

SOUTH AFRICA / JUDGMENT

Albertse N.O and Others v Nelesco 91 (Pty) Ltd (1096/2022) [2023] ZAFSHC 5 (13 January 2023) [2023] ZAFSHC 5

COURT

Free State High Court, Bloemfontein

BEFORE

Chesiwe

CASE / FILE NUMBER

1096/2022

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No: 1096/2022

In the matter between:

LEVINA FRANCINA ALBERTSE N.O

1st Applicant

NELMARI ALBERTSE OOSTHYSEN N.O

2nd Applicant

JACO ALBERTSE N.O

3rd Applicant

and

NELESCO 91 (PTY) LTD

Respondent

BEFORE:

CHESIWE, J

DATE RESERVED: 18 AUGUST 2022

DELIVERED ON: This judgment was handed electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 12h00 on 13 January 2023.

[1] This is a motion application in which the applicants seek a declaratory order that the Lease Agreement was terminated on 31 January 2022. The application is opposed by the Respondent.

[2] The prayers sought are as follows:

"1. A declaratory order that the Lease Agreement appended to the founding affidavit as Annexure 'A4' terminated on 31 January 2022;

2. A declaratory order that the Respondent's occupation, after 31 January 2022 of Portion 7 (a portion of Portion 6) of the Farm A[...] 2[...], District Bloemfontein, Free State Province held under Deed of Transport T24612/2007 ('the property') is unlawful;

3. An order evicting the Respondent and/or any person and/or entity occupying the property unlawfully as at date of the order from the premises within 14 (Fourteen) days failing which the sheriff within whose jurisdiction

the property falls is mandated and instructed to evict the Respondent or any such third party and/or persons from the property with the assistance of the South African Police Service if needed;

4. That the Respondent pays the costs of this application and any subsequent eviction costs on a scale as between attorney and client."

BACKGROUND

[3] The Albrmax Trust being the registered owner of a portion of the Farm A[...] 2[...] District Bloemfontein Free State Province entered into a Lease Agreement with Nelesco 91 (Pty) Ltd, a duly incorporated in terms of the Company Laws of the Republic of South Africa with registration number 2[...] for several years in terms of previous

Lease Agreement. The Lease Agreement was renewed with consent of Albrmax on or about 1 March 2017.

[4] In terms of the Lease Agreement, Nelesco has a right of first refusal for a period commencing on the day on which the Lease Agreement commenced. The right of first refusal expired seven (7) days after

termination of the Lease Agreement, which is 8 February 2022.

- [5] On 4 October 2021, the Applicants' legal representative directed a letter to Nelesco's attorneys that the Applicants do not intend to renew the Lease Agreement. On 13 December 2021, a second letter was communicated on the termination of the Lease Agreement by way of effluxion of time as provided in the agreement.
- [6] The Nelesco (The Respondent) through its attorneys responded that it heard from undisclosed sources that a Gert Snyman would be the new operator on the premises, which allegation was denied by the

Applicants.

- [7] Counsel on behalf of the Applicants, Adv. De Jager submitted in oral argument that clause 4 of the Lease Agreement is the crux of this matter and that the Respondent's allegation that a Gert Snyman informed employees of the Respondent that it will be the new tenant is absurd as it was a mere allegation. Counsel further submitted that

the Respondent has to show that there was a new tenant for clause 4 to be implemented. Counsel stated that the Court is to grant the declaratory order in favour of the Applicants.

- [8] Counsel on behalf of the Respondent, Adv. Snellenberg SC, submitted in oral argument that there are factual disputes as well as material disputes and that these disputes cannot be addressed in motion

proceedings. Counsel indicated that the issue of Mr Gert Snyman cannot be dealt with on the papers as he'd need to be put under cross-examination. Counsel further submitted that there is a pending review application before Court. Counsel indicated that the Respondent raised points in limine, namely non-joinder of the Ancor Family Trust and the Applicants' locus standi.

- [9] I will deal with the point in limine first.

NON-JOINDER

- [10] Uniform Rule 10(3) deals with who should be joined or cited as applicant/respondent – plaintiff/defendant. In *Judicial Services Commission and Another v Cape Bar Council and Another*,^[1] the Court held as follows:

“It has now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interests which may be affected prejudicially by the judgment of the court in the proceedings concerned.”

- [11] In *Fluxmans Incorporated v Lithos Corporation of South Africa (Pty) Ltd and Another*,^[2] the Court held the view stating that:

“parties may only be joined as matter of necessity and not convenience. It is only necessary if the parties sought to be joined would be prejudicially affected by the judgment of the court in the proceedings.”

- [12] The Respondent in the replying affidavit contends that a portion of the Farm A[...] 2[...], forms part of the fuel station which portion is erected on Ancor Trust. The issue of the Anchor Trust is a pending review matter under case number 2452/2019. In that pending application, Ancor Trust has demanded that its property be restored to it (the strip).
- [13] The Applicants in their replying affidavit denied that the strip of the land belongs to Ancor Trust and Anchor Trust has no direct and substantial interest in the relief sought in the current application.
- [14] In *Amalgamated Engineering Union v Minister of Labour*[3], Fagan AJA held that the Court would not determine issues in which a third party may have a direct and substantial interest without being satisfied that the rights of such a party will be prejudicially affected by its judgment.
- [15] Indeed, Ancor Trust may have a direct and substantial interest to be joined in this matter. It is difficult at this stage to determine whether Ancor Trust has a direct or substantial interest as the parties, that is Albrmax & Ancor Family Trust, are currently involved in another pending review matter to determine ownership of the strip of land.
- [16] In the Respondent's replying affidavit, the following is noted in respect of Ancor:

"7.5 ANCOR Trust has demanded that its property be restored to it and the respondent's occupation on the ANCOR Trust property is with the aforesaid Trust consent."

7.6 The portion that the applicant's (sic) refers to as being the 'Strip', is the portion of the property that belongs to the ANCOR Trust and this was not possessed/occupied by the applicants and their predecessors, as if owner for a period of 30 years, and the occupation and/or possession was not exercised openly as envisaged by the provisions of Act 68 of 1969."

- [17] The mention of the ANCOR Trust in the papers and that there is a dispute that involves this Trust, does result in the Trust having a direct and substantial interest. For the mere fact that Nelesco conducts a filling station business on portion 7, known as the strip.
- [18] Harms [4] dealt with direct and substantial interest and stated the following:

"a) If a party has direct and substantial interest in any order the court might make in the proceedings, or if such order cannot be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings unless the court is satisfied that he has waived his rights to be joined."

- b) The mere fact that a party may have an interest in the right, outcome of the litigation does warrant a non-joinder objection.
- c) The term "direct and substantial interest" means an interest in the right which is the subject-matter of the litigation

and not merely an indirect financial interest in the litigation.

d) An academic interest is not sufficient. On the other hand, the joinder of joint wrongdoers as defendants is not necessary, although

advisable.

e)

f) A mere interest is also insufficient. A litigation funder may be directly liable for costs and may be joined as a co-litigant in the funded litigation. This would be the case where the funder exercises a level of control over the litigation or stands to benefit from litigation.”

[19] ANCOR Trust is currently a subject matter of a review application. It therefore does have direct and substantial interest in the matter as the order, if granted will affect portion 7 of the part where the Respondent (Nelesco) conducts its business.

[20] In my view, ANCOR Trust ought to have been joined as a party to these proceedings. Therefore, the non-joinder application ought to succeed.

LOCUS STANDI

[21] The Respondent’s second point in limine is that of locus standi of the Applicants.

[22] The general requirements for locus standi are that a party must have adequate interests in the subject matter of the litigation, that interest must not be too remote, that the interest must be actual and it must not be abstract and must be current interest.[5]

[23] In *Mars Incorporated v Candy World (Pty) Ltd*[6], the Court said the following:

“In accordance with the general rule that it is for the party instituting proceedings to allege and prove that it has locus standi, the onus of establishing that issue rests upon the applicant.”

[24] The Applicants’ founding affidavit does not establish locus standi, except stating that they are duly appointed as trustees of Albrmax Trust. In the replying affidavit, the deponent states that he is the duly authorised Trustee of the Albrmax Trust. It is trite that in motion proceedings, the applicant must establish locus standi in the founding affidavit and not in the replying affidavit.[7]

[25] The Applicants contend that the Letters of Authority attached as Annexure ‘A2’ to the founding affidavit and read with the Albrmax Trust Deed confirmed the necessary locus standi. Bearing in mind that one of the Trustees, Mr. Frederik Jacobus Albertse has passed on. The Applicants are therefore required to

establish locus standi in their founding affidavit as well as the number of trustees. That is the requirement for the existence of the trust. All these must be established in the founding affidavit, including dealing with the Albrmax Trust Deed in their founding papers and not in the replying affidavit.

[26] Thus locus standi is indeed an issue that needs to be determined before the merits and the party alleging locus standi must do so in the founding papers. The Applicants failed to establish their locus standi. Having attached papers in the replying affidavit makes it difficult for the Respondent as it cannot reply after the filing of a reply by the Respondent, unless this is with the leave of the Court.

[27] The Respondent's second point in limine therefore ought to succeed.

MOTION PROCEEDINGS

[28] It is trite that an applicant in motion proceedings must make out his or her case and produce all the evidence to use in support of his or her affidavit that is filed with the notice of motion and is not permitted to supplement it in the replying affidavit nor make out a new case in the replying affidavit. (See Minister of Land Affairs and Agriculture & others v Daf Wevel Trust & others, 2008 (2) SA 184 (SCA at 200 C-E)

[29] In National Director of Public Prosecutions v Zuma,[8] Harms DP stated that motion proceedings were designed for the resolution of legal disputes based on the common cause facts.

Disputes do arise in motion application whether minor or substantial, as a result the Uniform Rules guide in order to determine the facts upon which disputes of fact are determined and/or whether the matter is to be referred to oral evidence or trial.

[30] Counsel for the Respondent submitted in oral argument that the Applicants proceeded with motion proceedings knowing that a dispute of fact existed and could reasonably foresee that a dispute of facts exist. Counsel further submitted that the version of the Respondent does not consist of bold or uncredited worthy denials. Counsel indicated that the Applicants are engaging in trial by ambush.

[31] Counsel for the Applicants submitted that the papers are sufficient for this court to formulate judgment in that it is not necessary for any oral evidence.

[32] The Applicants' founding affidavit is based on clause 4.1 and 4.2 of the Lease Agreement, (page 40) which reads as follows:

"4.1 Die verhuurder onderneem om indien hy die verhuurder perseel vir 'n verders termyn wil verhuur ná die verstrykingsdatum, hy die verhuurder perseel eerste aan die Huurder te huur sal aanbied, onderworpe daaraan dat die Huurder stiptelik sy verpligtinge in terme van hierindie ooreenkoms vir die volle duur van die ooreenkoms nagekom het, en het die Huurder die reg van eerste weiering ten opsigte van sodanige aanbod.

4.2 Indien die Verhuurder 'n aanbod ontvang van enige ander persoon as die huurder om die verhuurder perseel te huur onderneem die Verhuurder om, alvorens hy sodanige aanbod al aanvaar, die Verhuurde perseel aan die Huurder te huur aan te bied teen dieselfde terme en voorwaardes as die aanbod van sodanige ander persoon, welke onderneming slegs geld vir die duur van hierdie ooreenkoms en 'n periode van 7 (SEWE) dae ná die verstrykingsdatum.”

[33] The Respondent in the answering affidavit stated that the Applicants breached the Lease Agreement in that a Mr Snyman informed Mr La Grange, Mr. Grobler and Mr Johnson (all 3 having submitted confirmatory affidavits to the effect)[9] that:

“the Respondent must be ‘out of the premises’ by 1 February 2022 because he would henceforth be conducting the business from the premises.

This allegation is vehemently denied by Mr Snyman who submitted his confirmatory affidavit which is attached to the founding affidavit.

[34] The following is noted in Mr Snyman’s confirmatory affidavit:

“10. The only occasion that I can recall having visited the said leased premises in the recent past was when I incidentally noticed a tanker truck on the said premises which carried a tank belonging to one of the longstanding clients of a retailer in our supply network (as wholesaler, a licenced wholesaler supplies to retailers or bulk end-users of fuel only.)

11. In the circumstances, I was curious as to the tanker truck’s intention and investigated for myself. It was on this occasion that I might have communicated with either one or more of the three gentlemen referred above. At no stage whatsoever did I inquire about their intentions to vacate the premises, for the simple reason that it was none of my business. I also had no personal knowledge of the contractual relationship between the landlord and its tenants. I simply had no interest in the subject matter.”

[35] Indeed, as correctly stated by Counsel for the Respondent, there are factual disputes which the Applicant was aware of. The Court cannot ignore the allegations raised against the Applicant about Mr. Snyman. The question is whether the three (3) gentlemen perjure themselves to confirm what Mr. Snyman told them. Furthermore, Mr Snyman’s visitation to the premises with the late Mr Albertse and indicating that they were friends, is not in the founding affidavit, as a consequence of that, the Respondent could not reply to such an allegation.

[36] The Applicants having foreseen that a dispute exists in terms of the Lease Agreement, as well as what was said by Mr Snyman should not have proceeded with motion proceedings.

CONCLUSION

[37] In my view, there are several aspects that cannot be cleared on the papers, particularly the issue of Mr Snyman which may need to be cross-examined, including the three (3) gentlemen who confirmed under oath what Mr Snyman told them. This can only be done in oral evidence.

[38] Further that there exists a dispute between the parties. The question being, is Mr Snyman the new tenant and if the Applicants did not breach the Lease Agreement. The disputes pertain to the very issue that has its foundations in the Lease Agreement. It is clear that this court is precluded from properly deciding the application on the affidavits.

[39] Rule 6(5) g of the Uniform Rules of Court provides that:

“Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it deems fit with a view to ensuring a just expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear to be examined and cross-examined as a witness or it may refer the matter to trial with the appropriate directions as to pleadings or definition of issues, or otherwise.”

[40] It is trite therefore that a final order may only be granted in this application if the facts averred in the Applicants’ affidavit have been admitted by the Respondent.[10] There is no question that the alleged facts raised by the Respondent are real genuine and/or bona fide disputes of fact.

[41] In Mahomed v Malk,[11] the Court said the following:

“...it seems to me that the court should apply the well-known rule of procedure that questions of credibility should not be decided on affidavit...”

[42] Therefore, to have this matter expeditiously resolved it would be just and equitable that it be referred for oral evidence rather than dismissing the whole application. In terms of Rule 6(5), the court has a wide discretion regarding referring matters for oral evidence, if an application to refer a matter for oral evidence should be made at the outset. However, in certain circumstances, the court may decide that a matter should be referred for oral evidence even where no such application had been made. (See Pahad Shipping CC v Commissioner for the South African Revenue Services [2010] 2 ALL SA 246 (SCA) at para 20)

[43] After consideration of the papers and the submissions made, I am convinced that the disputes in this matter and in the interest of justice, the matter be referred to trial.

COSTS

[44] The Respondent succeeded in the points in limine raised. The Applicants were aware that the Respondent raised an existing dispute, but still proceeded with a motion application. Therefore, a cost order is warranted against the Applicants.

ORDER

[45] Accordingly, the following order is made:

1. The Applicants' application under Case Number: 1096/2022 is referred to trial.
2. The Notice of Motion in the application shall stand as the Applicants.
3. The Founding Affidavit shall stand as the Applicants' particulars of claim.
4. The Respondent's Answering Affidavit shall stand as the Respondent's plea.
5. The Applicants' Replying Affidavit shall stand as the Applicants' replication.
6. Further exchange of pleadings including discovery and the request for and provision of trial particulars shall be regulated by the Uniform Rules of Court in respect of action proceedings. Discovery of documents not forming part of the application papers shall take place in accordance with the Court Rules.
7. The parties are granted leave to utilise Rule 28 in the event the parties wish to amend the papers.
8. The Applicants are to pay the Respondent the costs of the points in limine including the costs of the application.

CHESIWE, J

On behalf of the Appellant:

Adv. NF De Jager

Instructed by:

Phatshoane Henny Attorneys

BLOEMFONTEIN

On behalf of the Respondent:

Adv. N Snellenburg SC

Instructed by:

Honey Attorneys

[1] (818/11) [2012] ZASCA 115 (14 September 2012) at para [12]

[2](2011/10614)

[2014] ZAGPJHC 290; 2015 (2) SA 322 at para [5]

[3] 1949 (3) SA 637 (A)

[4] Civil Procedure in the Superior Courts, Last Updated: February 2019

- SI 64 at B10.2 Direct and Substantial Interest.

[5] DE van Loggerenberg and E Bertelsmann Erasmus, Superior Court Practice 2nd ed. Vol 1 at D1-186

[6] (265/89) [1990] ZASCA 149; 1991 (1) SA 567 (AD); [1991] 2 All SA 25 (A) (28 November 1990)

[7] Giant Concert CC v Minister of Local Government, Housing and Traditional Affairs KwaZulu-Natal and Others, 2011 (4) SA 164 KZP at para 16)

[8] 2009 (2) SA 277 (SCA)

[9] (Page 90 of the Respondent's answering affidavit)

[10] Plascon-Evans Paints v van Riebeeck paints (Pty) Ltd 1984 (3) SA 623 (A).

[11] 1930 TPD 615 at 620

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