

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 2021/37747

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

A handwritten signature in black ink, appearing to be "M. M. M. M. M.", is written over a light blue rectangular background.

16 March 2023

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SIGNATURE

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DATE

In the matter of :

JEWEL CITY (PTY) LTD

Applicant

and

CORNER SPAZA SHOP

First Respondent

**ELECTRICAL ARMATURE WINDERS/
AUTOMOTIVE ELECTRICAL SHOP**

Second Respondent

**REDEAF AUTO PAINTS / AUTOMOTIVE
PAINT HSOP**

Third Respondent

FELICITY MINI-MARKET/ OTHER SPAZA SHOP

Fourth Respondent

**THE UNLAWFUL COMMERCIAL OCCUPIERS OF
THE WORLD TRADE CENTRE**

Fifth Respondent

JUDGMENT

Heard: 13 March 2023

Delivered: 16 March 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 16 March 2023.

Summary: *Eviction* – commercial occupiers – building occupied by residential and commercial occupiers - importance of including facts and description to distinguish commercial occupiers from residential occupiers.

Locus standi – challenge directed at deponent to founding affidavit – distinguish locus standi of applicant from authority to represent applicant – relevance of Rule 7

Lis alibi pendens – subsequent owner is not precluded from pursuing eviction relief by an eviction application launched by previous owner.

TURNER AJ

[1] The applicant is the owner of a property located at the Corner of Fox Street and End Street in downtown Johannesburg, with a double-storey building thereon referred to as “World Centre” or “World Trade Centre”. The building occupies Erven 473, 474, 475 and 482; City and Suburban, Registration I.R., Gauteng (“the building”). The applicant acquired the building in 2018 but, from the description in the papers and the photographs produced by the applicant, it seems that over many years prior thereto, the building has fallen into severe disrepair. Over those years, it has come to be occupied by persons carrying on commercial enterprises and persons making the building their home.

[2] The applicant seeks an order evicting the respondents from the property. It alleges that the respondents carry out commercial businesses from the property, that they have no right to do so and that as owner, it has the right to evict them. In the papers, the applicant has recorded expressly that it does not seek to evict residential occupiers in this application and that the application is directed only at commercial occupiers.

- [3] The respondents do not dispute the applicant's ownership of the property. They also do not assert any legal right against the applicant (such as a lease) which would entitle them to continued occupation of the premises. In fact, the answering affidavit does not raise any defence on behalf of the first to fourth respondents. Instead, the deponent to the answering affidavit raises two *in limine* defences and then, on the merits, set out facts to establish that the property is also inhabited by families who have made the building their home for a number of years. Some of these residential occupiers also use the building to run a small business.
- [4] I deal first with the points *in limine* and then with the merits of the dispute.
- [5] The respondents' first point *in limine* is described as a "lack of *locus standi*". They argue that no documents are attached to the founding affidavit to substantiate the deponent's allegation that Ithemba Property Management is the applicant's managing agent. The respondents assert that, in the absence of such documentation, such as a resolution appointing Ithemba, the court should reject the *locus standi* of the deponent.
- [6] This defence can summarily be disposed of. First, the party that must have *locus standi* is the Applicant. In this case, there is no dispute that the Applicant, as owner, has *locus standi*. Second, the person that must have the necessary authority to bring the application when the applicant is a juristic person, is the person representing the applicant in launching the application. In this case it is the attorney who signed the notice of motion. "*It is the institution of the proceedings and the prosecution thereof which must be authorised*" (*Ganes & Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) para 19), not the

deponent. No challenge has been directed at the authority of this attorney to act on behalf of the applicant. Uniform Rule 7 provides the mechanism for challenging the authority of the attorney bringing the application and the respondents have not delivered a Rule 7 notice. Consequently, there is no legitimate challenge to that authority. (*ANC Umvoti Council v Umvoti Municipality* 2010 (3) SA 31 (KZP) at [28]) Third, the deponent to the affidavit does not need to be a person within the applicant's organisation or to be formally authorised to depose to the founding affidavit. The deponent to the affidavit is required to have personal knowledge of the evidence relevant to supporting the applicant's cause of action. The attorney bringing the application, who is authorised to do so on behalf of the applicant, attaches the founding affidavit of a person with the relevant knowledge as the evidence in support of the application.

[7] In the circumstances, there is no merit to the *in limine* defence of *locus standi* and it falls to be dismissed.

[8] The second *in limine* defence is *lis pendens*. This, too, can be summarily disposed of. The plea of *lis alibi pendens* is a dilatory plea and, if upheld, merely delays the resolution of the matter and does not dispose of it. The party raising the defence must discharge the onus of establishing: (a) pending litigation; (b) between the same parties or their privies; (c) based on the same cause of action; (d) in respect of the same subject matter. Once these elements are established, the Court still has a discretion whether to uphold or reject the defence. (*Caesarstone Sdot-Yam Ltd v The World of Marble and Granite* 2000 CC and others 2013 (6) SA 499 (SCA) at [12] – [36];)

- [9] The other proceedings relied upon by the respondents were application proceedings instituted by the previous owner of the property against all of the occupants of the property, both commercial and residential. That application was launched in 2017 and directed at the parties in occupation during 2017, relying on the facts as known in 2017. The current application is instituted by a different applicant, relying on a right acquired after the 2017 proceedings were instituted, and directed at respondents who may or may not have been in occupation at the time of the first application. This appears to be accepted by the respondents. Counsel for the respondent acknowledged that the current Applicant couldn't withdraw the 2017 litigation (because it is not a party to that litigation) but argued that the current applicant should substitute itself as the applicant in the 2017 proceedings. This contention exposes the fallacy in the defence. The fact that the current applicant does not have the right to withdraw the previous proceedings and cannot unilaterally substitute itself as applicant, is evidence which shows that the litigation is not between the same parties to the current litigation.
- [10] In the circumstances, the requirements for the defence of *lis alibi pendens* have not been met and that plea is also dismissed. In passing, I note that neither the principle of fairness nor convenience would justify the Court exercising a discretion in favour of staying the current application: there is no reason why the current applicant should be bound by or restricted to the facts and arguments relied upon by the previous owner in the previous application; given the absence of any actionable defence from the first to fourth respondents, discussed below, there is no reason to delay granting the relief.

- [11] On the merits of the application, it appears that there is a misalignment between the case made by the applicant and the defences raised by the respondents. In the founding affidavit, the applicant is at pains to record that it seeks eviction only of the commercial operations being undertaken from the premises. It expressly confirms that it does not intend to evict the residential occupiers at this stage. However, the “catch-all” manner in which the Applicant describes the parties falling within the category persons described in the citation of the fifth respondent, does give rise to uncertainty that could undermine the clear delineation that the applicant attempts to make between commercial and residential occupants. What happens to individuals who live on the property but carry on a small business or use their residential space to support a business? Are they to be evicted too? I can understand that certain of the building’s occupants may have been uncertain and concerned over the scope of the intended order.
- [12] As appears from the Sheriff’s return of service, the Sheriff was able to identify the businesses of the first to fourth respondents at the property, and to serve the founding papers on each of them. However, the Sheriff was not able separately to identify other businesses from the description in the Notice of Motion in order to serve the papers on them individually. So, in respect of the parties generally included in the description of the fifth respondent, the Sheriff effected service by affixing the papers to the wall of the building.
- [13] This indicates that the description relied upon, being “The Unlawful Commercial Occupiers Of The World Trade Centre” is not accurate enough to enable the Sheriff to distinguish commercial occupiers from residential or other occupiers.

In my view, the Sheriff will be faced with the same difficulty when tasked with carrying out the execution of the eviction order.

[14] In the founding affidavit, supplemented by the replying affidavit, the applicant has clearly identified five commercial enterprises that operate from the premises and can be identified as operating from the property. Their eviction is the object of the application and the respondents' answering affidavit does not appear to deal with these businesses at all. Although the deponent alleges that she has authority to depose to the affidavit "*on behalf of all other several adult occupiers who are not cited in this matter*" (para 5), she does not hold herself out as a representative of the commercial occupiers of the building. In particular, the deponent to the answering affidavit does not dispute the critical allegations in the founding affidavit related to the first to fourth respondents or the carpentry workshop – that their businesses are carried out from the premises.

[15] On the papers, therefore, it appears that there is no dispute that: i) there are residential occupiers of the building in addition to commercial occupiers; ii) the first respondent is a commercial operation which occupies shop 1; iii) the second respondent is a commercial operation which occupies shop 4; iv) the third respondent is a commercial operation that occupies shop 5; v) the fourth respondent is a commercial operation which occupies shop 6; vi) the carpentry workshop occupies an identifiable area on the ground floor; vii) there are other commercial enterprises which operate from the premises and occupy other areas in the building.

[16] Given the manner in which the respondents' defence has been set out, it seems to me that there is no defence proffered by the first to fourth respondents or by

the operators of the carpentry workshop. As such, an eviction order can and should be granted against those respondents.

[17] The applicant has not attempted to describe carefully the other commercial operations being undertaken at the building (besides the first to fourth respondents and the carpentry workshop) to enable the Sheriff to identify those occupants and to distinguish them from the residential occupants. Instead, the order it seeks appears structured to give the Sheriff a discretion in deciding whether a particular occupant falls within the general description falling within the description of “*Further Unlawful Commercial Occupiers*.” This is unsatisfactory.

[18] During argument, I pointed out to Applicant’s counsel that the order sought against the “fifth respondent”, being the class of occupiers described collectively as “*The Further Unlawful Commercial Occupiers Of The World Trade Centre*” is not sufficiently clear or particularised. After taking an instruction, counsel confirmed that the Applicant did not persist in seeking this wide order and moved to amend the relief claimed to limit its application only to evicting the businesses of the first to fourth respondents and the carpentry workshop operated on the premises. Counsel for the respondents did not object to this amendment, and he was correct not to do so, as this clarified and limited the order sought to a group other than the residential occupiers who the answering affidavit sought to protect.

[19] Were an order to be granted in imprecise terms, there is a risk that the rights of the residential occupants may be negatively affected. If the applicant wanted to evict occupiers other than those specifically identified in the papers, it was

required to do more to enable the Court and the Sheriff to identify the intended evictees and the spaces in the building from which they were required to be evicted. This would have included: a description of relevant part of the building; identifying the particular shops or areas occupied by commercial enterprises and those occupied for residential purposes.

[20] If the applicant undertakes the necessary due diligence and is able to identify with sufficient specificity other commercial occupiers that it wishes to evict, it may then be entitled to bring such an application in the future.

[21] The applicant argued that the costs of the application should be paid by the respondents' legal representatives *de bonis de propriis*. It relied on the dicta of this Court in *Lushaba v MEC for Health, Gauteng* 2015 (3) SA 616 (GJ) at [68] in support of this argument. In my view, although the *in limine* points have been dismissed and there were delays in the delivery of the answering papers that may have frustrated the applicant and its attorneys, the conduct of the respondents' legal representatives does meet the test for the application of a *de bonis* costs order. I hazard a guess that if the applicant had been clearer in their description of the occupiers that fell within the group of 5th respondents, much of the frustration it complained of may have been averted.

[22] In the circumstances, I grant the following order:

(1) The following persons and businesses are evicted from the World Trade Centre situated at the Corner of Fox Street and End Street (No. 228 and 230 Fox Street and 36 and 38 End Street) and described as Erven 473, 474, 475 and 482, Johannesburg:

- a. The first to fourth respondents and all those occupying shops 1, 4, 5 & 6 by, through or under the first to fourth respondents;
- b. The proprietors and operators of the carpentry workshop operated at the property and all those occupying the carpentry workshop area by, through or under such persons.

(2) In the event that the persons listed in (1) above do not vacate shops 1, 4, 5 & 6 as well as the carpentry workshop as ordered, the Sheriff of the Court or his lawfully appointed deputy is authorised and directed to evict those persons from shops 1, 4, 5 & 6 and as the carpentry workshop.

(3) The first to fourth respondents are ordered and directed to pay the costs of this application.



 TURNER AJ

Counsel for the applicant : L Hollander
 Instructed by : Vermaak Marshall Wellbeloved Inc

Counsel for the respondents: L Ndlovu
 Instructed by: Precious Muleya Attorneys

Date of hearing: 13 March 2023

Date of Judgment: 16 March 2023