

SOUTH AFRICA / JUDGMENT

## Westhills 379 Development (Pty) Limited v Bantu Foods (Pty) Ltd (32500/2020) [2021] ZAGPPHC 422 (28 May 2021) [2021] ZAGPPHC 422

COURT

North Gauteng High Court, Pretoria

BEFORE

E.M Kubushi

CASE / FILE NUMBER

32500/2020

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### Source record

IN THE HIGH COURT OF  
SOUTH AFRICA  
(GAUTENG  
DIVISION, PRETORIA)

Case

Number: 32500/2020

In

the matter between:

WESTHILLS  
379 DEVELOPMENT (PTY) LIMITED  
APPLICANT  
(REG.  
NO.: 2017/155033/07)  
and  
BUNTU FOODS (PTY)  
LTD  
RESPONDENT  
(REG.  
NO: 2017/479535/07)

## JUDGMENT

KUBUSHI J,

Delivered: This judgement is handed down electronically by circulating to the parties' representatives by email and by uploading on Caselines

## INTRODUCTION

[1] In this application the applicant, Westhills 379 Developments (Pty) Limited, seeks an order for the eviction of the respondent, Buntu Foods (Pty) Ltd, from the commercial premises it leased to the respondent, with costs. The principal issues being whether the respondent materially breached the lease agreement and if so, whether the lease agreement require rectification in respect of the obligation to pay the second deposit required in terms of the lease agreement.

## BACKGROUND

[2] The common cause facts are that on 14 December 2018, the parties concluded a written lease agreement. The lease agreement applies to premises comprising two parts, Unit 2 and Unit 3. The lease agreement provides for the respondent to pay a deposit, which was to be paid in two tranches, and for the respondent to pay rental for Unit 3. The

respondent paid rentals, in respect of Unit 2 and the first tranche of the deposit. The respondent has not paid any rental in respect of Unit 3, and has not paid the second tranche of the deposit. The respondent remains in possession of Units 2 and 3. After giving the respondent an opportunity to remedy its breaches, the applicant is alleged to have validly terminated the lease agreement, and, as a result, it is averred on behalf of the applicant that the respondent, remains in unlawful possession of the premises. The applicant has as such approached court for the relief to have the respondent evicted from the premises.

[3] The respondent is opposing the application and raises various defences. In answer to the applicant's claim, the respondent seeks to establish that it did not breach the lease agreement by failing to pay the second deposit payment and by failing to make any payments in respect of Unit 3, which is the unit in contestation. The respondent's defence, in essence is that:

3.1 Firstly, it has not breached the obligation to make the second deposit payment because the lease agreement falls to be rectified on the basis of a mutual mistake between the parties.

3.2 Secondly, it has not breached the obligation to pay any amounts in respect of Unit 3. In that regard, the respondent contends, that it was not afforded full beneficial occupation of the premises since there are various defects at the premises (Unit 3 in particular) and it has not been provided with occupation certificates for Unit 2 and Unit 3.

- [4] In addition, the respondent has raised two preliminary points, namely, the application to strike out in terms of Uniform Rule 16 (5) and a material dispute of fact. I have to deal, first, with the preliminary points before considering the merits of the main application.

#### PRELIMINARY POINTS

##### Rule 6 (15) Application

- [5] As earlier stated, the respondent has launched an application for an order in terms of Uniform Rule 6 (15) as a preliminary issue. The purpose of the application is to have certain paragraphs and/or words contained in the applicants' replying affidavit struck out as it is contended that they constitute a new cause of action not pleaded in the founding affidavit and which is prejudicial to the respondent.
- [6] Uniform Rule 6 (15) provides as follows:

*“The Court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious, or irrelevant with an appropriate order as to costs, including costs as between attorney and client. The Court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it is not granted.”*

##### Grounds for Striking-Out

- [7] The legal grounds upon which the respondent relies upon are the impugned words, paragraphs, and annexures stand to be struck out because they constitute a new cause of action which the applicant is attempting to introduce in the replying affidavit and the respondent is prejudiced thereby. The paragraphs and/or words that the respondent seeks to strike out are stated in the application to strike out as follows:

7.1 The following words in paragraph 4 of the applicant's replying affidavit "or other charges whatsoever for Unit 3' be struck out.

7.2 The following words in paragraph 8.2 of the applicant's replying affidavit "and utility charges relating to Unit 3 including water, electricity and the like' be struck out.

7.3 Paragraphs 8.5 and 8.6 of the applicant's replying affidavit be struck out.

7.4 Paragraphs 39 to 55 and annexure RA7 of the applicant's replying affidavit be struck out.

7.5 Paragraph 64 of the applicant's replying affidavit be struck out.

7.6 Paragraph 234 and annexure RA29 of the applicant's replying affidavit be struck out.

- [8] The argument by the respondent's counsel, in this regard, is that in terms of the founding affidavit, the breach relied on by the applicant was that the respondent had allegedly failed to pay the 'second portion' of the deposit and the rental which were due. Counsel argued, further, that in terms of the applicant's notices of breach, the only breach relied upon by the applicant was the respondent's alleged failure to pay the rental and the 'second portion' of the deposit. The issue of consumption charges (electricity, water, and sanitation), according

to the respondent's counsel, was never raised by the applicant in the founding affidavit. Therefore, the contention is that by introducing the consumption charges in the replying affidavit, the applicant is attempting to introduce a new cause of action in reply. All the applicant's causes of action should have been contained in the founding affidavit, so it is argued.

- [9] In support of this argument, the respondent's counsel referred to the decision in *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others*,<sup>[1]</sup> wherein Viljoen J stated the following:

"It has always been the practice of the Courts in South Africa to strike out matter in replying affidavits which should have appeared in petitions or founding affidavits, including facts to establish locus standi or the jurisdiction of the Court. See *Herbstein and Van Winsen, The Civil Practice of the Superior Courts in South Africa*, 2nd ed., pp. 75, 94. In my view this practice still prevails. In submitting that an applicant may in the replying affidavit supplement

a case he has made out in the founding affidavit Mr. Van der Spuy has referred me to the decision in the matter of *Reiter v Bierberg and Others*, 1938 S.W.A. 13, in which the headnote reads:

"A petitioner for an interdict against spoliation is entitled to embody in his petition only sufficient allegations to establish his right, and in his replying affidavit he may supplement the information in the petition by anything further to enable him to refute the case put up by respondent."

It lies, of course, in the discretion of the Court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit. In the present case, the applicant has not made out even a skeleton of a case in so far as his locus standi rests on a stipulatio alteri. *Reiter's case*, supra, does not assist the applicant."

- [11] Continuing with the analogy used in *Titty's Bar and Bottle Store* case, the respondent's counsel submits that the applicant has not even made out a 'skeleton of a case' insofar as consumption

charges in the founding affidavit, are concerned. Accordingly, the respondent is contending for the words, paragraphs and annexures

pertaining thereto in the replying affidavit and as identified in its application to strike out, to be struck out.

- [12] The question that ought to be determined is whether the impugned words, paragraphs, and annexures that the respondent seeks to be struck out constitute a new cause of action which the applicant is attempting to introduce in the replying affidavit, and if so, whether the respondent is prejudiced thereby.

[13] As already stated the respondent's application to strike out is based on the failure by the applicant to allege one of its causes of action, the failure to pay consumption costs, in the founding affidavit and alleging same in the replying affidavit.

[14] I am in agreement with the applicant that the words and/or paragraph the respondent is complaining about ought not to be struck off, for the reasons stated hereunder. As contended for by the applicant's counsel the consumption charges are raised in paragraph 9.9 of the founding affidavit. The said paragraph reads as follows:

*"9.9. The Respondent would pay to the Applicant all electricity and water charges in respect of the premises including charges payable in terms of the relevant City Council's local electricity tariffs and by-laws as amended from time to time (clause 5);"*

[15] This question can be answered by considering what the relief the applicant is seeking in this application. It is common cause that the relief sought by the applicant is the eviction of the respondent from the leased premises. In order to succeed in such a claim, the applicant must allege and prove that the respondent has breached the terms of the lease agreement thus entitling it (the applicant) to cancel the agreement and evict the respondent from the premises.

[16] The applicant submits that it was entitled to terminate the lease on the basis of three breaches by the respondent:

16.1 The respondent has failed to pay the second deposit payment due under the lease;

16.2 The respondent has not paid any rent in respect of Unit 3 to date, despite being in occupation of the premises; and

16.3 The respondent has not paid any amounts in respect of water, electricity, sanitary refuse rubbish removal, sewerage and vacuum tank services and/or removals (Consumption Charges) that it has consumed in respect of Unit 3.

[17] The applicant's submission that the consumption charges are validly raised even if they were not the basis for the cancellation, is well taken. The respondent's only substantive defence to not paying the Consumption Charges is that this did not form the basis for the termination of the lease. The respondent is entitled to rely upon any breach to support its termination of the agreement — even breaches it did not initially rely upon. In support of this argument, the applicant's counsel quoted the decision in *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd*, [2] where the following was said:

*"Where a party seeks to terminate an agreement and relies upon a wrong reason to do so he is not bound thereby, but is entitled to take advantage of the existence of a justifiable reason for termination, notwithstanding the wrong reason he may have given."*

[18] Whether or not the applicant relied in its termination notices on the respondent's failure to pay Consumption Charges is immaterial — it may rely on those breaches now.

- [19] The question that follows is whether the said paragraphs and words if left in the replying affidavit will be prejudicial to the respondent. It is my view that the respondent would not be prejudiced if the said words and paragraphs in the replying affidavit are not removed.
- [20] In terms of Uniform Rule 6 (15), a court shall not grant the application unless it is satisfied that the applicant will be prejudiced in its case if the application is not granted.
- [20] The court in Vaatz,[3] dealing with prejudice, in relation to Uniform Rule 6 (15), remarked as follows:
- “The phrase ‘prejudice to the applicant’s case’ clearly does not mean that, if the offending allegations remain, the innocent party’s chances of success will be reduced. It is substantially less than that. How much less depends on all the circumstances; for instance, in motion proceedings it is necessary to answer the other party’s allegations and a party does not do so at his own risk. If a party is required to deal with scandalous or irrelevant matter the main issue could be side-tracked but if such matter is left unanswered the innocent party may well be defamed. The retention of such matter would therefore be prejudicial to the innocent party.”*
- [21] As is stated in Vaatz,[4] in motion proceedings it is necessary to answer the other party’s allegations and a party does not do so at his own peril. The court, dealing with scandalous and irrelevant matters, concluded that where a party is required to deal with scandalous or irrelevant matter the main issue could be side tracked but if such matter is left unanswered the innocent party may well be defamed and the retention of such matter would, therefore, be prejudicial to the innocent party.
- [22] In this, instance, the respondent would not be prejudiced as the relief sought by the applicant is not per se for payment of the consumption charges, but the relief is for eviction. The failure to state the consumption charges would in any way not affect the respondent’s

#### Material Disputes of Fact

- [23] The respondent has, as earlier stated, raised a point in limine re material dispute of fact. Relying on the decision of the Supreme Court of Appeal in *National Director of Public Prosecutions v Zuma*, [5] the respondent’s counsel contends that when regard is had to the affidavits filed of record, the papers reveal several extensive
- and material disputes of fact, incapable of being resolved in these proceedings. Applicant
- [24] The proposition presented on behalf of the applicant is that the respondent’s defence should be rejected out of hand in terms of the second exception to the Plascon-Evans [6] rule and the applicant’s version be accepted as the truth.
- [25] According to the applicant’s counsel, the proper approach to disputes of fact in motion proceedings has been articulated by the Supreme Court of Appeal in the following terms:

"an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers."

[27] Therefore, the rule, that the respondent's version of the facts must form the basis for the court's adjudication of an application for final relief, is subject to two exceptions.

27.1 The first exception applies where a denial by the respondent of a fact which has been alleged by the applicant may be insufficient to raise a real, genuine or bona fide dispute regarding this alleged fact. If, in such a case, the respondent has not availed itself of the right to apply for the deponent concerned to be called to be cross-examined in terms of Rule 6(5)(g) of the Uniform Rules of Court, and the Court is satisfied as to the inherent credibility of the factual averment of applicant, it may proceed on the basis of the correctness of this averment and include it within the factual matrix upon which it determines whether the applicant is entitled to the relief sought.

27.2 The second exception applies where a respondent's answer contains a denial of allegations which were so far-fetched and untenable that a court is justified in rejecting them on the papers. The second exception is designed to deal with a case in which a respondent makes certain bald allegations or far-fetched denials which are manifestly untenable, not supported by any evidence or reason and which have been designed simply to exploit the ordinary Plascon-Evans rule to the latter's advantage and to the detriment of applicant whose factual averments cannot be attacked on any plausible basis.

[28] In other words, in terms of the second exception to the Plascon-Evans rule, a court is entitled to reject on the papers a positive defence put up by a respondent, so it is argued. To strengthen this argument, the applicant's counsel referred to decisions in *Da Mata v Otto*, NO[7] and *Siffman v Kriel*,[8] wherein the court confirmed that even uncontradicted evidence may be rejected by a court in motion proceedings.

[29] It is trite that motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is, also, well established under the Plascon-Evans rule that wherein motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the

papers.

- [30] The parties seem to agree that the applicant cannot escape the fact that there exists a fundamental factual dispute, save where the dictum in the Plascon-Evans case can be successfully applied.
- [31] On the papers before me the allegations of the respondent cannot be said to be "far-fetched or clearly untenable" justifying this court in rejecting them merely on the papers. The defences raised by the respondent are not bald allegations or far-fetched denials which are manifestly untenable, or not supported by any evidence or reason and does not appear to have been designed simply to exploit the ordinary Plascon-Evans rule.
- [32] It is evident from the papers that there is a material dispute of fact which cannot be decided on the papers as they stand. In the exercise of my discretion I do not think that the issues pertaining to the dispute of fact can be resolved by viva voce evidence but must be referred to trial.
- [33] The parties seem not to be agreed as to the issues that requires determination by the court. In order to limit the issues for determination at the trial, I, in that regard, have to rule that the parties hold a pre-trial conference to jointly compile the issues for the determination of the court before the matter can be set down for hearing.
- [34] In the premises I have to make the following order:
1. The application to strike out is dismissed with costs.
  2. The matter is referred to trial.
  3. The parties are to hold a pre-trial conference to jointly compile the

**issues**

for determination by the court at the trial, before the matter is set down for hearing.

4. The pleadings filed on record are to serve as the pleadings at the trial and the parties are given leave to file any pleadings which may be considered necessary to take the process to the conclusion of the trial.
5. Costs of the main application are reserved for determination at the trial.

E.M KUBUSHI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearance:

Applicant's Counsel

: Adv. DW Watson

Applicant's Attorneys

: Christelis & Artemides Attorneys

Respondent's Counsel

: Adv A Lamprecht

Respondent's Attorneys

: Millers Attorneys

Date of hearing

: 20 April 2021

Date of

## judgment

: 28 May 2021

[1] 1974

(4) SA 362 (T).

[2] 1985

(4) SA 809 (A) at 832C-D.

[3] Vaatz v Law Society of Namibia 1991 (3) SA 563 at 566J.

[4] Page 566J – 567B.

[5]

[2009] ZASCA 1; 2009

(2) SA 277 (SCA) at para [26].

[6] See Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd [1984] 2 All SA 366 (A).

[7] 1972

(3) SA 858 (A) at 868B-F.

[8] 1909 TS 538 at 543.

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