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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED: NO
Date: 11 March 2025
Case Number:011335/2024

In the matter between:

**MULTIFLAT RESIDENTIAL PROPERTIES
(PTY) LTD-EIKEHOF (M)
(REG NO: 2000/018447/07)**

Applicant

and

**MD SHAR ALI
(ID NO:) 7[...]**

Respondent

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 11 March 2025.

JUDGMENT

COLLIS J

INTRODUCTION

1. In this opposed application wherein, the Applicant is seeking an order for eviction, against the Respondent from commercial immovable property. The Applicant is the owner of the property registered into its name.

2. The Applicant alleges that the Respondent breached the terms of the commercial lease agreement, specifically with reference to the use of the leased premises, by failing to operate a laundry business, which was specifically stipulated by the commercial lease agreement, and in direct breach of the commercial lease agreement, attempting to operate a spaza shop from the Applicant's premises.

3. The Respondent opposes this application, on the alleged basis that the Respondent had alleged oral agreements with the representatives of the Applicant, to operate a spaza shop from the premises, and on this basis, he contends, that the Applicant cannot evict him.

4. The Respondent further does not deny that he is in breach of the written commercial lease agreement between the parties, in that he was operating a business from the premises that was specifically not provided for or that was prohibited by the commercial lease agreement, or that the Applicant had properly terminated the agreement between the parties. This termination occurred on the 9th January 2024.

BACKGROUND

5. This application as mentioned, is for the eviction of the Respondent, from commercial property, where he conducts his business. The basis for the Applicant's application for eviction is as follows:

5.1 The basis for the cancellation of the lease agreement by the Applicant, is not due to non-payment of the monthly rental, but due to the breach on the part of the Respondent, in failing to adhere to the express terms of the lease agreement, specifically with reference to the use of the leased premises, by operating a business from the commercial premises which was not agreed to between the parties, and therefore, which was specifically excluded by the commercial lease agreement.

5.2 The Applicant specifically refers to the purpose for the use of the leased premises by the Respondent, as expressly stated in paragraph "E" of the Information Schedule of the Lease Agreement.

5.3 In terms of paragraph "E" of the information Schedule of the Lease Agreement, the parties expressly agreed that the purpose for which the leased premises were to be let, was for: "a laundry".

5.4 In terms of paragraph "E" of the information Schedule of the Lease Agreement, the parties expressly agreed that the lease of the leased premises would be for a laundry, and for nothing else.

5.5 This paragraph "E" of the Information Schedule of the lease agreement must be read in conjunction with clause 4.2 of the Conditions of Lease, which specifically provided for the following:

"4.2 The Tenant shall use the Leased Premises solely for the Permitted Purpose."

5.6 The Respondent failed to adhere to the terms of the Lease Agreement, and therefore the Applicant contends the Respondent was, and still is, in breach of the lease agreement.

5.7 When the Applicant became aware of the fact that the Respondent breached the agreement, by contravening the terms of the agreement, and failing to adhere thereto, specifically with reference to the use of the leased premises, the Applicant, acting in terms of the lease agreement, notified the Respondent of the breach of the lease agreement, on the 19th of September 2023.

5.8 As per Annexure "AS3" to the Founding Affidavit, the breach of the Respondent was clearly set out and addressed. The Respondent, despite being made well aware of this, and the Applicant's position on the issue, however failed to remedy the breach.

ISSUES FOR DETERMINATION

6. This Court was called upon to determine whether the Applicant has made out a proper case in the application to have an eviction order granted against the Respondent. In this regard, the Applicant, approaches this Court as the lawful and rightful owner of the immovable property, and this is common cause between the parties. As lawful owner the Applicant is relying on the rei vindicatio and the Respondents' possession of the property.

REQUIREMENTS FOR REI VINDICATIO

7. In order for the Applicant to thus succeed with an eviction, the Applicant must allege and prove:¹

¹ Amler's Precedent of Pleadings Eight Edition p 188.

7.1 the right of the Respondent to possess, i.e a lease agreement between the parties;

7.2 a valid termination of the right to possess;

7.3 a continued occupation by the respondent or someone holding on behalf of or through the Respondent;

7.4 compliance with the provisions of any statutory requirements;

7.5 damages (if any) suffered as a result of the holding over.

COMMON CAUSE FACTS

8. It is a common cause fact between the parties, that the Respondent does not deny his breach of the commercial lease agreement, or that the Applicant has properly terminated the agreement between them. Therefore, the Respondent is in unlawful occupation of the property.

POINTS IN LIMINE

9. The Respondent however had raised two *points in limine* in defence.

9.1 The first issue raised is taking issue with the deponent to the Founding Affidavit's ability to depose to the affidavit on behalf of the Applicant;

9.2 The second issue raised by the Respondent, is that the Applicant's application is premature as the Applicant was obliged to first proceed

by way of ADR as provided for in paragraph 13.3 of the lease agreement, or on terms of Rule 41A.

10. It's important to note that but for these *points in limine* raised, no additional defences have been disclosed by the Respondent against the eviction and breach claim of the Applicant.

Deponent's ability to deposed to the Founding Affidavit.

11. As per the Founding Affidavit, the deponent alleges, that she is an adult female Legal Advisor in the employ of City Property Administration (Pty) Ltd, and that her employer is the Applicant's duly authorised agent which handles and facilitates, *inter alia*, the administration and legal aspects of the Applicants properties. As such the deponent further contends that she is duly authorised to deposed to this affidavit.

12. She further alleges that the file pertaining to the Respondent as well as the leased premises falls under her direct control and that she has acquainted herself with the content of the file and the facts of the matter.² These aspects regarding the ability of the Applicant's deponent to depose to the affidavits, and her authorisation to depose thereto has been dealt with in detail in paragraphs 1.1 to 1.5 in the Founding Affidavit, as well as paragraphs 4.1 to 4.16 of the Replying Affidavit.

13. It on this basis that Counsel submitted that it is clear that the deponent has been properly authorised to depose to the affidavits on behalf of the Applicant, as stated in the Founding Affidavit, as well as in terms of Annexure "RA1" to the Replying Affidavit.

² Founding Affidavit para 1 p 08-7.

14. Furthermore, that apparent from the founding papers, it is clear from that, not only is the deponent duly authorised to act on behalf of the Applicant, but the facts of the matter fall within her personal knowledge, as she has personally dealt with this matter.

15. The deponent further indicates that the facts of the matter fall within her personal knowledge, and that she can swear positively to the facts, as is required by the Uniform Rules of Court, with specific reference to Rule 6.

16. Before this Court, Counsel for Applicant submitted that the Respondent has not raised any issue in terms of Rule 7, and further fails to place any evidence before this Court, as to why the deponent of the Applicant cannot act on behalf of the Applicant, in deposing to these affidavits. The Respondent has also failed to invoke the provisions of Rule 7, or to have filed any formal Notice in terms of Rule 7.

17. For the above reasons Counsel had argued, that the Respondent is making mere allegations with no proof whatsoever, to support his contentions, and without any personal knowledge that would disqualify the deponent from making these affidavits, as per the requirements of the Uniform Rules of Court.

18. In its Answering Affidavit the Respondent denies that the deponent has the necessary locus standi to depose to the affidavit on behalf of the Applicant. More so in the absence of a special resolution or confirmatory affidavit attached to the Founding Affidavit.

19. In addition, the Respondent alleges that there is nothing in the Founding Affidavit that suggest that Ms Agelique Smit who is an employee of City Property Administration is in anyway authorised to

depose the Affidavit on behalf of the Applicant,³ more so where applications have been launched on behalf of juristic persons, where such juristic person has resolved to bring the application and/or institute the proceedings.

20. The Applicant herein has also failed to attach to the founding papers a special resolution from the Applicant to the effect that the mentioned person, is indeed authorised to depose the Affidavit on behalf of the Applicant.

21. Absent such proof the Respondent therefore contends that there has also been non-compliance with Rule 6(1).⁴

³ Amler's Precedent of Pleadings page 67 "Legal standing must appear from the description of the parties or must be dealt with. It must also appear ex facie the initiating documents".

⁴ Uniform Rule 6 (1).

22. The Respondent is further of the view that it is clear that the City Property Administration has the substantial interest in the matter and should have been joined and/or cited as a party to the proceedings.⁵

23. The Respondent further alleges, that the Applicant has through its Replying Affidavit attempted to cure such defects in the Founding Affidavit by attaching a special resolution signed after the founding statement was deposed by what it contends is a none party to the proceedings.⁶ This the Respondent argues is prejudicial and irregular to the Respondent as it amounts to the introduction of new facts to which it will not be afforded a right of reply.

24. Absent such special resolution attach to the Founding Statement, the attorney submitted that the statement remains a nullity and has no legal effect in so far as issues raise in the notice of motion.

⁵ Uniform Rule 10 (1).

⁶ Para 3 Special Resolution, "The company hereby ratifies all and any actions which Mrs Smith may already have taken in relation to the application and/or action referred to above".

THE LAW

25. The question of locus standi is not only a procedural aspect, but it is also a matter of substance. It concerns the sufficiency and directness of a person's interest in the litigation in order for that person to be accepted as a litigation party.

26. The general rule is that it is for the party instituting proceedings to allege and prove its locus standi; and onus of establishing that rests on that party. It must accordingly appear ex facie the founding pleadings that the parties thereto have the necessary legal standing or locus standing in iudicio.⁷

⁷ Amler's Precedents of Pleadings page 245.

27. According Erasmus Superior Court Practice Second Edition⁸ the statement of facts must at least contain the following information:

27.1. The Applicant's right to apply, that is, the Applicant's locus standi,

27.2 In Scott v Hanekom⁹ it is said that it is 'trite law that appropriate allegations to establish locus standi of an applicant should be made in launching affidavits and not in the replying affidavits,

27.3 That the deponent to the Affidavit need not be authorized by the party concerned to depose thereto,

27.4 That it is the institution of the proceedings and the prosecution thereof which must be authorized.

28. When Notice of Motion proceedings are brought by a legal persona such a company, evidence must be placed before the court that the

⁸ Page D1-54.

⁹ 1980(3) SA 1182 (C) at 1188H.

applicant has duly resolved to institute the proceedings and the proceedings are instituted at its instance.¹⁰

29. In a case where the deponent acting on behalf of an applicant company lacks the capacity to launch application proceedings on behalf of the company, and the Respondent objects thereto, want of capacity cannot later be remedied by a decision of the directors of the company that did not exist at the stage when the application was launched.

30. From the founding papers before this Court it is clear that, not only is the deponent duly authorised to act on behalf of the Applicant, but the facts of the matter fall within her personal knowledge, as she has personally dealt with this matter as managing agent of the Applicant.

¹⁰ Erasmus Superior Court Practice Volume 2 p D1-55.

31. Before this Court the deponent has qualified this assertion further in that the file of the Applicant, pertaining to the Respondent, as well as the leased premises, which is the subject of this application, falls under her direct control, and she is familiar with the content thereof, as well as the facts of this matter, as she has personally dealt with this matter.

32. As the deponent has indicated that the facts of the matter fall within her personal knowledge, and that she can swear positively to the facts, as is required by the Uniform Rules of Court, there has thus been compliance with Rule 6.

33. The next question is whether the Applicant has a right to apply for the relief sought in these proceedings, that is, the Applicant's locus standi. This refers to the ability of the Applicant to bring this application, being an eviction application, and therefore, the Applicant, being the owner of the immovable property, which is common cause, gives the Applicant the necessary locus standi to bring this application.

34. This Court agrees that the issue raised to the locus standi of the Applicant has no merit as the Applicant is the owner of the leased property which ownership has not been contested by the Respondent. See *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) at 575H–I and *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at 1057G–H.

35. As mentioned, the Respondent seems to take issue with the authorisation of the deponent, and seemingly also the authorisation to institute these proceedings.

36. The deponent to the affidavit as mentioned, need not be authorized by the party concerned to depose thereto. It is the institution of the proceedings and the prosecution thereof that must be authorized and

which authorization concerns proper authority to act on behalf of a party in the proceedings.

37. The provisions of Rule 7(1) should be invoked when 'the authority of anyone acting on behalf of a party' is challenged. The Respondent failed to invoke the provisions of Rule 7 and further fails to place any evidence before this Court, as to why the deponent of the Applicant cannot act on behalf of the Applicant, in deposing to these affidavits. Absent such challenge this is really the end of the matter on this point.¹¹

38. The Respondent by merely making the allegations of lack of authority with no proof, whatsoever to support his contentions, and without any personal knowledge that would disqualify the deponent from making these affidavits, and without invoking the remedy in terms of Rule 7, and by taking a further step in filing his Answering Affidavit,

¹¹ Eskom v Soweto City Council 1992 (2) SA 703 (W) at 207D-E.

and not objecting to the Annexure to the Replying Affidavit, he has failed to appropriately raise this issue.

39. Consequently, the *first point in limine* is found to be without merit and is dismissed with costs.

The second point in limine, i.e. failure to first proceed by way of ADR.

40. The alleged second *point in limine* taken by the Respondent, is that the Applicant's Application was premature, as the Applicant was obliged to first proceed by way of dispute resolution, as provided for in paragraph 13.3 of the lease agreement, or in terms of Rule 41A.

41. Paragraph 13.2 of the lease agreement, provides as follows:

“Choice of Process:

13.2.1. Without excluding any rights of the Tenant prescribed by the Consumer Protection Act, 2008 or any other legislation applicable, from time to time, either party may elect whether a dispute in terms of this agreement is to be brought in a court with competent jurisdiction or by way of dispute resolution as set out in clause 13.3 below.”

42. From the above paragraph it is apparent that the Applicant is not obliged to follow the dispute resolution route, if it elects not to, and the Applicant has the right to proceed with legal process, through a court, if the Applicant so elects.

43. In terms of this clause 13.2, the Applicant elected not to follow the dispute resolution route, and elected to proceed by way of this Application for Eviction.

44. In regard to Rule 41A, the Applicant indeed has filed the required notice, indicating that mediation would be of no use, as the Respondent is in breach of the agreement, the Respondent fails to remedy such breach, and as such, the Applicant has cancelled the lease agreement and proceeded by way of Court proceedings.¹²

45. Failure to have complied with ADR therefore, is a meritless point in limine if regard is had to the provisions of clause 13.2 of the lease agreement.

46. Consequently, this second *point in limine* is also dismissed with costs.

¹² Caselines 08-9.

47. As for the remainder of the defence raised, the Respondent contends that an alleged oral agreement, was reached with representatives of the Applicant wherein he was given permission to use the leased premises as a spaza shop and not as a laundry. In this regard it should be mentioned that the Respondent fails to annex any confirmatory affidavits of these specific individuals depicting such permission.

48. Clause 13.6 of the lease agreement, is what is known as a "non-variation clause" and it reads as follows:

"No addition to or variation, consensual cancellation or novation of the Agreement and no waiver of any rights arising out of this Agreement or its breach or termination shall be of any force or effect unless reduced to writing and signed by both Parties."

49. The alleged ratification alleged by the Respondent not only holds no merit, but is specifically denied by the Applicant, and as mentioned the Respondent fails to provide any proof thereof, that complies with the terms of the lease agreement, specifically clause 13.6 thereof.

50. Clause 13.6 of the agreement between the parties, specifically require any variation to be done in writing, and signed by the parties. This was clearly not done. This clause specifically provides for a non-variation clause, and which specifically indicates that no variation of this agreement will be of any force and effect, unless it is reduced to writing, and signed by both parties.

51. Therefore, apparent from the above it is clear what the terms and conditions between the parties were when they entered into the

agreement. The agreement therefore contains a non-variation clause, which is also referred to in practice as the Shifren clause.

52. The Respondent further fails to explain how, when and where the terms of the agreement, was ever varied, altered or changed by both the parties, in writing, and signed by them. The lack of detail provided by the Respondent further supports the Applicant's version that no such alleged oral agreement or agreements were ever concluded.

53. The Respondent also fails to plead any compliance, whatsoever, with this paragraph of the agreement, requiring any such alleged variation to be in writing, and signed by both parties. As the Applicant specifically denies such compliance with clause 13.6 the Respondent carried the onus to proof same which in *casu* he has failed to do.

54. As a result, the Respondent is bound by the written lease agreement. The principal of caveat subscriptor further finds application in this matter, and the Respondent is bound by the written agreement between the parties, as signed and concluded by them.¹³

55. Consequently, this Court finds that the Respondent has also failed to disclose a defence on the merits and for that reasons his eviction will be ordered.

COSTS

56. The Lease Agreement concluded between the parties makes provision for costs on attorney and client scale in the event of legal proceedings being embarked upon to enforce any of its rights in terms of this agreement.¹⁴ Herein, there is no basis to deny the successful

¹³ SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren and Others 1964 (4) SA 760 (A) and the reported judgment of Brisley v Drotsky 2002 (4) SA 1 (SCA), which simply again confirmed the Shifren principle.

¹⁴ Clause 13.7 of the Lease Agreement.

party of such costs or to deny the scale as agreed to in the agreement.
This Court in exercising its discretion will proceed to award such costs.

ORDER

57. In the result the following order is made:

57.1 The points in limine are dismissed with costs;

57.2 The Lease Agreement between the Applicant and the Respondent, entered into on the 27th of July 2023, is hereby cancelled;

57.3 The Respondent and all other occupants, occupying through or under him, are to vacate the premises situated at SHOP 1506 EIKEHOF (M), 58 BOURKE STREET, SUNNYSIDE, PRETORIA, GAUTENG PROVINCE (the premises), together with any movable property that is on or in the said premises, within 5 court days of service of the order on him;

57.4 In the event that the Respondent, and all those occupying through or under him, fail to vacate the premises, known as at SHOP 1506 EIKEHOF (M), 58 BOURKE STREET, SUNNYSIDE, PRETORIA, GAUTENG PROVINCE, within time period as stated in paragraph 57.3 above, the Sheriff of the area, where the immovable property is situated, is authorised to assist the Applicant in evicting the Respondent, and all those occupying through or under him, from the premises;

57.5 The Respondent is ordered to pay the costs of this application, on an attorney and client scale.

C COLLIS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

Counsel for the Applicant: Adv. Z Schoeman

Instructing Attorney: Savage, Jooste and Adams Inc.

Legal Representative for the Respondent: Mr. M J Mahlanya

Instructing Attorney: Mahlanya Matsobane and Associates

Date of Hearing: 12 November 2024

Date of Judgment: 11 March 2025