

SOUTH AFRICA / JUDGMENT

MEC Department of Public Works, Eastern Cape v Mpumlwana (86/20) [2020] ZAECMHC 58 (1 December 2020) [2020] ZAECMHC 58

COURT

Eastern Cape High Court, Mthatha

BEFORE

B R Tokota

CASE / FILE NUMBER

86/20

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE LOCAL
DIVISION, MTHATHA)

Case

No: 86/20

In

the matter between:

MEC DEPARTMENT OF
PUBLIC
WORKS,
EASTERN
CAPE
Applicant
and
NYAMEKA
RUTH
MPUMLWANA
Respondent

JUDGMENT

TOKOTA J:

Introduction:

[1] The applicant in his capacity as the nominal representative of the Department of Public Works, Eastern Cape (the department) seeks an eviction order against the respondent from erf.290, the property situated in the Mthatha Municipal district. On 14 November 2012, the applicant represented by one George Sidaza purportedly entered into a lease agreement with the respondent in terms whereof the respondent was to conduct her business interests in the property. Despite the

signing date, the lease was to commence on 1 April 2012 and expire on 31 March 2013. The applicant is seeking an order of eviction of the respondent from the property on the grounds thereof that the respondent has breached the terms and conditions of the lease

agreement. Furthermore, the applicant seeks a declaratory order that the lease agreement entered into between itself and the respondent

has expired by effluxion of time and therefore the respondent is occupying its property unlawfully.

[2] In her opposing affidavit the respondent attached another lease agreement, which she claims was also concluded eight days after the first one. This one purports to have been signed on the 23rd of November 2012 (second agreement) and was for duration of a period of 9 years. According to the second agreement, it was to commence on 1 April 2013 and expire on 31 March 2022. Consequently, the respondent opposes the application on the basis that her lease agreement is still current and will expire in 2022. The applicant disputes the authenticity of the second agreement and claims that it is a forged document. The applicant has applied for the amendment of the Notice of Motion to include a declaratory order that the second purported lease agreement is invalid. The application for the amendment is also opposed.

Factual matrix

[3] The factual background, as appears from the papers, can be summarised as follows: According to the respondent's version (which is not disputed) during 1998 she approached the department with a view to secure property for leasing purposes. She was informed that erf.290 was available but was not in good condition. Through negotiations,

she managed to secure the property in order to conduct her business venture. She has entered into numerous lease agreements since 1998 and has been in occupation of the property since then. The respondent is carrying out a business of assisting small businesses and offers training for them. These small businesses are also housed in the same property. She claims that she is not

sub-letting the property but it is necessary for these small businesses to be “in the proximity of [her] office” even though she is doing the “training at a price”. For obvious reasons the written lease agreements, if there were any, from 1998 to March 2012 were not attached to the papers.

- [4] On 14 November 2012 the department represented by one George Sidaza, concluded a lease agreement with the respondent in terms whereof erf 290, a property situated in Mthatha Municipal district, was purportedly leased to the respondent for a period of one year commencing from 1 April 2012 ending on 31 March 2013. The respondent was to pay monthly rental for R7 787.55 (Seven thousand seven hundred and eighty seven rand fifty five cents) inclusive of VAT. The purpose of the lease was for the respondent to conduct commercial business on the property. One of her businesses on the premises is called Khanyisa Business Consultants. It is the alleged breach of this agreement, which prompted the institution of these proceedings.
- [5] The application is founded principally on two grounds. First, the applicant contends that the respondent has breached the terms of the agreement in that she has failed to pay rentals and Municipal rate charges. It is alleged that currently the respondent is in arrears by R1 085 726.00 (One million and eighty five thousand seven hundred and twenty six rand. Second, the applicant contends that as the lease agreement has come to an end by effluxion of time the respondent is not entitled to remain in the premises. The applicant contends that the purported renewal of the lease agreement dated 23 November 2012, the original of which cannot be traced, is a forged document and must also be declared invalid.

Points in limine

- [6] It is perhaps expedient that I first deal with the preliminary points taken by the respondent. The respondent took the following points in limine:
- (a) That this application is based on *rei vindicatio*. The applicant is not the owner of the property instead Transkei Township Board is the owner thereof and therefore the MEC lacks *locus standi* to institute these proceedings.
 - (b) That the Head of the Department (HoD) who is the deponent to the founding affidavit has no authority either to depose to the affidavit on behalf of the MEC or to institute these proceedings.
 - (c) That there has been a non-joinder of the necessary party, which is the Department of Public Works. On this score, it is contended that the lease agreement was entered into between the department and the respondent and accordingly it is the department, which should have instituted these proceedings.
 - (d) That at the time the lease agreement was concluded the present incumbent, HoD, was not in the department. Therefore, so the argument goes, his evidence constitutes hearsay evidence and is therefore inadmissible.

- [7] As to the first point the respondent raises two mutually exclusive defences in the matter. First, she contends that she has a valid lease agreement with the department which expires in 2022 and therefore she is in lawful occupation of the property. Second, the department is not the owner of the property concerned and the property belongs to the Transkei Township Board, which does not exist anymore. Consequently, so it is contended, nobody can claim it. According to this argument, the property is *res nullius*. The two defences are mutually exclusive. The respondent does not explain why she negotiated with the department to lease the said property from it if it is not the owner of the property and why she concluded a lease agreement with the department.
- [8] In paragraph 12 of the supplementary affidavit the applicant states that the respondent is in arrears with the rent in the amount of R1, 08 (One million and eighty five thousand rand). In her answering affidavit the respondent does not deny this allegation. Her response thereto is “it is also worth noting that contrary to what is contained in paragraph 33 of the deponent’s founding affidavit stating that “arrears are presently R870 414.31 (eight hundred and seventy thousand, four hundred and fourteen rand [thirteen] thirty one cents) he now, in less than a month, reflects arrear rental at R1 085 726.05 (One million and eighty five thousand seven hundred and twenty-six rand five cents) as per annexure “MA1.

I will not answer to the rest of the allegations relating to the reason why the government wants the property except to state that unless and until the department or government has title to the property and claims cancellation of the lease agreement, it has no authority to evict me.”

She claims in the paragraph quoted above that the applicant has no authority to evict her.[1]

- [9] The defence by the respondent that the applicant is not the owner of the property has to be rejected. From her own version she approached the department and negotiated the lease agreement with it. The lease agreement on which she relies for “lawful” occupation of the property was concluded between herself and the department. Consequently reliance on the point that the department is not the owner for the purposes of her defence, and seeking to rely on

the lease agreement entered into with it is mutually incompatible. It has been said that: ‘(N)o person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate.’[2]

To borrow from the case of *Plascon-Evans*[3], the allegations of the respondent are so far-fetched or clearly untenable that a court would be justified in rejecting them merely on the papers. After all, when she signed the contractual document she thereby acknowledged that the department was the owner thereof.

[10] As to the second point it is obvious from the papers that, the MEC in his representative capacity as the nominal applicant and not the HoD has instituted these proceedings. The HoD has deposed to the affidavit by virtue of his position as the Accounting Officer of the department. He has unlimited access to the records of the department. There is therefore no substance in the argument. The HoD does not require any authority from the MEC to depose to the affidavit.[4]

[11] As to the third point I also find that there is no merit in this argument. The department is an organ of State. In terms of section 2(1) of the State Liability Act[5] the executive authority must be cited as the nominal applicant or respondent in any action taken by or against the department.

The effect of the provision is that, when the State is suing or being sued, the Minister of the State, in cases involving a national

department, or the MEC of the department concerned, in cases involving provincial departments, must be cited. The Executive

Authority is defined in the Act as follows:

“executive authority”, in relation to-

(a) a national department, means the Cabinet member who is accountable to Parliament for that department; and

(b) a provincial department, means the member of the Executive Council

of a province who is accountable to the provincial legislature for that department;”[6]

Assuming that this point was valid, it would mean that two separate affidavits had to be filed in relation to one issue. In any event the point is at odds with the defence raised by the respondent. She cannot be allowed to blow hot and cold by stating that the department is not the owner of the property consequently has no locus standi and at the same breath argue that it should have been joined in the proceedings.

[12] With regard to the fourth point I also find that the point is bad in law. The fact that the HoD was not present when the agreement was signed does not preclude him from deposing to the facts, which are available in the records. Anybody who has access to the records can testify as to what the records reveal. As a matter of fact the facts deposed to are supported by documents and are common cause. If the point were to be upheld it would mean that it would be practically impossible for the departments to operate as officials come and go either through transfer, retirements or deaths. Accordingly this point as well is rejected.

Amendment of the notice of motion.

[13] The general rule is that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by an order of costs, 'or in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the

pleading which it is sought to amend was filed.'[7]

[14] In Mukaddam[8]Jafta J said:

'It is important that the rules of courts are used as tools to facilitate access to courts rather than hindering it. Hence rules are made for courts and not that the courts are established for rules. Therefore, the primary function of the rules of courts is the attainment of justice. . . '

Furthermore, technical objections should not be allowed to hinder the court from deciding the real issues.

[15] In my view the objection has no merit. The basis of objection is that, first, there are no facts in the founding affidavit in support of the amendment. If the application is allowed, so the argument goes, the respondent would be ambushed in that in absence of facts in support thereof in the founding affidavit the respondent would have been denied an opportunity to deal therewith and that the applicant would have been allowed to introduce a new cause of action, which did not exist. Second, the application constitutes an abuse of the court process and is mala fide.

[16] The existence of the purported lease agreement upon which the respondent relies for her defence was introduced for the first time in the answering affidavit. The applicant had no knowledge of the existence thereof. It has to be dealt with accordingly in these proceedings. To declare the lease agreement dated 14 November 2012 and leave the one dated 23 November 2012, (provided it is a valid lease) will leave the applicant with an option to bring another application to declare it as invalid. That situation would be untenable and would lead to unnecessary endless litigations

[17] The respondent alleges that she has a valid lease agreement with the applicant and therefore is lawfully occupying the property. Her objection to the amendment of the notice of motion is based on the grounds thereof that she will be prejudiced by reason of the fact that the original prayers disclosed no cause of action and to allow the amendment would be allowing the applicant to revive a claim, which it did not have. There is no substance in this argument and it must be rejected without further ado. As will appear in this judgment both lease agreements were invalid and enforceable. In the circumstances the amendment falls to be granted.

Merits of the application:

[18] Despite the fact that the respondent took occupation of the property since 1998, and is still in occupation thereof, she has not denied pertinently that she is in arrears in rentals by the amount stated above. She took a point that the applicant filed a supplementary affidavit

without leave of the court. In this regard, she issued a Rule 30 notice stating that such filing of the supplementary affidavit constituted an irregular step but has not pursued it. Instead, when she filed answering affidavit she responded to the allegations in the supplementary affidavit. Nothing will be said again about a Rule 30 notice.

Validity of the lease agreements:

[19] At the hearing of this matter on 22 October 2020 I raised with Counsel the point as to whether or the contract was valid, in the light of the allegations by the respondent that the lease agreement was secured by means of negotiations instead of following the procedure for procurement in terms of section 217 of the Constitution of the Republic of South Africa, 1996 (the Constitution), the contract of lease. Both Counsel were taken by surprise in that it never occurred in their minds that lease agreements fell within the category of 'goods and services' as envisaged in section

217. Since this point was raised by me mero motu they requested that I give them an opportunity to prepare for it. Furthermore Counsel for the respondent, notwithstanding the fact that the matter was set down for argument on application for amendment as well as the merits of the application, only prepared heads of argument for the opposition of the amendment only. I then issued the following directive:

"Having read the papers filed of record I have gleaned therefrom that the respondent obtained the lease agreement from the applicant by means of negotiations as opposed to procurement process as required by the Constitution. In view of the fact that the Department of Public Works is an organ of State the parties are invited to submit heads of argument addressing the following:

1. Whether section 217 of the Constitution applies to lease agreements procured by the State from outside entities and/members of the public? If so, in the light of the fact that from the papers the respondent secured the lease between herself and the Department of Public Works through negotiations instead of the procurement processes whether the lease agreement is a valid and enforceable transaction in a court of law;
2. Whether the court is entitled to raise this point mero motu; since it is apparent on the papers, but the common approach of the parties proceeded on [a] different approach to the point raised;
3. The respondent is also directed to cover the merits of the application in the heads of argument;
4. If any of the parties wishes to file an affidavit regarding the point raised by the court, leave is hereby granted to that party to file that affidavit on or before Monday 26 October 2020;
5. If such affidavit is filed the other party will be entitled to respond thereto on or before Tuesday the 27th of October 2020.

6. The requested heads of argument are to be emailed directly to my secretary or myself at tokotab@gmail.com.
7. The matter will be argued on Thursday the 29th of October 2020.”

I am indebted to counsel for both parties for their helpful heads of argument.

[20] Mr Madikizela, who appeared for the respondent, conceded that the point raised by the court is covered in the papers and that it is a legal point. In his heads of argument, Mr Madikizela argued as follows in this regard. “It is submitted [that] the question of the applicability of section 217 on the procurement of the respondent’s lease, which must be answered affirmatively, is a point of law.” He submitted, however, that this court has no authority to raise this point. He relied on the case of *Fischer v Ramahlele* 2014 (4) SA 614 (SCA) ([2014] 3 All SA 395; [2014] ZASCA 88) para.14

Mr Mapoma, who appeared for the applicant, on the other hand submitted that the court was entitled to raise the point as it is covered in the pleadings. He also conceded that the point is a legal one. He too referred to the dictum in the case of *Fischer*[9]

[21] In my view reliance on *Fischer* by Mr Madikizela is misplaced. In that case, it was stated that it is not for the court to raise new issues not traversed in the pleadings or affidavits. In the case at hand, the point I raised is covered in the papers.

I accept that a court is not permitted to tell the litigants what they should complain about. The court has to determine the issues as pleaded by the parties. The exception is when the parties wrongly define the legal point to be determined. In that case, the court is not bound by what the parties define the real legal issues for determination. It has been held that “[w]here a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality. Accordingly, the Supreme Court of Appeal was entitled *mero motu* to raise the issue of the commissioner’s jurisdiction and to require argument thereon.”[10]

Consequently, *Fischer*’s case did not change the Constitutional court decision on this issue. Accordingly I was not only entitled to but obliged to direct the parties to address the court on the point I raised otherwise an impression would have been created to the parties that the State is entitled to procure goods and services from the public in a manner otherwise than that prescribed by the Constitution.

[22] Mr Mdikizela, in contradistinction to what he conceded and argued in his written heads of argument, submitted further that the point I raised is a factual point and not legal. A factual point is that the procurement of the lease was obtained by means of negotiation and not by tender. Nothing can be clearer than the following quotation from the respondent’s answering affidavit:

“3.1 During 1998 I approached the department of Public Works with a view to secure a certain dilapidated property situated at 59 Madeira Street, Mthatha, this being erf 290, Mthatha, for rental purposes.

3.2 In our preliminary negotiations I was informed that I could get the property and advised that the department had no funds to renovate the building, which was last renovated in 1976.

3.3 We however agreed that I could, if able attend to renovations of the building, clear its yard and keep receipts for my expenses which, I was advised, would be set-off as against rental payable for the property.”

The respondent goes on and states that she has been in occupation of the property for the past 21 years and that she has entered into ‘a number of lease agreements’ during this period. She states that the lease agreement now in issue is but one of those lease agreements she entered into between herself and the department.

[23] The legal issue I raised was whether such agreements, in light of the failure to follow the processes prescribed by law were valid agreements in law. The answer to this is not far to seek. The legal question is whether public procurement contracts secured without following the prescripts such as section 217 of the Constitution, Public Finance Management Act, Regulations and Supply Chain Management as prescribed by National Treasury can be valid and enforceable. Procurement of contracts by the State by way of lease agreements is governed by section 217.[11] The section provides: “When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national

legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent,

competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-

- (a) categories of preference in the allocation of contracts; and
 - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.”

It is now settled that lease agreements concluded contrary to the provisions of section 217 such contracts are invalid and unenforceable.[12] This actually disposes of the applicant’s case and on this ground alone, the application must succeed.

[24] Lest it be said but for the above point the application would have failed. Far from it. The defence of the respondent is that the lease agreement dated 12 November 2012 was renewed by the second agreement dated 23 November 2012. That argument loses sight of the fact that in terms of clause 22.1 of the agreement the lease was only renewable at the expiration of the first agreement, which would have been 31 March

2013. Furthermore, notice of not less than two months had to be given for such renewal (clause 22.1.1). In terms of clause 26.3 'no variation or consensual cancellation of this lease shall be of any force or effect unless reduced to writing and signed by both

parties.' Clauses 22 .1 and 22.1.1 were never varied as prescribed in clause 26.3. Consequently, on this point alone the second agreement purporting to renew the first agreement had no force and effect. Even assuming that the second lease was current the respondent had in any event breached the terms and conditions thereof by failing to fulfil her obligation to pay monthly rentals. She is therefore not entitled to remain in the property.

Costs:

[25] There is no reason why costs should not follow the result. The opposition was unreasonable. The respondent has enjoyed the benefit of occupying the government property at tax payers' expenses. She must bear the consequences.

[26] In the result the following order will issue.

1. The application succeeds.
2. Application for amendment is granted.
3. It is declared that the purported lease agreements entered into by the applicant and the respondent on 12 November 2012 and 23 November 2012 respectively are invalid and of no force or effect.
2. The respondent is ordered to vacate the property erf 290 situated at 59 Madeira street Mthatha within 20 days from the date of this order, failing

which the sheriff is authorised to remove her.

3. Save for those costs that the applicant was ordered to pay on 4

February 2020 the respondent is ordered to pay costs of the application including all costs reserved and costs of opposition of the amendment.

B RTOKOTA

JUDGE OF THE HIGH COURT

Appearances:

For the applicant

Mr S X Mapoma

Instructed by Mvuzo Notyesi Inc.

For the respondent:

Mr S Madikizela

Instructed by Prince Madikizela & Co

Date of Hearing:

27 October 2020.

Date delivered:

1 December 2020.

[1] Paragraph 15 of the answering affidavit p.87

[2]Hlatshwayo v Mare and Deas 1912 AD 242 at 259; Shepherd Real Estate Investments (Pty) Ltd v Roux le Roux Motors CC [2019] ZASCA 178; 2020 (2) SA 419 (SCA) at para 23.

[3]Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984

(3) SA 623 (A) at 634-635).

[4]Ganes and another v Telecom Namibia Ltd. [2003] ZASCA 123; 2004 (3) SA 615 (SCA); [2004] 2 All SA 609 (SCA) at para 19.

[5] State Liability Act 20 of 1957.

[6] Section 4A of the State Liability Act 20 of 1957

[7]Moolman v Estate Moolman 1927 CPD 27 at 29; Ascendis Animal Health (Pty) Limited v Merck Sharp Dohme Corporation and Others [2019] ZACC 41; 2020 (1) SA 327 (CC); 2020 (1) BCLR 1 (CC) at para 89.

[8]Mukaddam v Pioneer Foods (Pty) Ltd and Others [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) at para 32 (Mukaddam).

[9] Para. 13

[10]CUSA v Tao Ying Metal Industries [2008] ZACC 15; 2009 (2) SA 204 (CC); (2009 (1) BCLR 1 (CC); [2009] 1 BLLR 1 (CC); (2008) 29 ILJ 2461; [2008] ZACC

15) para. 68. There is a plethora of decisions that approved this approach including cases from the Constitutional court.

[11]Airports Company South Africa Soc Ltd v Imperial Group Ltd and Others 2020

(4) SA 17 (SCA) paras. 63-64

[12] Municipal Manager: Qaukeni Local Muni v FV General Trading CC 2010 (1) SA 356 (SCA) ([2009] ZASCA 66); [2009] 4 All SA 231 (SCA) para.16; Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others 2014 (4) SA 179 (CC) (2014 (6) BCLR 641 para.40; Valor IT v Premier, North West Province and Others (Case no 322/19) [2020] ZASCA 62 (9 June 2020) para.41

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