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

CASE NUMBER: 2021/31075

In the matter between:

CENTPRET PROPERTIES (PTY) LIMITED
(REGISTRATION NUMBER:[…]) Applicant

and

GODFREY NCHAUPA ATTORNEYS INC
(REGISTRATION NUMBER:[…]) First Respondent

GODFREY NCHAUPA
(IDENTITY NUMBER:[…]) Second Respondent

Neutral Citation: *Centpret Properties (Pty) Limited v Godfrey Nchaupa Attorneys Inc and Another* (Case No: 2021/31075) [2023] ZAGPJHC 671 (30 May 2023).

JUDGMENT

WANLESS AJ

Introduction

[1] In this application CENTPRET PROPERTIES (PTY) LIMITED *("the Applicant")* originally sought the eviction of GODFREY NCHAUPA ATTORNEYS INCORPORATED *("the First Respondent")* from Office MS0425, MALBOROUGH HOUSE, 127 FOX STREET, JOHANNESBURG *("the property")* owned by the Applicant. The Applicant also sought an order that the First and Second Respondents pay to the Applicant the sum of R29 392.62 in respect of arrear rental and other obligations, jointly and severally the one paying the other to be absolved, it being common cause that one GODFREY NCHAUPA, adult male and attorney of this Court *("the Second Respondent")* had bound himself as surety and co-principal debtor to the Applicant for the due fulfilment by the First Respondent of all the terms

of the lease agreement *("the agreement")* entered into between the Applicant and the First Respondent. An order in respect of the costs of the application was also sought, on a joint a several basis, against both Respondents.

[2] Regrettably, what commenced as a relatively simple and straightforward application, once opposed by both the First and Second respondents, became a highly complex application consisting of, *inter alia*, numerous interlocutory applications and the raising of various points *in limine*. Also of concern are a number of what may best be described as "technical objections"; the "use" or potential "abuse" of the rules of court and "reliance" upon various Practice Directives of this Division.

[3] The aforegoing is clearly illustrated by a perusal of the Joint Practice Note; the Draft Orders handed in to this Court by both parties and the Heads of Argument delivered by the parties prior to the matter being argued on the Opposed Motion roll of this Court. As previously noted by this Court in other matters the failure of parties to place interlocutory applications on the interlocutory application roll for decision prior to having the matter heard on the Opposed Motion roll, is inexcusable. To effectively burden this Court with deciding multiple applications within what purports to be a single Opposed Motion, is not only unfair to the Court which is already burdened with an onerous workload but does little to promote the interests of justice. Moreover, it defeats the commendable object of creating a court to deal with interlocutory applications.

[4] The order now sought by the Applicant reads as follows:

1. The First and Second Respondents' late delivery of the Answering Affidavit is condoned.

2. The Respondents are to pay the costs of that application on the scale of attorney and client.

3. The Respondents' application in terms of Rule 30(1) be dismissed.

4. The Respondents are to pay the costs of that application on the scale of attorney and client.

5. The First and Second Respondents are to pay the Applicant the sum of R29 392.62 jointly and severally the one paying the other to be absolved.

6. The First and Second Respondents are to pay the costs of the eviction application jointly and severally the one paying the other to be absolved on the scale of attorney and client.

[5] On behalf of the First and Second Respondents, a Draft Order was also handed in at the hearing of this application which reads as follows: -

1. Respondents' late filing of their Answering Affidavit is condoned and that the Applicant pay the costs of opposition on attorney and client scale;

2. That the Respondents' point *in limine* is upheld;

3. That the Respondents' application in terms of Rule 30(1) is upheld with costs on attorney and client scale;

4. That the Applicant's Replying Affidavit is declared irregular step (sic) and thus set aside with costs on attorney and client scale;

5. That the Applicant's application for eviction of the Respondents is dismissed with costs on attorney and client scale.

The Facts

[6] The facts of this matter which are either common cause or cannot seriously be disputed by any of the parties are as set out hereunder.

[7] The Applicant as owner of the property concluded the agreement with the First Respondent to lease the property for the period 1 January 2019 to 31 December 2020. The Second Respondent bound himself as surety.

[8] The First Respondent fell into arears in respect of payment of the rental amounts due and on 8 February 2021 a demand was dispatched calling on the Respondents to rectify the default within seven days from the date of the letter failing which the lease would be cancelled.

[9] The breach was not rectified by the Respondents on or before the 11th of March 2021 and it is further common cause that on the 11th of March 2021 the Applicant sent a notice cancelling the agreement which was received by the Respondents. In the premises, the agreement was allegedly cancelled by the Applicant on the 11th of March 2021.

[10] In the premises, the Applicant submits that it is common cause that the Applicant is the owner and that the Applicant served a breach notice on the 8th of February 2021

and then cancelled the lease on the 11th of March 2021. Thus, the Applicant submits that the requisites for the *rei vindicatio* have been satisfied.[1]

[11] Following thereon the Applicant submits that it, as owner, has the requisite *locus standi* at the date that the application was instituted and served (issued on 30 June 2021 and served on 19 July 2021) to seek the eviction of the First Respondent and claim payment from the Respondents, as there was no extant lease agreement in existence and the First Respondent had no right to occupy the property. The Applicant therefore had a complete cause of action premised on the *rei vindicatio*. The importance and relevance of this will become more apparent later in this judgment, particularly in light of the defence as raised by the Respondents.

[12] On 26 July 2021 the Respondents served their notice of intension to oppose the eviction application, premised on the facts in the founding papers.

[13] It is common cause that there were negotiations between the parties aimed at securing payment of the admitted arears in terms of the agreement. On the Applicant's version, at no stage prior to the service of the Respondents' Answering Affidavit was any alleged renewal of the lease agreement raised during negotiations.

[14] It is common cause that the Respondents served their notice of intention to oppose this application on the 26th of July 2021. On the 27th of July 2021 (this is further common cause) the Second Respondent received an email from one ALTHEA LOTZ ("Lotz") who appears to be a Property Manager (Commercial) but whom it is common cause is an employee of City Property Administration Managing Agents employed by the Applicant and the Applicant's duly authorised agent to administer the property. Attached to this email was a Notice of Renewal of Monthly Tenancy (with monthly freeze) also dated the 28th of July 2021.

[15] This notice was signed by the Second Respondent on behalf of the First Respondent and emailed back to Lotz the same day. Lotz acknowledged receipt thereof. In the Applicant's Replying Affidavit deposed to by one WOODROW THOMAS JULIAN WILSON ("Wilson"), in his capacity as the legal advisor of City Property Administration and in the Applicant's Answering Affidavit in respect of the application by the Respondents for condonation, it is stated that the abovementioned notice was sent to the Second Respondent in error and/or was due to the Applicant's automated renewal systems. However, no confirmatory or explanatory affidavit has been placed before this Court by Lotz or any other appropriate employee/s of either City Property Administration and/or the Applicant to explain this error. The Applicant does rely

[1] *Chetty v Naidoo* 1974 (3) SA 13 (AD) at 14-15.

however on a letter addressed by the Applicant's attorney to the Second Respondent dealing with same and dated the 11th of February 2022.

[16] On the 4th of October 2021 and the 1st of November 2021 the Respondents made two (2) payments of R12 000.00 to the Applicant (a total of R24 000.00). No other payments were made by the Respondents to the Applicant.

[17] The First Respondent vacated the property on or about the 5th of July 2022 and prior to the application being heard by this Court. In the premises, it was no longer necessary for the Applicant to seek an order that the First Respondent be evicted from the property as is evident from the Applicant's Draft Order referred to earlier in this judgment. In the premises, the only issue for this Court to decide in respect of the eviction application is the issue of costs.

[18] The Applicant seeks an order that the Respondents be ordered to pay the costs of that application, jointly and severally the one paying the other to absolved, on the scale of attorney and client whilst the Respondents seek an order dismissing the application with costs on the same scale. Aligned to the merits of the eviction application is the monetary claim of the Applicant for the sum of R29 392.62 in terms of the agreement (as dealt with hereunder).

The Applicant's case in respect of the eviction application

[19] In light if the facts which are common cause in this matter, it was submitted on behalf of the Applicant that:

19.1 The Applicant was clearly entitled to rely on the *rei vindicatio* to regain possession of its property and therefore to institute the application;

19.2 The onus is upon the Respondents to prove that the First Respondent had the right to occupy the property;

19.3 If the Respondents did not discharge the onus then the Applicant would be entitled to judgment;[2]

19.4 The First Respondent had breached the agreement and the Applicant had cancelled the agreement;

19.5 The First Respondent had failed to vacate the property giving rise to the necessity for the Applicant to institute the eviction application;

[2] *Chetty v Naidoo* (*supra*).

19.6 There was never any renewal of the agreement and/or a new agreement of lease entered into between the Applicant and the First Respondent;

19.7 The Applicant is therefore entitled to the costs of the eviction application.

The Respondents' case in respect of the eviction application

[20] The Respondents submit, *inter alia*, that:

20.1 The application was served by the Applicant upon the Respondents on the 19th of July 2021;

20.2 On the 27th of July 2021 the Applicant renewed the agreement with the First Respondent;

20.3 In the premises, the application became moot and should be dismissed with costs.

The point *in limine* raised by the Respondents in respect of Rule 41A

[21] Before dealing with the issue of whether the agreement was renewed or not, it is noted by this Court that whilst the issue of mootness was raised by the Respondents as a point *in limine* (and referred to as such) the Respondents also purported to raise a further point *in limine*, namely that the Applicant had failed to comply with the provisions of Rule 41A (Mediation) and therefore the matter should be struck off the roll. However, this point was not proceeded with before this Court and the matter was fully argued.

[22] Had this point been taken, this Court would have held that in light of, *inter alia*, the Respondents' failure to invoke the provisions of the said rule the matter should in any event proceed before it and would have dismissed the point *in limine*.

The Court's findings in respect of the eviction application

[23] As is the case with any other contract, document, judgment or order of court the renewal notice relied upon by the Respondents must be read in context and objectively assessed, having regard to, *inter alia*, surrounding circumstances.[3]

[24] The renewal notice could, on its own terms, only apply to an instance where:

24.1 An extant lease agreement expired through the effluxion of time;

24.2 Upon the aforesaid effluxion the lease converted to a monthly tenancy;

24.3 The tenancy was operative (not cancelled at the time that the renewal notice was sent).

[25] The aforegoing appears plainly from the contents of the renewal notice itself which reads, *inter alia*, as follows:

> *"2. The Landlord concluded a lease agreement with the Tenant … which agreement continued from the lease expiry date on a month-to-month basis …"*
>
> *"4. The landlord would like to continue with the lease agreement on a month-to-month basis subject to the monthly rental … R1724.25 …"*
>
> *"6. Where the Tenant fails to notify the Landlord of its wish to terminate the lease agreement, the lease agreement will automatically continue on a month-to-month basis".*

[26] The fact that the renewal notice only pertains to the continuation of an extant lease supports the Applicant's version, on a balance of probabilities, that the renewal notice was sent in error as there was no lease in existence, due to the termination of the lease on 11 March 2012 (which is common cause).

[27] The aforegoing gives some credence to the submission made by the Applicant's Counsel that the Respondents are attempting to rely on this mistake to create a defence.[4]

[28] Further, from the application papers before this Court the Respondents' conduct in negotiating to settle arrears (not demanding or insisting that the lease was renewed) supports the version that there was no renewal.

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[3] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paragraph [18].
[4] *McCreath v Wolmarans N.O. and Others* 2009 (5) SA 451 (ECG) at paragraph [18].

[29] It is also common cause that aside from the two payments of R12 000.00 made by the Respondents in respect of the admitted arears the Respondents have made no other payments in respect of rental. This common cause fact (that the Respondents did not make any payments towards rental under any purported renewal of the agreement from 27 July 2021 or thereafter) is inconsistent conduct with that of a party who had concluded a lease renewal.

[30] Finally, the following facts clearly show there was no renewal of the agreement, namely: -

30.1 The Applicant placed the Respondents on terms;

30.2 Cancelled the lease agreement;

30.3 Instituted proceedings for eviction and a money judgment;

30.4 Served the application on the Respondents.

[31] Thus, the Applicant could never have had the intention to conclude a renewal of the lease under these circumstances and, on a balance of probabilities, the Respondents should have been under no illusion that the renewal notice was an error.

[32] So, whilst the Applicant can be justifiably criticised for failing to explain the reasons for this mistake (as dealt with earlier in this judgment) the failure of the Applicant to do so in reply, pales in significance when compared to the objective facts of the matter as set out herein.[5]

[33] In the premises, the Respondents have failed to discharge the onus incumbent upon them to prove that the agreement was renewed and that the First Respondent had the right to continue to occupy the property pursuant to the cancellation of the agreement. More particularly the application never became moot since when the application was instituted and served the First Respondent had not vacated the property and only vacated the property on or about the 5th of July 2022. The Applicant was clearly entitled to proceed with the application on the basis of, *inter alia*, seeking a costs order in respect of the eviction application; judgment in respect of the arrear rental claimed and cost orders in respect of the various other interlocutory applications (dealt with later in this judgment).

[5] *McCreath* (*supra*) at paragraph [18].

The claim by the Applicant that the First and Second Respondents pay to the Applicant the sum of R29 392.62 jointly and severally the one paying the other to be absolved

[34] In its Founding Affidavit the Applicant avers that the First Respondent is indebted to the Applicant in the total sum of R29 392.62 in respect of rent and other ancillary charges in terms of the agreement and as set out in Annexure "FA6" which is a reconciliation of the First Respondent's account. The Applicant claims payment of this amount but does not claim interest in respect thereof, either in its Notice of Motion or in the Draft Order referred to earlier in this judgment.

[35] The Respondents proffer what Applicant's Counsel has described as a qualified denial in respect of being in arears *"as per the alleged reconciliation"* and rely on the two payments of a total of R24 000.00 pursuant to negotiations.

[36] In line with the tests as enunciated in, *inter alia*, *Plascon-Evans*;[6] *Wightman*[7] and *Soffiantini*,[8] this Court is satisfied that the aforesaid denial does not constitute a *bona fide* defence to the eviction application. But what effect, if any, does the payment of R24 000.00 have on the Applicant's claim for payment of the sum of R29 392.62?

[37] The Applicant submits that on the Respondents' own version (in an email dated 27 October 2021) after having paid the first R12 000.00 (on 4 October 2021) the outstanding balance was R34 580.50, together with the *"current rental amount"* as at 27 October 2021.

[38] It is further submitted by the Applicant that by adding rental payable under the cancelled lease to the aforesaid amount for five months the aggregate claim stands at R44 490.00 and when the second payment of R12 000.00 is deducted (1 November 2021) the outstanding balance is R32 490.00 (as at 31 March 2022).

[39] In the premises, the Applicant submits that the relief claimed in prayer 4 was never extinguished and since the Applicant cannot claim a larger amount the judgment claim should remain at R29 392.62.

[40] This Court cannot fault the reasoning behind the aforesaid submissions made on behalf of the Applicant. In the premises, this Court holds that the Applicant has proved, on a balance of probabilities, that the Respondents are indebted to the Applicant, jointly and severally the one paying the other to be absolved, in the sum R29 392.62.

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[6] *Plascon-Evans v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD) at 634-635.
[7] *Wightman v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA)
[8] *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154H.

The First and Second Respondents' application in terms of Rule 30(1)

[41] This further application epitomises the unfortunate manner in which the litigation surrounding this application was carried out. Earlier comments made in this judgment pertaining to interlocutory applications refer.

[42] Having carefully considered the application in terms of Rule 30(1) in this matter, it is clear to this Court that there are criticisms that may be made in respect of the manner in which both parties conducted themselves in respect thereof. Arising therefrom, it is further clear that this Court should not be a slave to the rules of court which are there to assist the Court and not to hinder or burden the Court by forcing the Court to write lengthy and complex judgments dealing with same. As proposed by the Applicant herein (with authority therefor) this Court should adopt a pragmatic approach thereto. In light thereof, this Court declines to become embroiled therein and this interlocutory application is postponed *sine die*, each party to pay their own costs. This order shall include the relief sought in the Respondents' Draft Order that the Replying Affidavit of the Applicant be declared to be an irregular step.

The application for condonation for the late filing of the Respondents' Answering Affidavit

[43] The Applicant withdrew its opposition to this application but sought an order for costs. The Respondents seek an order that the Applicant pay the costs of that application on the scale of attorney and client.

[44] This Court repeats its observations pertaining to blameworthiness as dealt with above; declines to attempt to resolve various disputes of fact and reminds the parties of the fact that this Court has a wide and general discretion when it comes to the issue of costs. In the premises, this Court is of the opinion that each party should pay their own costs in respect of this further interlocutory application.

Costs in respect of the eviction application

[45] It is fairly trite that (as set out above) a court has a general discretion, to be exercised judicially, in respect of costs. Costs normally follow the result, unless unusual or exceptional circumstances exist. No such circumstances exist in this matter and there is no reason as to why the Respondents should not be ordered to pay the costs of the eviction application, jointly and severally the one paying the other to be absolved.

[46] The Applicant has submitted that these costs should be paid on the scale of attorney and client. In this regard, Advocate Van der Merwe, for the Applicant, pointed to the many unsavoury and disconcerting remarks made by the Second Respondent, an officer of this Court, against the Applicant's attorneys. There is no denying the nature of the comments made by the Second Respondent and the undesirability thereof. At the same time, Advocate Van Der Merwe (correctly) conceded in his Heads of Argument that the Applicant's attorneys had retaliated thereto. This too is unfortunate and unbecoming of attorneys of this Court.

[47] During the course of argument, this Court raised the issue of the scale of costs with Applicant's Counsel, considering the relief sought and the amount of the money claimed. Simply put, this Court enquired whether or not the matter should not have been instituted in the Magistrates' Court at far lesser costs. Advocate Van der Merwe's response to this Court was that there was ample authority for the fact that where a Respondent was an officer of the Court (as in this case) the matter should be heard in the High Court. Advocate Van der Merwe undertook to provide this Court with such authority.

[48] On the 16th of February 2023, in light of the fact that no such authority had been received from Advocate Van der Merwe, the clerk of this court addressed an email to him, requesting same. This elicited a response on or about the 21st of February 2023. Regrettably, not only did the aforegoing considerably delay the finalisation of this judgment (apart from the onerous workload facing this Court) but, as conceded by Advocate Van der Merwe in his email, the authority provided little in respect of an authoritative answer to the question posed by this Court (as set out above).

[49] In the opinion of this Court, any cost order in this matter should be on the High Court scale. This is simply because the Respondents failed to exercise their right at any stage of these proceedings to object to the institution of the application in the High Court and have the matter removed to the Magistrates' Court. Certainly, no such objection was ever brought to the attention of this Court.

[50] Further as to the scale of costs, this Court is not satisfied that, for the reasons set out above, it should, in the exercise of its discretion, award costs on the punitive scale. In the premises, the Respondents will pay the costs of the eviction application on the party and party scale.

Order

[51] This Court makes the following order:

1. The First and Second Respondents' late delivery of the answering affidavit is condoned;

2. Each party is to pay their own costs of the condonation application;

3. The First and Second Respondents' application in terms of Rule 30(1) and the application that the Replying Affidavit of the Applicant be declared to be an irregular step are postponed *sine die*;

4. Each party is to pay their own costs in respect of the applications as set out in paragraph 3 hereof;

5. The First and Second Respondents are to pay to the Applicant the sum of R29392.62 (Twenty Nine Thousand, Three Hundred and Ninety Two Rand and Sixty Two Cents), jointly and severally the one paying the other to be absolved;

6. The First and Second Respondents are to pay the costs of the eviction application, jointly and severally the one paying the other to be absolved.

B.C. WANLESS
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard:	16 November 2022
Ex Tempore:	30 May 2023
Transcript:	08 June 2023

Appearances

For Applicant:	C van der Merwe
Instructed by:	Vermaak Marshall Wellbeloved Inc.
For Respondents:	G Nchaupa [and In Person]
Instructed by:	Godfrey Nchaupa Attorneys Inc.