

SOUTH AFRICA / JUDGMENT

Anchorprops 31 (Pty) Ltd and Another v Levin (3104/2020) [2020] ZAGPJHC 183 (28 May 2020) [2020] ZAGPJHC 183

COURT

South Gauteng High Court, Johannesburg

BEFORE

PF Louw, S Yacoob

CASE / FILE NUMBER

3104/2020

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

APPEAL

CASE NO. 3104/2020

In

the matter between:

ANCHORPROPS

31 (PTY)

LTD

First Appellant

FLEMMING

JENSEN

Second Appellant

and

GRANT BENJAMIN

LEVIN

Respondent

JUDGMENT

LOUW AJ

INTRODUCTION

- [1] This is an appeal against the orders which the magistrate's court of Randburg (presided over by Magistrate Persence) made in application proceedings on the 29th of August 2019 evicting the second respondent from certain premises and ordering that the first respondent pay the applicant's costs.
- [2] The applicant in the magistrate's court was Mr Grant Levin. The first respondent was Anchorprops 31 (Pty) Ltd and the second respondent was Mr Flemming Jensen. I refer to them by their names. Anchorprops and Mr Jensen are the appellants and Mr Levin is the respondent herein. The premises in question consist of a residential property located at 31 Shandon Way, Parkmore. I refer to it as "the property".
- [3] Mr Levin brought the application in the form required by section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, "the PIE Act".
- [4] This judgment is handed down during Alert Level 4 of the national lockdown to combat the COVID 19 pandemic. Alert Level 4 commenced on 1 May 2020 and is regulated by the regulations published under Government Notice No. 480 on 29 April 2020 in terms of section 27(2) of the Disaster Management Act 57 of 2002. The regulations are of consequence for two reasons. The first is that the matter was enrolled for hearing during the currency of Alert Level 4 and there was accordingly no oral hearing in compliance with paragraph 16 of the Judge President's Consolidated Directive, read with section 19(a) of the Superior Courts Act, 10 of 2013. The appeal is consequently determined on the record and the written submissions of the parties' legal representatives. The second is that the regulations[1] impact on the remedy of eviction. Regulation 19 prohibits the execution of evictions and suspends any order of eviction until the last day of Alert Level 4, unless the court determines that it is not just and equitable to suspend the order. This last aspect was not considered in the argument presented on Mr Levin's behalf, although submissions were made on Mr Jensen's behalf in his counsel's practice note. Nevertheless, the requirements of justice and equity contemplated in regulation 19 overlap with the requirements of justice and equity under section 4(7), (8) and (9) of the PIE Act. I address this issue further where I deal with the remedy question.
- [5] The legal representatives of the parties prepared and presented extensive and incisive written argument for which they have to be commended.
- [6] The core facts – which are expanded on below – may for introductory purposes and to isolate and name the disputes be summarised as follows: Mr Levin leased the property to Anchorprops in terms of a written lease. Mr Jensen, a director of Anchorprops, physically

occupied the property during the currency of the lease and held over after its termination. Mr Jensen justified his continued occupation by an oral agreement which he alleged that he and Mr Levin had entered into after the termination of the written lease. Mr Jensen asserts that it is still in force. (I refer to it as “the oral lease” to distinguish it from “the written lease” which refers to the agreement between Anchorprops and Mr Levin.)

- [7] Three discrete questions arose from the affidavits. The first was Mr Jensen’s contention that the matter could not be determined on application because of a factual dispute between him and Mr Levin, the dispute being his assertion of the oral agreement, which Mr Levin denied. In what follows I refer to this as “the procedural question”. The second question followed from Mr Jensen’s argument that the oral agreement justified his occupation of the property and thus gave him a defence on the merits. The question that arose in this regard was whether the oral agreement had been established. I refer to this as “the merits question”. The third concerned the requirements of the PIE Act to determine whether eviction as remedy would be just and equitable in the circumstances of the case. Allegations for and against the proposition were made in the three sets of affidavits. I refer to this as “the remedy question”. The magistrate re-stated the facts and made the orders that I referred to in the first paragraph above but the magistrate did not analyse the three core questions. I intend to make a few remarks about the judgment. Before doing so and before turning to the three questions, I propose to give a more comprehensive overview of the facts and the legal proceedings that have preceded the appeal.

THE

FACTS

- [8] As I have already remarked, Mr Levin is the registered owner of the residential property in issue. He lets the property out on commercial terms and it is consequently an income producing investment for him. During December 2016 Mr Levin leased the property to Anchorprops. The lease was in writing and contained all the terms normally expected to be in a commercial transaction of this type. The lease was for a term of 12 months but could be extended. The rental was R29 000-00 per month. Mr Jensen, who described himself as “a non-executive director” of Anchorprops, occupied the property. The lease was extended twice, first to 30 June 2018 and then to 31 December 2018.
- [9] By October 2018 Anchorprops had fallen into arrears with its rental obligations. Mr Levin eventually cancelled the written lease for this reason. He also demanded that Mr Jensen vacate the property and he claimed the arrear rentals from Anchorprops and Mr Jensen. Neither Anchorprops nor Mr Jensen complied with the demands. If not cancelled, the written lease expired by effluxion of time in December 2018 and from January 2019 onwards it was immaterial for purposes of this case whether the written lease had been cancelled or terminated by effluxion of time because it is common cause that the written lease did not justify Mr Jensen’s occupation.

- [10] In May 2019 Mr Levin initiated the eviction proceedings and delivered a founding affidavit complying with the PIE Act and setting out fulfilment of the requirements for the relief sought viz. ownership or control by the applicant, unlawful occupation by the respondent and that the remedy is just and equitable.
- [11] It thus fell on Mr Jensen to deny ownership(or control) or occupation or to engage on the remedy question. He could also raise a ground legally to justify his occupation. Mr Jensen admitted the ownership and occupation allegations and joined issue on the remedy question. He also attempted to justify his occupation in the answering affidavit by relying on the oral lease. According to him the lease had been entered into in or around February 2019, is of undetermined duration and is still in place. It can be cancelled only upon reasonable notice which has not happened. The rental is R29 000-00 per month, payable in advance every quarter. In support of the oral lease Mr Jensen referred to an amount of R100 000-00 that had been paid to Mr Levin during March 2019 which Mr Jensen alleged was the rental payment for the first quarter under the oral lease and thus constituted performance of the oral lease.
- [12] In his replying affidavit Mr Levin emphatically denied that the oral lease had been entered into at all. He acknowledged the R100 000-00 payment but asserted that it was on account of the Anchorprops unpaid rentals under the written lease and not rental under a new lease. Most importantly, Mr Levin also attached a string of electronic messages (“the WhatsApp messages”) that were exchanged between him and Mr Jensen from about August 2018 to April 2019, thus straddling the period within which the oral agreement was entered into according to Mr Jensen. These manifestly did not prove any oral agreement.
- [13] Mr Levin did not seek a contractual remedy in the application. He merely sought Mr Jensen’s eviction. Somewhat incongruously, he sought costs against both Mr Jensen and Anchorprops. There was no legal basis for a costs order against Anchorprops. It could perhaps be argued that Anchorprops was not a necessary party to the proceedings. But then again, Anchorprops was as a matter of fact joined as a party and it opposed the application.
- [14] I return to the WhatsApp messages and the costs issue later in the judgment. I should point out that Mr Jensen also raised other points in his answering affidavit. One of these was that the court did not have jurisdiction because he is a citizen of Denmark. He did not persist with these points.
- [15] After argument the magistrate delivered an oral judgment which is recorded as follows:
- “The court finds it just and equitable in terms of section 4 that the second respondent and all those occupying through him are to vacate the premises situated at 31 Shandon Way, Parkmore, Sandton on or before the 30th of September 2019, failing which the sheriff is authorised to effect such eviction on the 1st of October 2019, the second respondent is to pay the costs on a party-and-party scale.”*

[16] The oral judgment obviously contained no reason for the orders made. Mr Jensen and Anchorprops then sought written reasons, as they were entitled to do, and the magistrate obliged. The following written reasons were provided:

“Introduction

The applicant brought an application in terms of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 to evict the second respondent and any person occupying through him from the property situated at 31 Sanden way, Parkmore, Sandton.

Facts found proven

1. The applicant is the registered owner of the abovementioned property.
2. The application terminated the lease agreement on 15 October 2018 and informs the second respondent to vacate the property on 31 October 2018
3. The lease agreement between the parties expired on 31 December 2018.
4. The second respondent’s argument was that the oral lease agreement was concluded between the parties. The applicant argued on this point and stated that even if there was such an oral agreement, the second respondent was in breach of it as the second respondent made no rental payments.

Reasons for judgment

5. The court found that the second respondent is in unlawful occupation and that constitutes the eviction.

The personal circumstances of the second respondent were taken into consideration as well as the prejudice the applicant is suffering due to the high amount of arrear rent.

For that reason the court found in terms of section 4(8) of Act 19 of 1998 it just and equitable to evict the second respondent and all those occupying through him from the afore said property.”

[17] Mr Jensen and Anchorprops appealed against all the orders made. This appeal is thus against both the eviction order and the costs order.

THE

JUDGMENT

[18] It is trite that what is generally called a judgment consists of two parts. The first is the recordal of the court’s

reasons

for the order made and the second is the executive part of the judgment, i.e. the order itself. Whilst the orders that the magistrate made were clear and unambiguous, the judgment lacked reasoning. The written reasons simply stated proven facts and under the heading “reasons for judgment” the magistrate stated conclusions of fact and law.

[19] The composite judgment (the oral judgment and written reasons) does not meet the requirements that are set in our law for judgments.

At the risk of stating the obvious, a judgment should proceed from a concise recapitulation of the case which should include a summary of the facts, the relevant legal principles, the contentions made by the parties and any other specific feature of the case. The ultimate purpose of any judgment is to explain the order that is made. An order is a judicial creation. Between the statement of the case and the order and linking them should be the court’s reasoning. Reasons are of paramount importance because they explain why the court made the order which it did. Every court is accountable for the orders that it makes and the only method of accounting is to give reasons. In our adversarial legal system the court owes a special duty to the losing party to provide the reasons why he, she or it lost, often an unexpected and unwelcome outcome which invariably causes anguish.

[20] In *Mphahlele v First National Bank of SA Ltd*[2] Goldstone J made the following remarks about the role and function of a judgment in the common law tradition:

“There is no express constitutional provision which requires Judges[3] to furnish reasons for their decisions. Nonetheless, in terms of s1 of the Constitution, the rule of law is one of the founding

values of our democratic state, and the Judiciary is bound by it. The rule of law undoubtedly requires Judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer.”

[21] Similar observations were made by the Supreme Court of Canada in *R v Shephard*[4], observing that justice cannot be seen to be done if judges fail to articulate the reasons for their orders. An order without

reasons may lead to the failure of justice which could lead to the whole process being set aside.

[22] Against this background I now turn to the three questions identified in paragraph [7].

THE PROCEDURAL QUESTION

- [23] Mr Levin brought the eviction proceedings on application. Speaking generally, application proceedings are inadequate to the task of determining factual disputes. Where a dispute arises in application proceedings on a central issue, the dispute cannot be determined in the application and the application itself may be dismissed or struck from the roll or in certain cases the alleged fact may be referred for evidence or the whole matter may be sent to trial.
- [24] The general rule is subject to two exceptions. The first is where the dispute does not concern a central issue in the case but a peripheral matter so that even if the respondent's version on the disputed issue is accepted, the relief sought can still be granted. In such a case the fact of the dispute does not derail the proceedings. This is the territory of the venerable Plascon-Evans rule. This exception obviously does not apply in the present matter because the issue raised by Mr Jensen (his reliance on the oral agreement) is central and not peripheral to the dispute. If Mr Jensen's version is accepted, Mr Levin must fail.
- [25] The second exception is actually not an exception but is rather the initial determination whether there is a factual dispute at all. Not all assertions are assertions of fact. To put it differently, not all alleged facts are facts. If the fact alleged is not an actual fact, even if it concerns a central issue, and it is concluded that the raising of the fact is a device, a diversion, to stymie justice, the court will ignore it and decide the application without it. A respondent can thus not rely on a non
- or imaginary fact. Application proceedings are only derailed where the fact raised is real, genuine and bona fide.[5] If the court concludes that a factual dispute is not real, genuine and bona fide, the court may adopt a robust approach and ignore the chimera. It must, however, be stressed that adopting a robust approach, i.e. deciding that an alleged fact is not a fact at all, requires caution. The field of application of the robust approach is limited to the rare case where the allegations that are made by the side attempting to derail the application are so clearly false or intrinsically improbable that a court may safely conclude that an oral hearing would not diminish the balance of probabilities.[6]
- [26] In my view the present matter falls under the second exception. I am of the view that Mr Jensen's reliance on the oral lease can be rejected on affidavit. (This is probably what the magistrate did.) In short Mr Jensen's version about the oral agreement is so improbable that I do not believe that there are any prospects that it could be established by oral evidence. In the first place there is only a single consideration in favour of the oral agreement namely Mr Jensen's own say-so in his answering affidavit. Weighing against accepting his version of the oral agreement are some weighty considerations. The first is that Mr Jensen's statement on oath is directly contradicted by Mr Levin's statement, also on oath, denying the oral agreement. There is no objective evidence to support the oral agreement. Although Mr Jensen stated the essentials of an agreement of lease, he did so in vague terms. He could for instance not provide a date on which the agreement would have been entered into. One would have expected such a momentous matter as the oral lease to be referred to in

contemporaneous exchanges. The rental (R29 000-00 a month, for three months being the first quarter of the duration of the alleged lease) appears to be reverse-engineered from the R100 000-00 which was admittedly paid to Mr Levin at the time, or based on the rental in the original lease between Mr Levin and Anchorprops. However, the R13 000-00 difference between what would have been the rental and the amount paid is not explained. Although, as remarked above, a court should be wary to deal with probabilities

when considering the question whether an allegation of fact constitutes a fact or is a fiction, the probabilities against the oral lease are overwhelming. It is, first of all, highly unlikely that Mr Levin would have entered into an oral agreement at that time in the terms alleged by Mr Jensen. Mr Levin previously had a comprehensive written lease containing all the usual commercial terms of leases with Anchorprops and Anchorprops had failed to comply with its obligations and then failed to vacate the property (by Mr Jensen's departure) when it should have done so. When the oral lease was allegedly entered into Anchorprops still owed arrear rental under the written lease. Mr Levin was brazenly holding over. He was acting unlawfully. Mr Levin, moreover, conducted a leasing business with respect to the property. He required an income from the property. It would make no business sense for Mr Levin to allow Mr Jensen to occupy the property until "reasonable notice" would be given to vacate the property. The upshot of the oral lease would be that Mr Jensen could remain indefinitely in the property by challenging any notice given to him to vacate the property as "unreasonable". Mr Levin would become the commercial captive of Mr Jensen. In short: It is highly unlikely that Mr Levin would enter into an imprecise, non-businesslike, one-sided arrangement with someone who had demonstrated a propensity for wrongful conduct, viz. the holding over and non-payment of the rental.

[27] The exchange of WhatsApp messages, however, clinches the matter. The messages do not allow for any oral agreement of the ilk alleged by Mr Jensen. The WhatsApp messages show only two things namely that Mr Levin continuously demanded payment of the arrear rentals and that Mr Jensen avoided making payment. In fact, Mr Levin was reduced to begging Mr Jensen to make the arrear payments and disclosing his own financial embarrassment following on the failure to pay the rental. The WhatsApp messages show Mr Jensen making one promise to make payment after the other. Mr Jensen told Mr Levin of various events that he promised would place him in funds, but the promises never materialised. Taken together, they appear to be a series of misrepresentations that were calculated to stave off the inevitable eviction.

[28] To my mind this is one of the rare cases where a court should, with certainty, conclude on the affidavits that a deponent's

allegation of a disputed fact is not real, genuine and bona fide. The dispute was raised to derail the course of justice. The matter could thus be determined on application.

THE MERITS QUESTION

[29] The merits question was whether the oral agreement had been established. One would normally at this point analyse the

burden of proof and then subject the facts contained in the affidavits to a critical appraisal to determine whether the oral agreement as disputed fact had been established. But it is not necessary here.

[30] By rejecting the argument that the reference to the oral agreement raised a real, genuine and bona fide factual dispute, it must follow that the oral lease has not been established, no matter who had the burden of proof. If the allegation of the oral lease falls to be rejected, then any defence based on the oral lease must perforce fail.

[31] In summary the position on the merits is that Mr Levin alleged that he was the owner of the property and that Mr Jensen was in unlawful occupation thereof at the time that the application was launched, Mr Jensen did not dispute the allegations of ownership and occupation but sought to establish lawfulness by reliance on the oral lease. For the reasons set out above there could not have been an oral lease and therefore there is no defence to Mr Levin's claim on the merits. The only question that remains is whether the court below was correct in finding that it was just and equitable to evict Mr Jensen and what the date would be on which the order should have been effective.

THE REMEDY QUESTION

[32] Section 4(7) of the PIE Act provides that if an unlawful occupier has occupied the property for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction only if it is of the opinion that it is just and equitable to do so. The court must, in considering the justice and equity of the eviction, consider all the relevant circumstances. There is no closed list of circumstances. The sub-section in sum cautions the court to be aware of the equities and justice where the occupier in question is a vulnerable person.

[33] Section 4(8) provides that if the court is satisfied that all the requirements of the section have been complied with and that no valid defence has been raised by the unlawful occupier, the court must grant an order for the eviction of the occupier and the court must determine a just and equitable date on which the unlawful occupier must vacate the land and the date on which an eviction order may be carried out if the occupier has not vacated the land on the date determined. Section 9 enjoins the court to have regard to all relevant factors including the period the unlawful occupier and his or her family have resided on the land in question in determining a just and equitable date for the eviction.

[34] There are thus multiple sets of just and equitable considerations that have to be taken into account. The first group has to do with the question whether an eviction order should be issued at all. The second group follows upon that and concerns the date on which the property has to be vacated and the order enforced.

- [35] Mr Jensen contends that he is a vulnerable person for three reasons. One, age: Mr Jensen is 76 years old. Two, health: Mr Jensen said that he is ailing. Three, lack of resources: Mr Jensen said that he is currently unemployed.
- [36] Mr Jensen's case is that he will be rendered homeless if he is evicted from the premises. Mr Jensen's age is not disputed. He is indeed of mature years. But whether he is vulnerable because of his advanced age is not clear from the papers. Mr Jensen merely asserted the health and employment points in his answering affidavit without providing any particulars and Mr Jensen did not take the court into his confidence by giving any details of his situation in life. There are many questions about his circumstances that he could have explained to give substance to his statement that he has nowhere else to go to. He is a Danish citizen and the Danish social services are notoriously well-funded. Mr Jensen could perhaps have explained why he would not benefit from the system to which he seems to be entitled. He did not explain whether he is in receipt of a pension or annuities paid by a retirement fund or returns paid by investments. He also does not take the court into his confidence as to the source of the R100 000 he previously paid to Mr Levin, and regarding his ability to procure funding for a less costly residence in less affluent circumstances. His bold laments that he is destitute, will be homeless, is workless and is ailing ring hollow against the fact that he rented expensive accommodation for himself through a company of which he was a director. A party expecting a court to interfere with the cornerstone right of ownership should do more than make bold assertions such as these. The WhatsApp messages are also relevant in

this context. They reflect a propensity to make and break promises.

- [37] Justice and equity moreover require that Mr Levin's interests be considered. The WhatsApp messages reflect that Mr Levin literally pleaded with Mr Jensen to make payment of the arrear rentals. Mr Levin repeatedly made it clear that he required payment of the arrears to maintain his family. It would seem that the income produced by the property is necessary for Mr Levin's own economic survival. He does not appear to be an exploitative landlord who preys on the meek and mild but an ordinary person who is reliant upon the income from an investment property.
- [38] Mr Jensen is effectively in the category of lessees who hold over. He was not forced by the inequities of our society to take occupation because he could not survive otherwise. He leased (through Anchorprops) an expensive property for which he has stopped paying and for which he refuses to pay. He is not a victim of circumstances beyond his control but the author of his own misfortune.
- [39] For these reasons I conclude that justice and equity demand that he be evicted.

CONCLUDING REMARKS

[40] I remarked above that this appeal is being disposed of during Alert Level 4 of the national lockdown. Regulation 19 suspends any eviction order until the end of Level 4. But there is no indication that evictions will be allowed during later alert levels. However, an eviction order may be executed if the court finds that it is just and equitable to order an immediate eviction during the lockdown. I can see no reason for an order that the general suspension of eviction orders should not apply here, nor were any submissions made on Mr Levin's behalf that that was the case. The point of departure of the lockdown is that everyone should stay at home. Although he illegally occupies the property, it is Mr Jensen's home at this time. He does fall within a risk group due to his age. The economic consequences of the lockdown are the same for all landlords. I can see no feature in this case that distinguishes it from the probably thousands of eviction matters that are sitting in the wings awaiting a governmental decision that evictions may again be carried out. The order that I propose is that Mr Jensen be allowed to remain in the property until such time as the rules pertaining to the national lockdown allow for eviction orders to be executed, plus two weeks or 14 days thereafter. No one knows when the lockdown rules will be amended in this manner and I believe that it is reasonable to afford Mr Jensen two weeks thereafter to vacate the property by his own volition. Should Mr Jensen not vacate the property within the two

week period, the order may be carried out two weeks later, that is, 28 days or four weeks after the amendment of the lockdown rules to allow for the execution of eviction orders. In my view it is just and equitable for Mr Jensen to take his departure in a dignified manner from Mr Levin's property within that time.

[41] The appeal process was less than perfect in two respects, the particulars of which are not controversial, namely that the appellants did not comply with a prescribed time bar and that some of the documentation was incomplete. The imperfections are set out in an affidavit by Mr Jensen's attorney. There is no need to deal any further with these issues because I am satisfied that the required condonation should be granted and that the costs of the condonation application be costs in the appeal.

[42] Although the magistrate's judgment is open to criticism, it cannot be said to be wrong on the main question whether the oral agreement has been established and the appeal on the merits must therefore fail. A fresh order has to be made in terms of section 4(8) of the PIE Act.

[43] The costs award which should be made in the appeal is debateable. To recap: the magistrate's order evicted Mr Jensen but required Anchorprops to pay the costs. No reason is provided in the judgment why the normal rule of costs following the event should not have applied. Mr Jensen lost and he should have been ordered to pay the costs. On the other hand, both Mr Levin and Anchorprops were joined, both opposed the application, both are appellants and both appeal the merits and the costs order. Although it was probably conceptually wrong for the court to evict Mr Jensen but require Anchorprops to make the payment of the costs and for Mr Levin to have joined Anchorprops in the first place, a more just and equitable costs order than the order which the magistrate made would be to order

costs against both appellants as claimed in the notice of motion.

ORDERS

[44] In the result I would make the following orders:

1. The appellants are granted the relief sought in the condonation application dated 19 December 2019 with the costs of the condonation application being costs in the appeal;
2. the costs order made by the magistrate is set aside and is replaced with the following order: “The first and second respondents are ordered to pay the applicant’s costs jointly and severally on the party and party scale”;
3. the appeal against the eviction order is dismissed with costs;
4. the second appellant is ordered to vacate the premises situated at 31 Shandon Way, Parkmore, Sandown, Johannesburg no later than 14 (fourteen) days from the date on which eviction orders may again be carried out during in terms of the regulations under the Disaster Management Act 57 of 2002 (“the regulations”) or the regulations cease to apply, whichever occurs first;
5. if the second appellant fails to vacate the premises as set out in paragraph 4 above, the sheriff is authorised to evict him 28 (twenty eight) days after the date on which eviction orders may again be carried out, either in terms of the regulations or after they have ceased to apply, whichever occurs first.

PF LOUW AJ

I agree.

S YACOOB J

It is so ordered.

[1] Regulations issued in terms of section 27(2) of the Disaster Management Act, 57 of 2002, published on 29 April 2020

[2]

[1999] ZACC 1; 1999 2 SA 667 (CC) at para [12]. See also *Tredoux v Kellerman* 2010 1 SA 160 (C) at para [4], *Road Accident Fund v Marunga* 2003 5 SA 164 (SCA) and the contribution of M Corbett in 1998 SALJ 116 under the heading “The duty to give reasons” at 117-118.

[3] Which, of course, also applies also to magistrates.

[4] 2002 SCC 26; [2002] 1 SCR 869 and see the common law authorities summarized therein.

[5] See Whiteman t/a JW Construction v Headfour (Pty) Ltd 2008 3 SA 371 (SCA). See the remark of Wallis JA in Media 24 Box (Pty) Ltd v Oxford University Press SA (Pty) Ltd 2017 2 SA 1 (SCA) at 18A that findings to the effect that facts are implausible, far-fetched or so clearly untenable that they could safely be rejected on the papers occurs infrequently. This is so because the courts are aware that evidence and cross-examination

may alter its views of the facts and the plausibility of evidence. See also the comments in Cape Town City v South African National Roads Agency Ltd 2015 6 SA 535 (WCC) at 608F regarding the classification in South African Veterinary Council v Szamanski 2003 4 SA 42 (SCA) para [24]. In my view the present is one of the rarities where the positive allegation made by Mr Jensen can safely be discarded.

[6] See, for example, Fakie v CCII Systems (Pty) Ltd

[2006] ZASCA 52; 2006 4 SA 326 (SCA) para [55] and further.

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