

SOUTH AFRICA / JUDGMENT

Even Properties CC v Waseem Auto CC and Others (2022/13715) [2023] ZAGPJHC 93 (7 February 2023)

[2023] ZAGPJHC 93

COURT

South Gauteng High Court, Johannesburg

BEFORE

Strydom

CASE / FILE NUMBER

2022/13715

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

No: 2022/13715

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES/NO

SIGNATURE:

DATE: 7/02/2023

In

the matter between: EVEN PROPERTIES CC
 (Registration
 No. 2[...])
 Applicant
 and
 WASEEM
 AUTO CC
 First Respondent
 MEHMOOD
 ALI
 Second Respondent
 RAHEEL
 HUMAIR
 Third Respondent

JUDGMENT

STRYDOM J

- [1] This is an application in which Even Properties CC (the applicant) in the first instance seeks in claim A relief against Waseem Auto CC (the first respondent) for its eviction from commercial premises situated at Erf No. 3[...], Portion No. [...], Booysens Reserve, which is more commonly known as 1[...], F[...] Street, Booysens Reserve, Johannesburg (the premises). Further ancillary relief and a costs order is sought against the respondents.
- [2] In claim B an order is sought against the respondents to pay the applicant an amount of R2,737,367.03 for arrear rental and ancillary expenses in terms of a lease agreement. Interest is claimed at the rate of 24% per annum a tempore morae and a costs order is sought against the respondents.
- [3] On or about 6 April 2018, a written Lease Agreement (“the Lease Agreement”) was entered into between the applicant and the first respondent. It should be noted that the applicant’s notice of motion is defective as it refers to the “respondents” instead of only the “first respondent”. The material terms of this agreement were, inter alia, the following:
- 3.1 The applicant let the premises to the first respondent;
- 3.2 The Lease Agreement would subsist for a period of approximately 60 months, commencing on the 1st day of May 2018 and terminating on the 14th day of April 2023;
- 3.3 The initial monthly rental payable by the first respondents would be an amount of R45,000 rent plus R5,000 for rates and taxes excluding VAT, per month, for the first year of the lease period;
- 3.4 The rental payable would escalate annually;

3.5 The first respondent would be charged interest of 2% per month on any overdue amount charged by the applicant;

3.6 Should any amount payable by the first respondent not be paid on the due date or should the first respondent commit any breach of any of the provisions of this agreement the applicant would become entitled to cancel the Lease Agreement by notice.

- [4] The first respondent did not oppose the relief nor did the second respondent. It has become common cause that the second respondent passed away before the application was filed but the applicant stated in its replying affidavit that it was not aware of this fact when the application was launched.
- [5] It was submitted on behalf of the applicant that there was no need to substitute the second respondent with the executor of his estate as “that by operation of the law; [sic] any debts due by the second respondent should be allocated under the deceased’s estate”.
- [6] I do not agree with this submission and when it became known to the applicant that the second respondent passed away the applicant should have substituted the second respondent with his executor in terms of Rule 15(2). This was not done and no order will be made against the second respondent.
- [7] It should be noted that the second respondent was the only member of the first respondent and this may explain why the first respondent never entered an appearance to defend. Fact is as it stands when the application was heard before this court the first respondent did not oppose the application.
- [8] The only party who opposed the application was the third respondent. Claim B pertains, inter alia, to the third respondent as it was alleged that he signed as surety and co-principal debtor for the debt of the first respondent. He filed a notice of intention to oppose and an opposing affidavit.
- [9] It should be noted that the third respondent was not legally represented and as a layman he filed a notice of intention to oppose and an affidavit. In his answering affidavit he raises the defence that the applicant’s averments in its “motion” are vague and embarrassing as it lacks averments. He stated that the applicant failed to show “the representative capacity of the second and third respondents or whom represented first respondent”.
- [10] He denied the existence of the suretyship which he allegedly signed and avers it has not been annexed to the founding affidavit. He stated that the applicant’s application is so vague that he could not answer thereto.
- [11] What becomes clear is that the third respondent was not representing the first respondent. This he confirmed during the hearing before this court.

[12] As far as the claim against the third respondent is concerned, the applicant attached the lease agreement which contained a clause which deals with the suretyship. In terms of clause 19.4 the third respondent and the deceased Mehmood Ali, bound themselves as surety and co-principal debtors together with the first respondent for the debt in terms of the Lease Agreement. This clause was specifically signed by the third respondent. In court he alleged that he only signed as witness. This defence was not properly raised

in the answering affidavit. On the face of it, the third respondent signed as surety but he also signed as a witness to the signatories

which appear at the end of the Lease Agreement.

[13] The third respondent filed a further affidavit as part of an application to strike out allegations in the affidavit filed on behalf of the applicant in terms of Rule 23(2). Third respondent applied for a directive that the applicant's claim be struck out on the grounds that the entire claim was vexatious, irrelevant and without merit. In this affidavit, the third respondent avers that his name should be removed as third respondent in the main application for eviction.

[14] This further affidavit was filed in an ill-conceived interlocutory application and should in the ordinary course be ignored for purposes of considering the merits of the main application.

[15] As stated, the third respondent appeared in person and was not legally represented. In my view it will be in the interests of justice for the court to take note of the allegations made in this affidavit as far as defences in the main application is concerned.

[16] In this affidavit the third respondent claims he should not have been a party to the main proceedings as he was not a party to the Lease agreement entered into between the applicant and the first respondent. This of course is correct as the third respondent was not a party to the Lease Agreement. He was only a witness to this Lease Agreement but also signed, on the face of the agreement, as a surety for the obligations of the first respondent.

[17] The third respondent has nothing to do with the eviction application as it does not pertain to him. He pertinently stated in this further affidavit that the application for eviction of the first respondent does not relate to him.

[18] Having considered the evidence in this matter, the applicant has made out a case for the eviction of the first respondent. The first respondent was indebted to the applicant in a substantial amount of money, the exact quantum thereof I will deal with later in this judgment. In fact, the first respondent did not oppose the relief in claim A which should be granted on an unopposed basis.

[19] As part of claim A, prayer 4 of the notice of motion claims for costs to be paid by the respondents which would include the second and third respondents. A costs order should only be granted against the first respondent.

- [20] As the first respondent is indebted to the applicant for a substantial amount of money, the agreement was, in my view, validly cancelled on 24 March 2022.
- [21] As far as claim B is concerned, the applicant seeks judgment against the respondents in the amount of R2,737,367.03 which it avers is due and owing to the applicant by the respondents in respect of arrear rentals and ancillary expenses. A statement of account was attached to the founding affidavit for the month of March 2022.
- [22] According to the statement, rental was initially paid but from 1 December 2018 large amounts, over and above monthly rentals due, were debited to the account. For instance, an amount of R228,436.96 was debited against the account but some months later there was a credit note in the amount of R222,178.16. Then on 1 June 2019, there was a debit for R252,892.20 and on 1 December 2019 for R272,901.06. These items do not appear to be for rental but may be for interest due.
- [23] During argument before this court counsel for the applicant could not assist the court to explain these debits.
- [24] On the papers before this court, the court is satisfied that the first respondent should not only be evicted from the premises but he is indebted to the applicant in a substantial amount. The quantum of the debt however is not clear and the court is of the view that the extent of the first respondent's indebtedness should be determined by a trial court.
- [25] As far as the second respondent is concerned, no order can be made against the second respondent up until the second respondent is substituted as a party by the executor of his estate.
- [26] As far as the third respondent is concerned, he as a layman stated his defences in very unclear terms. In the interests of justice the court is of the view that claim B should be referred to trial, not only as far as the quantum of the indebtedness is concerned, but also as far as the liability of the third respondent. In terms of Rule 6(5)(g) the court is entitled to make such order as it deems fit when in the court's view the application cannot properly be decided on affidavit. This the court intends to do in relation to claim B. It should be emphasised that the liability of the first respondent concerning claim B is not referred. The court is satisfied that the first respondent is liable for payment of a sum of money, the extent of which should be established on trial.
- [27] The following order is made.

Claim A

1. The first respondent and all those occupying by, through or under the first respondent from the commercial premises situated at Erf No. 3[...], Portion No. [...], Booysens Reserve, which is more commonly known as 1[...], F[...] Street, Booysens Reserve, Johannesburg, are ejected forthwith.

2. The Sheriff of this Court or his duly authorised deputy are authorised to forthwith do and take all steps necessary to eject the first respondent and all those occupying by, through or under the first respondent from the aforementioned premises.
3. The first respondent is ordered to pay the costs of this application.

Claim B

4. The first respondent is ordered to pay the applicant the amount for arrear rental and ancillary expenses in terms of the Lease Agreement which it can prove at the trial referred to hereinbelow.
5. In all other respects, claim B is referred to trial.
6. The applicant's notice of motion shall stand as a simple summons and the third respondent's answering affidavit as a notice of intention to defend.
7. The particulars of claim shall stand as the declaration of the applicant as of date of this judgment and thereafter the Uniform Rules dealing with further pleadings, discovery and the conduct of trials shall apply.
8. The costs concerning claim B will be costs in the cause.

STRYDOM J

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

JOHANNESBURG

APPEARANCES

Counsel for the applicant:

Ms. C. M Laurent

Instructed by:

SSLR Incorporated

Counsel for the respondents:

Mr. R. Humair

Instructed by:

In Person

Date of hearing:

31 JANUARY 2023

Date of Judgment:

07 FEBRUARY 2023

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