1st Respondent is in anticipatory breach of contract.

    b. Interdicting the 1st and/or the 2nd Respondent from closing the business premises of the Applicant and/or ejecting the Applicant from the business premises.

    c. Instructing the 1st Respondent to withdraw intention and/or threats to cancel the contract and eject the Applicant from the business premises;

    d. Declaring the intention and/or threats to cancel the contract and eject the Applicant from the business premises unlawful.

    e. Instructing the 1st Respondent to provide the Applicant with the break down and/or computation of all charges in respect

of electricity and water actually consumed upon the premises itself including external signage and air-conditioning based on consumption as metered and calculated according to the official tariffs, levies and costs, applicable to the Lessee, from the supply authority concerned as well as the Lessee's pro rata share of electricity and water consumed within the common area or areas of the property including water and electricity consumed by signage and air-conditioning serving the common area;

3. Directing the 1st Respondent and the 2nd Respondent to bear the cost of this application in case of opposition thereof, the one paying the other to be absolved.

[2] The facts of this case are briefly as follows:
The first respondent and the applicant entered into an agreement of lease in terms of which the first respondent leased to the applicant certain business premises known as Shop No 301, Central Park, Bloemfontein. In terms of the said lease agreement, over and above the payment of monthly rental, the applicant was liable for payment of certain utilities including water and electricity.

[3] It would appear that prior to the institution of these proceedings there had been an ongoing dispute between the applicant and the respondent regarding the electricity and water accounts. At the time when this application was instituted, the said dispute had not been resolved.

[4] On 12 March 2021, the first respondent issued a notice to the applicant informing the latter that it (the applicant) was in breach of clause 27.1.1 of the lease agreement and further informed the applicant to rectify the breach within 21 days. The notice further state that "*failure to rectify [the] breach may result in the cancellation of the lease agreement and the institution of claims, including, but not limited to full arrears and the costs of reinstatement*."

[5] Following this notice there was an exchange of correspondence between the first respondent and the applicant over whether the applicant was in arrears of its obligations with the first respondent or not. On 23 April 2021, the first respondent sent a letter of demand to the applicant demanding payment of R54 499.21within 7 days failing which the first respondent threated to take steps for payment of the said amount, cancellation of the lease agreement, ejectment and damages. This letter prompted this application.

[6] The application is opposed on the following four points *in limine* and on the merits:

1. That this Court lacks jurisdiction to entertain this application. The respondents have since abandoned this ground and it need not detain us any further;

2. Lack of urgency and exceptional circumstances. The parties dealt comprehensively with the merits as they were intertwined with the issue of urgency. I am satisfied that the applicant has made out a case for urgency and the non-compliance with the rules relating to the time limits is condoned.

3. That the application brought by the applicant was defective. The Notice of Motion of the applicant afforded the respondents no provision to oppose the application and to file an answering affidavit. This Notice of Motion was thus defective and went against the prescripts of Uniform Rule 6(5). The respondents, however, filed the answering affidavit before the application was heard. The respondents did not demonstrate any prejudice they suffered by the non-compliance of Rule 5. In my view, this issue has since become moot and further reference to it is unnecessary.

4. That the order sought is incompetent.

[7] In dealing with this last issue *in limine,* it is necessary at this stage to mention that the applicant initially sought interim relief but later requested this court to grant final relief. There was no application made for the amendment of the Notice of Motion and consequently for the relief sought. The applicant seeks a declaratory order that the first respondent is in anticipatory breach of the agreement. This assertion made is that the first respondent threatens to cancel the agreement when there is a dispute regarding the water and electricity accounts.

[8] Clause 27 of the agreement deals with breach of the agreement. What the first respondent sought to do when it demanded the applicant to rectify the alleged breach of the agreement cannot be interpreted as repudiation of the agreement. The first respondent actually affords the Applicant an opportunity to make good the alleged breach. I am unable to see how the first respondent in this case can be said to be in anticipatory breach of the agreement when it takes steps sanctioned by the agreement and thus gives a

notice to the applicant to make payment and remedy the breach. The first respondent is only doing that which the agreement allows.

[9] The applicant further seeks orders interdicting the first respondent from 'threatening' to close the business of the applicant or ejecting them from the premises. These orders which the applicant seeks are final and are couched in such a way that they will endure forever. The applicant submits that this court has powers to grant orders like these owing to the inherent jurisdiction this court has. I am unable to agree. The relief sought, if it is granted, would have the effect that the first respondent will never, under any circumstances cancel this agreement of sale. The first respondent will further be unable to enforce the terms of this agreement. The interdicts sought have perpetual intent built into them. This court cannot grant this kind of interdictory relief under these circumstances. The orders sought are incompetent.

[10] The requirements for the granting of a final interdict are settled. The applicant must establish (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the lack of an adequate alternative remedy.

[11] The applicant has failed to establish the requirements for an interdict. I agree with Counsel for the first respondent that the applicant has failed to show that he has no other adequate alternative remedy. It is the uncontested evidence of the first respondent that if eviction were to eventuate, a lawful and due process of the law would be followed. If the first respondent cancels the agreement and brings an application to eject the

applicant, it can still oppose the ejectment and ensure, if successful, that he remains in the premises. If the first respondent resorts to self-help and closes the business without following due process, the applicant may still approach the for a spoliation order. In this regard, it is clear that the applicant has an adequate alternative remedy. This application must thus fail.

[12] I now turn to the costs. The awarding of the costs lies in the discretion of the court. I can see no reason why the successful party should not be granted the costs. I was addressed at length on the costs of 3 May 2021. It was argued on behalf of the applicants that due to the conduct of the parties to refuse to accept service on 29 April 2021, another service had to be done and the matter had to be postponed on 3 May 2021. The applicant contends that had the applicants accepted service of the application, then in that case the necessity to request a postponement on 3 May 2021 could have been avoided. The applicants thus put the blame squarely on the respondents for the postponement 3 May 2021.

[13] On the other hand, the respondents contend that they were served with a defective Notice of Motion. Despite the defect in the application, the respondents still managed to serve by email, the answering affidavit on Sunday afternoon. On Monday when the matter was due to be heard, the applicants sought a postponement to file a replying affidavit. Such a postponement was granted. The respondents argue that the applicant sought an indulgence and was obliged to pay the costs occasioned by the postponement.

[14] What is clear to me is that both sides are to blame for the matter not to proceed on 3 May 2021. The respondents made it difficult for the applicant to serve them prior to the hearing of the application. The applicants after service of the applicant also sought an indulgence. In my view, with regard to the costs of 3 May 2021, each party must bear its costs. I accordingly make the following order:

ORDER

1. The application is dismissed with costs.
2. Each party to bear its own costs of 3 May 2021.

PE MOLITSOANE, J

On behalf of the Applicants: Adv. ND Khokho
Instructed by:
Modisenyane Attorneys
BLOEMFONTEIN

On behalf of the Respondents: Adv. CJ Hendriks
Instructed by:
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