

SOUTH AFRICA / JUDGMENT

Next To (Pty) Ltd v K2018110768 (SA) (Pty) Ltd and Others (42478/2021) [2021] ZAGPPHC 698 (22 October 2021) [2021] ZAGPPHC 698

COURT
North Gauteng High Court, Pretoria

BEFORE
Collis

CASE / FILE NUMBER
42478/2021

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION PRETORIA)
(1)
REPORTABLE: NO
(2)
OF INTEREST TO OTHER JUDGES: NO
(3)
REVISED
22
OCTOBER 2021
CASE
NO: 42478/2021
In

the matter between:

NEXT
TO (PTY)
LTD
APPLICANT
(REG.
NO.: 2020/660076/07)
And
K2018110768(SA)(PTY)
LTD
FIRST RESPONDENT
(REG.
NO.: 2018/110768/07)
TERRA
BAR AND LOUNGE (PTY) LTD
SECOND RESPONDENT
(REG.
NO.: 2019/191322/07)
FRANCOIS
PIERRE
JOUBERT
THIRD RESPONDENT
WERNER
ALEXANDER WESSELS
FOURTH RESPONDENT
THE
PERSONS OCCUPYING PORTION 1
OF
ERF 909 MENLO PARK, REG. DIVISION
JR,
GAUTENG (better known as 309 Lynnwood
Road,
Menlo Park,
Pretoria)
FIFTH RESPONDENT
This

judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary.
The date
of this judgment is deemed to be 22 October 2021.

JUDGMENT

COLLIS J

INTRODUCTION

1. This is an opposed application for the ejectment of the respondents from business premises described as Portion 1 of Erf 909, Menlo Park, registration division JR, Gauteng, situated 309 Lynnwood Road, Menlo Park, Gauteng. In addition, the applicant seeks costs against any respondent who opposes the application. Before, this court only the second respondent opposes the application, with its opposing affidavit being deposed to by the fourth respondent.
2. The second respondent is a company, Terra Bar and Lounge (Pty) Ltd. It is under control of Mr Werner Alexander Wessels. He is the Fourth Respondent in the application. He is also the only director of Terra Bar.
3. On 6 October 2021, this matter was dealt with in the urgent court and thereafter judgment was reserved.
4. At the commencement of the proceedings, the court first requested the parties to address it on the urgency of the application. Subsequent thereto, the application was enrolled as an urgent application in terms of Uniform Rule of Court 6(12)(a).

BACKGROUND

5. By way of background: On 22 July 2021, the applicant became the registered owner of the property.[1] The said property was purchased from a company in liquidation namely Lynnwood Forum (Pty) Ltd. At the time of the sale the company was represented by its joint liquidators and the purchase price was set at R8.5 million. The sale agreement was concluded in October 2020.[2]
6. The company was liquidated following an application for winding-up launched by ABSA Bank Ltd ("ABSA"). In the liquidation

proceedings ABSA issued its application on 17 July 2017. On 13 May 2019 an order was granted for the provisional winding-up of the company, and eventually a final order was granted on 20 November 2019.

7. In terms of the sale agreement concluded between the applicant and the liquidators, the applicant became entitled to unfettered possession of the property on date of registration of the property into its name.

REQUIREMENTS FOR EJECTMENT

8. Ejectment of an occupier of premises may be obtained by means of:

8.1 the rei vindicatio, in which case reliance is placed on the plaintiff's/applicant's ownership and the defendant's/respondent's possession of the property; or

8.2 a possessory claim.[3] See further authorities. [4]

9. In this regard the plaintiff/applicant carries the onus.

10. This onus however will shift to whoever claims to be entitled to exercise occupation of the property, in order to establish a right to do so.

APPLICANT'S CASE

11. As per the founding affidavit, the applicant sets out, that it seeks ejectment of the respondents from its business premises as none of the respondents have any right to occupy its business premises.[5]

12. In addition, the applicant alleges that the business activities conducted on the property are unlawful and are not within the zoning rights granted in respect of the property. The unlawful use of the applicant's property exposes both the applicant and its directors to both criminal prosecution and potential civil liability for the unlawful activities conducted upon the property. Further that the persons who are occupying the property have no right to do so.

13. Furthermore, in terms of the zoning of the property and the allocated business rights, it is lawful to conduct upon the property "a place of refreshment". The applicant alleges in the founding affidavit that a nightclub is being conducted from the property in contravention of the zoning rights.

14. In addition, the applicant further alleges that after the conclusion of the sale agreement with the company in liquidation, it subsequently

learnt that the respondents concluded two lease agreements with the company in liquidation. The first lease agreement was concluded

before the company was placed in liquidation during March 2018 and the second lease agreement after the company was placed in liquidation during April 2019.[6] The applicant was never involved when the terms of these purported lease agreements were negotiated.

15. That being said, as the company at the time of the conclusion of the leases was already in liquidation, at no stage during this time whatsoever or at any stage thereafter, was there any ratification of the lease agreements in terms of section 341(2) of the Companies Act 73 of 1961 by the liquidators. This despite the liquidators having accepted certain rental money from the second respondents.

16. It is on this basis that the applicant contends that the purported leases relied upon by the second and fourth respondents are void as there had been non-compliance with the provisions of section 341(2) of the Companies Act.

DEFENCES RAISED BY THE RESPONDENTS

17. It is the case for the second and fourth respondents that the applicant is bound to the second lease agreement which was entered into between the second respondent and the company in liquidation. The date of this lease agreement is 25 April 2019. It has been attached as annexure “M” to the founding affidavit.[7]
18. In this context the second respondent alleges that the liquidators “accepted” or “ratified” this second lease agreement in the sense that they did not reject rental payments which the second respondent subsequently made to the liquidators in terms of this lease agreement. In fact the joint liquidators instead called upon the second respondent to perform in terms of the lease agreement.[8]
19. Albeit that this had been the state of play for some time, on or about 9 November 2020, the joint liquidators informed the second respondent that the Lease Agreement was void in terms of section 341(2) of the Companies Act, No. 73 of 1961.[9]
20. This stance taken by the joint liquidators was as a consequence of an email dated 3 November 2020 addressed by the applicant to the joint liquidators in terms of which the applicant instructed the joint liquidators that they should inform the respondents that the second lease agreement is void.
21. Following on this instruction that the liquidators acted upon, and on 11 March 2021, the applicant addressed a letter to the second respondent, informing it inter alia, that the lease agreement relied upon by it is void which the second respondent denies. It is on this basis that they assert a factual

dispute exists more so in circumstances where the joint liquidators have not been joined to these proceedings, nor have they taken any steps prior to the present application by the applicant, to evict the respondents from the lease premises.[10]

THE LAW

22. Section 341(2) of the Companies Act reads as follows:

“Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders.”

23. The word “disposition” is defined in Section 2 of the Act. The definition, in part, reads:

“... means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefore,”

24. The definition of the word “disposition” clearly provides for a company in liquidation to enter into of a lease agreement by a company in liquidation.

25. The question that now needs to be answered, is whether the conclusion of the second lease agreement between the joint liquidators and the second respondent, constituted a disposition made by the company in liquidation, in circumstances where there was already an application pending for its winding-up on the basis of its inability to pay its debts.

APPLICATION OF THE LAW

26. Section 341(2) clearly does not prohibit a company in liquidation from entering into a lease agreement after the winding up proceedings have commenced. If this however does transpire, such as in the present instance, the action by the liquidators as lessee and the tenant as lessor must be sanctioned by a court for its validation and it follows that in the absence thereof, such lease agreement would be void.
27. In the present instance it is common cause between the parties that a court was not approach for compliance with the provisions of section 341(2) of the Companies Act.
28. In the absence thereof it must as a result follow that a disposition in violation of Section 341(2) is void as no validation of the lease agreement in question had taken place.[11]
29. The further purpose of Section 341(2) is to ensure that the property of a company threatened with a winding-up order is not improperly

distributed prior to the commencement of the winding-up, and is available for the satisfaction of the claims of its creditors.[12] Differently put, it serves as a safeguard to the creditors of the company in liquidation.

30. In as far as the requirements for eviction are concerned, the applicant met these requirements, in that it has proven its ownership to the property in question and possession of the said property by the respondents.[13]
31. Any continued possession of the property in question by the respondents can only be valid if the respondents were able to establish

the validity and enforceability of the lease agreement upon which it relies. This the respondents in the present circumstances have failed to do.

32. In addition to the above, the respondents contend that in the present application there exists a dispute of fact which cannot be decided without the referral of the dispute to oral evidence. This they assert is the position in the current proceedings as the applicant has failed to join the liquidators.
33. Rule 6(5)(g) of the Uniform Rules of Court provides as follows: "Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision...".

34. If the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by the respondent together with the facts alleged by the applicant that are admitted by the respondent, justify such an order.[14]
35. In every case the court must examine an alleged dispute of fact and see whether in truth there is a real dispute of fact which cannot be satisfactorily determined without the aid of oral evidence.[15]
36. It has been held that a court should not be tempted to settle disputes of fact solely on the probabilities emerging from the affidavits without giving due consideration to the advantages of viva voce evidence.[16]
37. In the present application, the respondents have not requested a referral of the application to oral evidence, but rather that if the court finds that a dispute of fact exists, that the court should dismiss the application.[17] Secondly, the respondents asserts that the applicant's failure to join the liquidators is a further ground to conclude that a dispute of fact exists, as no affidavits have been deposed to by the liquidators to present evidence before this court. This assertion is simply not factually correct, as at least one of the liquidators even in the absence of having been joined in the proceedings, deposed to a supporting affidavit which was present to the court. As such the liquidator had every opportunity to rebut any version of events as alleged and made against it by the applicant.[18]
38. In the present proceedings as already mentioned, it is common cause that the second lease agreement relied upon by the respondents had not been validated by a court in order to comply with the requirements of section 341(2) of the Companies Act.
39. In the absence thereof, no validation of the second lease agreement relied upon by the respondents had occurred and consequently, the eviction which is being applied for, is justified in the circumstances.

ORDER

40. Consequently, the following order is made:

40.1 The application be adjudicated upon as an urgent application and that the ordinary forms and time periods, otherwise provided for in the Uniform Rules, be dispensed with in terms of Uniform Rule of Court 6(12)(a);

40.2 That the FIRST, SECOND, THIRD, FOURTH and FIFTH RESPONDENTS be ejected from the immovable property better known as Portion 1 of Erf 909, Menlo Park, Registration Division JR, Gauteng, and better known as 309 Lynwood Road, Menlo Park, Gauteng;

40.3 That the SECOND and FOURTH RESPONDENTS, jointly and severally, be ordered to pay the costs of this application.

COLLIS C

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant : Adv. M.P. Van Der Merwe SC

Attorney for the Applicant : Tim Du Toit Attorneys

Counsel for the Second Respondent : Adv. D. Keet & Adv B.C. Bester

Attorney for the Second Respondent : Modiba Du Plessis Attorneys

Date of Hearing

: 05 & 06 October 2021

Date of Judgment

: 22 October 2021

Judgment

transmitted electronically.

[1] Founding Affidavit par.60.2 p 001-28

[2] Founding Affidavit para 22 p 001-14

[3] Amler's Precedent of Pleadings Eight Edition Harms p 187

[4] See, for example, Concor Construction (Cape) (Pty) Ltd v Santambank Ltd 1993 (3) SA 930 (A).

[4] See, for example, Concor Construction (Cape) (Pty) Ltd v Santambank Ltd 1993
(3) SA 930 (A).

[5] Founding Affidavit para 13 p 001-10

[6] Founding Affidavit para 31 & 34 p 001-17-18.

[7] Founding Affidavit par 34 p 001-18

[8] Answering Affidavit para 26 p 006-10

[9] Answering Affidavit para 28 p 006-10 to 11

[10] Answering Affidavit para 34 p 006-13

[11] Herrigal NO v Bonn Roads Construction 1980 (4) SA 669 (SWA) at 677H – 678A

[12] Lane NO v Olivier Transport 1997 (1) SA 383 (C) at 385F

[13] Graham v Ridley 1931 TPD 476

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- [14] Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235. Also applied in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634.
- [15] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634I.
- [16] Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd 1971 (2) SA 388 (W) at 390B–G.
- [17] Answering Affidavit para 33 p 006-13
- [18] Annexure BB Index 30: Affidavit by Mr. Johannes Muller
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