

SOUTH AFRICA / JUDGMENT

Growthpoint Properties Limited v JICAMA 51 Ltd t/a Rusty Grand Cafe (M132/2022) [2022] ZANWHC 53 (30 December 2022) [2022] ZANWHC 53

COURT

North West High Court, Mafikeng

BEFORE

J T Djaje

CASE / FILE NUMBER

M132/2022

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Source record

IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION –
MAHIKENG

Case

Number: M132/2022

Reportable: YES / NO

Circulate to Judges:

YES / NO

Circulate to

Magistrates: YES / NO

Circulate to Regional

Magistrates: YES / NO

In

the matter between:

GROWTHPOINT

PROPERTIES

LIMITED

Applicant

And

JICAMA

51 (PTY) LTD t/a RUSTY GRAND

CAFÉ

Respondent

ORDER

In

the result the following
order is made:

1.
Confirmation of cancellation of the
subsequent lease agreement entered into between the parties on 12
March 2021 is hereby granted;
2.
The respondent and/or any person
claiming occupation under it are evicted from the immovable property
described as Shop 22 Waterfall
Mall Value Centre, Augrabies Avenue
Cashan Ext 12, Rustenburg;
3.
The respondent is ordered to immediately
remove all and any movable assets situated on the property and that
in the event the respondent
fails and/or refuses to vacate the
property and/or remove the movables therein, the Sheriff of this
Court or his duly authorised
Deputy is directed to remove the
respondent, and any persons claiming occupation under him as well as
the movables situated on
the property;
4.
The applicant is authorised to terminate
the respondent's supply of electricity to the property;
5.
The applicant is authorised to utilize
the services of an electrician, appointed by it, and to gain access
to the property in order
to disconnect the electricity supply to the
property;
6.
The respondent is prohibited from
tampering with any seal installed by the electrician, so as to
reconnect the power supply to the
property;
7.
The respondent is ordered to pay the costs of
the application.

JUDGMENT

DJAJE ADJP

- [1] The applicant approached this court for the eviction of the respondent from the premises situated at Shop 22 Waterfall Mall Value Centre, Augrabies Avenue Cashan Ext 12, Rustenburg ("the property"). In addition, the applicant seeks confirmation of cancellation of the subsequent lease agreement between the parties and the termination of electricity supply to the property.

- [2] The applicant is the owner of the property and entered into a lease agreement with the respondent on 14 May 2018, 6 June 2018 and 21 June 2018 (“the 2018 lease”). Subsequent to that the parties entered into a lease agreement on 12 March 2021 (“the 2021 lease”). The respondent leased the property for purposes of conducting a restaurant business. In terms of the lease agreement the respondent was liable for rental as follows: an amount of R76 048.51 (excl. vat) from 1 April 2018 to 31 March 2019; R82 130.23 (excl. vat) from 1 April 2019 to 31 March 2020 and R88 700.65 (excl. vat) from 1 April 2020 to 31 March 2021. In addition, the respondent would be responsible for electricity, water charges, rates and ancillary charges including 8% of the respondent’s turnover. The respondent also had to make a deposit of R589 470.13 in cash or by way of bank guaranteed cheque. There was a 100% covid relief for the respondent during the hard lockdown over the period of April 2020 to July 2020, a discount in the amount of R57 266.23 for August 2020 and 40% discount on rentals for September 2020 to January 2021. The total amount discounted was R589 470.13.
- [3] During April 2021 the applicant instituted an action against the respondent in the Rustenburg Magistrate’s court for eviction from the property and payment of the arrear rental. The matter was heard as a summary judgment application before the Magistrate’s court and the respondent raised a defence that there was a subsequent lease agreement entered into between the parties on 12 March 2021. The defence was accepted and the respondent was granted leave to defend the action. The action is still pending in the Magistrate’s court. In terms of the subsequent lease the respondent had to make payments to cover the arrears as follows: R110 000-00 on 11 March 2021; R40 000-00 on 15 March 2021; R150 000-00 on 22 March 2021; R150 000-00 on 12 April 2021 and R150 000-00 on 19 April 2021. The respondent would continue with the full rental.
- [4] It was submitted on behalf of the applicant that the respondent has breached the agreement by failing to make payment of its rental and ancillary charges. As at January 2022 the amount outstanding by the respondent was R782 027-00. It is for that reason that the applicant seeks a relief to cancel the subsequent lease agreement and that the respondent be evicted from the property.
- [5] The respondent raised a point in limine of lis pendens in that the matter between the parties is still pending in the Rustenburg Magistrate’s Court. The respondent argued that the applicant is doing forum shopping by bringing this application in this court when there is an action between the same parties pending in another court. In contention the applicant argued that the matter that is pending before another court is not the same as the one before this court. The matter before the Magistrate’s court relates to the arrear rental and ancillary charges in terms of the first lease agreement, whilst the cause of action in this application is the subsequent lease agreement. In support of its case the applicant referred to the case of *Keyter NO v Van Der Meulen and Another* NNO 2014 (5) SA 215 (ECG) where the court dealt with the requirements of the defence of lis alibi pendens as follows:

“The defence of lis alibi pendens arises when four requirements are met. They are that: (a) there is litigation pending (b) between the same parties (c) based on the same cause of action and (d) in respect of the same subject matter. Lis pendens if successfully raised does not put an end to the plaintiff’s or applicant’s case. Rather, it allows for the staying of the latter matter pending the final determination of the earlier matter.”

- [6] In *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others* [2013] ZASCA 129; 2013 (6) SA 499 (SCA) the court explained the doctrine of lis pendens as follows:

“[2] As its name indicates, a plea of lis alibi pendens is based on the proposition that the disputes (lis) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions. It is a plea that has been recognised by our courts for over 100 years.”

- [7] There is no dispute that there is a pending matter between the parties in the Magistrate’s court. However, the issue is whether it is the same cause of action. According to the applicant the action pending in the Magistrate’s Court is in relation to a different cause of action. It is common cause between the parties that there was a lease agreement entered into in May and June 2018. Subsequent to that, another lease agreement was concluded on 12 March 2021. The notice of motion in this application refers to the cancellation of the lease of 12 March 2021 and the eviction of the respondent from the property. In the action pending before the Magistrate’s Court, the plaintiff being the applicant herein is claiming for payment of the arrears and eviction of the defendant from the property. However, the claim for eviction was withdrawn in the pending action per notice of withdrawal attached to the founding affidavit herein.
- [8] The pending litigation between the parties is interlinked with the current matter. The applicant sent a letter to the respondent on 11 March 2021 containing certain conditions relating to the settlement of arrears. In the letter the applicant stated that if the conditions were accepted by the respondent, the lease would be renewed on the stated terms. Seemingly, the terms were acceptable to the parties and hence the conclusion of the subsequent lease. It is important to note that the March 2021 lease agreement does not have the same terms of payments of the rental and ancillary charges. This makes it a different lease agreement from the first one. Even if the two agreements relate to the same parties and the same property, the cause of action in the pending matter and the current application are not the same. The point in limine of lis pendens is therefore not applicable and stands to be dismissed.
- [9] The respondent also raised a point in limine of non-joinder of the Rustenburg Local Municipality. The respondent argued that the municipality is responsible for the supply of electricity to the property and should have been joined to these proceedings as the applicant

seeks that the supply of electricity to the property be terminated. In response the applicant argued that the services of the municipality are not required to disconnect electricity and only a qualified electrician would suffice. The applicant submitted that the respondent only occupies a portion of the building owned by the applicant and it is not necessary for the municipality to be involved in disconnecting the electricity. The test for non-joinder is trite and the respondent has not succeeded to show that the Rustenburg Municipality has any interest in the outcome of this matter. It is for that reason that the point in limine of non-joinder should fail.

Merits of the application

- [10] The applicant submitted that the respondent is in breach of the subsequent lease agreement concluded on 12 March 2021. As a result, the relief sought is for the cancellation of the agreement and the eviction of the respondent from the property. The applicant argued that the respondent failed to make payments as required in terms of the lease agreement and the amount of the arrears as at the date of demand on 11 February 2022 was R272 554.67. The amount excludes the top up deposit that the respondent agreed to pay in terms of the subsequent lease. It is the applicant's case that the lease agreement was cancelled on 29 March 2022 as a result of the continued breach by the respondent.
- [11] In contention, the respondent argued that there are factual disputes of fact in this matter based on the payments made and the existence of valid lease agreement. It was argued that the respondent had accepted the offer made by the applicant in terms of the new lease agreement and made payment in terms thereof. Further to that, the respondent accepted that the lease had been extended for a period of five years and the applicant is estopped from cancelling the agreement. The respondent contended that due to the disputes of fact the matter should either be referred for oral evidence or be dismissed.
- [12] A further contention on behalf of the respondent was that it holds a lien over the property due to the necessary improvements made. The respondent argued an amount of R2 500 000-00 was spent on the necessary improvements to the property in 2020 and this would be the basis for a counterclaim if the matter goes for trial.
- [13] In dealing with the dispute of facts in motion proceedings the following was stated in *Plascon-Evans Paints Ltd v Van Riebeeck paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634H-635C that:

"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact.....If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of

Court..... and the Court is satisfied as to the inherent credibility of the applicant's

factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines

whether the applicant is entitled to the final relief which he seeks.... Moreover, there may be exceptions to this general

rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers....”

[14] The respondent alleges that there is a dispute relating to the payments made and attached proof of payment. The proof of payment attached by the respondent shows the following as payment made:

“10.7 What is further complicating affairs for the Applicant, is that the Respondent complied with payments in terms of the new agreement , by paying lease to the Applicant in the following amounts:

13 APRIL 2021

- R110 000.00

20 APRIL 2021

- R110 000.00

10 MAY 2021

- R110 000.00

18 MAY 2021

- R110 000.00

28 JUNE 2021

- R150 000.00

1 JULY 2021

-R140 000.00

14 SEPT 2021

- R130 000.00

5 OCT 2021

-R130 000.00

15 NOV 2021

- R130 000.00

8 FEB 2022

-R120 000.00

8 MARCH 2022

- R100 000.00

5 APRIL 2022

- R135 000.00

10 MAY 2022

- R135 000.00

A copy of payment history regarding the rent pertaining to the new agreement is attached hereto as annexure “ETT3”. It is important to note that the Respondent had been complying to payment in respect of the new agreement for not less than 13 months.”

[15] In terms of the subsequent lease agreement the respondent had to settle the arrears as follows:

“21.1 Certain payments would have to be made by the respondent in the instalments in order to settle the arrears at the time as follows:

21.1.1 R110, 000.00 to be paid on 11 March 2021;

21.1.2 R40, 000.00 to be paid on 15 March 2021;

21.1.3 R150, 000.00 to be paid on 22 March 2021;

21.1.4 R150, 000.00 to be paid on 12 April 2021; and

21.1.5 R150, 000.00 to be on 19 April 2021.”

[16] The rentals going forward would be as follows:

“22. The manner in which rentals would be paid by the respondent going forward, over and above the payment towards the arrears would be paid as follows:-

22.1 March 2021 Rental of R136 94.88 would be paid in full on 10 May 2021;

22.2 April 2021 rental would be paid in full on 24 May 2021;

22.3 June rental would be paid in full on 14 June 2021.

23. Rental going forward from July 2021 would be paid in terms of the signed lease agreement. (The lease agreement in this instance is reference to the lease agreement referred to above).

24. In the event that the settlement of the arrears be accepted, the applicant would be prepared to renew the lease agreement on certain terms in relation to rentals and ancillary charges excluding VAT as follows:

24.1 Rent- Static rental in year 1 in the amount of R88 700.65;

24.2 Rates in the amount of R8.07/m which would escalate in July annually;

24.3 Refuse in the amount of R2.70/m which would escalate in July annually;

24.4 Aircon in the amount of R0.63/m which would escalate in July annually; and

24.5 The lease term would be for a period of five years.”

[17] On reconciliation of the payments made by the respondent as compared to what was due, an amount of R272 554-67 remained unpaid as at March

2022. There is clearly no dispute of fact in this instance as the applicant relies on the proof of payment versus the terms of the subsequent lease agreement. The principle enunciated in the Plascon-Evans case is clearly not applicable in this matter. The respondent was notified of the breach through a letter of demand and continued to be in breach of the agreement. The respondent’s argument that the applicant should claim for specific performance in terms of the agreement cannot succeed.

[18] The respondent raised a defence of lien over the property as a result of the necessary improvements made in 2020 in the amount of R2 500 000-00, which the respondent intends to claim as damages from the applicant. In contention the applicant argued that the improvements referred to by the respondent do not fall under the subsequent lease agreement but under the first agreement. Further to that, the applicant submitted that in terms of the first lease agreement, the owner or lessor is specifically excluded from any improvements by the respondent. It was argued by the applicant that the respondent has failed to prove how the amount of R2 500 000-00 was calculated and what the improvements were. As such the applicant’s case was that there is no case made out for a lien by the respondent over the property.

[19] In the first lease agreement there was provision made for any alterations made or to be made in the property as follows:

“15. SUITABILITY OF LEASED PREMISES

15.1 The tenant acknowledges that the leased premises are let in good order and condition and any alterations, renovation, additions and the like shall be for the account of the tenant.

15.3 The landlord shall not be under any obligation or liability to make any application, do any work or make any alterations or repairs to the leased premises in order to comply with the requirements of any local authority or other applicable laws and regulations.

15.4 The landlord shall not, however, unreasonably withhold its consent to the tenant doing any such work, alterations or repairs at the tenant's own cost and expense; provided that the landlord shall be entitled to require such work, alterations or repairs to be effected subject to the reasonable approval of the architect and the fees of such architect shall be paid by the tenant.

16. SPECIFICATION IN RES OF AND ALTERATIONS TO THE LEASED PREMISES

16.1 The tenant acknowledges that the leased premises are let in good order and condition and any alterations, renovations, additions and the like shall be for the account of the tenant. The tenant shall further not make any alterations or additions to the leased premises, the shopping centre, the complex or the roof without the landlord's written consent.

16.3 Should the tenant, prior to the commencement date or at any stage during the currency of this lease, request the landlord in writing to consent to any structural or non-structural alterations, renovations and/or additions to the leased premises (including the airconditioning unit and fire protection system), the complex and its roof over and above what is existing ("the work"), then such approval as the landlord may grant shall, unless expressly varied by the landlord in writing, be subject to the following terms-

16.3.1 in the event of the tenant awaiting occupation of the leased premises, the carrying out of the work shall not without the prior written consent of the landlord (whose decision shall be final and binding upon the tenant) delay the completion of the leased premises and/or the shopping centre;

16.3.2 the work, including the plans and specifications, shall have received the landlord's prior written consent, which in the case of non-structural alterations, renovations and/or additions only, shall not be unreasonably withheld, in order to obtain such approval, the tenant shall submit to the landlord and/or the architect, the following items listed in 16.3.2.1 to 16.3.2.2 below-

16.3.2.1 detailed shop fitting drawings shall include but not be limited to

details of all fittings and fixtures, wall and floor finishes, any plumbing, electrical and air-conditioning work, any internal

partitions, all materials to be used within the leased premises, all colour to be used in the interior of the leased premises; and

16.3.2.2 detailed drawings of the proposed bulkhead signage which shall include but not be limited to details of letter size and depth, material to be used, method of manufacture, details of illuminations and of method of erection.

16.3.3 the leased premises shall be completed in accordance with the plans and specifications referred to in 16.3.2, it being acknowledged that the scope of the work shall be only as expressly set forth in the said plans and specifications;

16.3.4 the express or implied approval by the landlord of the plans and specification shall not amount to a warranty or representation of the adequacy or suitability thereof and the landlord shall not be responsible for any faults or defects therein;

16.3.5 the tenant's work shall be executed in accordance with any applicable law or requirement of any public or controlling authority;

16.3.6 all the tenant's work shall be effected with new materials. Materials and workmanship shall be of a uniformly high quality used and/or performed in accordance with the very best standards of practice.

16.4 Should the tenant effect any alteration, renovations and/or additions to the complex or the leased premises without the landlord's prior written consent, the landlord shall be entitled to deem that such consent has been given and to exercise its rights in terms of this clause 16.

16.5 should consent be given by the landlord and/or the architect in terms of 16.3 above, then the landlord shall be entitled to appoint an agent, at the tenant's expense, to inspect any alteration to the leased premises and such inspections may take place at various stage of completion. The landlord shall approve the alterations on receipt of a final completion certificate, signed and approved by the landlord's agent."

[20] The respondent is raising this issue of improvements to the property as a defence to the relief sought under the subsequent lease. There are no specific details provided what the improvements are and whether there was any consent obtained from the applicant. The respondent has not attached any proof of the amount paid towards the said improvements. However, the issue to be determined is whether this defence raised by the respondent is valid in a relief for eviction.

[21] The applicant correctly referred to the matter of FHP Management (Pty) Ltd v Theron 2004 (3) SA 392 (C) that in order for an applicant to be successful with a claim of an improvement lien, they must prove that the improvements had actually been made and were necessary. The Supreme Court of Appeal in Pheiffer v Van Wyk (267/13) [2014] ZASCA 87 (30 May 2014) at par 10 held as follows:

"..... To successfully raise the defence of a lien, it must be alleged and proved that (a) the person has possession of the object,

(b) that the expenses incurred were necessary for the salvage of the property or that it was useful for the improvement of the object (improvement lien)."

[22] The respondent in this matter is in possession of the property, however has failed to establish that there was consent given by the applicant. Further to that, the respondent has failed to prove that the expenses were actually incurred and whether the improvements were indeed necessary or useful to salvage the property. As correctly argued by the applicant, there was no document or photos by the respondent to prove the expenses incurred. The respondent has failed to successfully raise the defence of improvement lien in

this matter. The applicant has made out a case as sought in the notice of motion and the application should succeed.

[23] As far as costs are concerned, they are in the discretion of the court. There is no reason why the applicant should be mulct with a costs order as none of the defences raised by the respondent were successful. Costs should therefore follow the result.

Order

[24] Consequently, the following order is made:

7. The respondent is ordered to pay the costs of the application.

J T DJAJE

DEPUTY JUDGE PRESIDENT

NORTH WEST HIGH COURT

APPEARANCES

DATE OF HEARING

: 10 NOVEMBER 2022

JUDGMENT

RESERVED

: 10 NOVEMBER 2022

DATE OF JUDGMENT

: 30 DECEMBER 2022

COUNSEL FOR THE APPLICANT

: ADV V VERGANO

COUNSEL FOR THE RESPONDENT : ADV H SCHOLTZ

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