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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
<u>27/1/2021</u>	
DATE	SIGNATURE

Case No.: 42594/2019

In the matter between:

DALE, JAYCEN TREVOR

Applicant

and

NEWHEY, MICHAELA SARAH

First Respondent

CITY OF JOHANNESBURG

Second Respondent

JUDGMENT

This judgment was handed down electronically by circulation to the parties' legal representatives by email and is deemed to be handed down about such circulation.

Gilbert AJ

1. The applicant seeks an eviction order against the first respondent who resides at [...].
2. The first respondent has opposed the relief and full sets of affidavits have been exchanged.
3. The applicant applied on 13 October 2020 to the registrar for a hearing on the opposed roll. On 26 October 2020 the Registrar allocated 25 January 2021, and the matter was set down for hearing.
4. Thereafter, on 28 November 2020 the first respondent launched an urgent application under case number 40638/2020 for the restoration of electrical supply to the property. It appears that such an urgent application was resolved save for the incidence of costs, which the parties agreed to be argued on the same day as this eviction application.
5. As matters now stand, the applicant seeks final relief against the first respondent in the form of an eviction, which the first respondent opposes. The second respondent has not participated in the proceedings.
6. After I had been allocated the matter and during the week preceding the hearing, I through my registrar drew the attention of the parties to the decision

of the Full Court of this Division in *ABSA Bank Limited v Molotsi*¹ as to the election, and the timing thereof, to be made by an applicant when seeking relief by way of motion proceedings whether to persist with seeking such final relief by way of motion or whether instead to seek a referral of the matter either to trial or to oral evidence.

7. At the commencement of argument, I enquired of Nr Nel, counsel for the applicant as to the applicant's position having considered *ABSA Bank v Molotsi*. Mr Nel elected to seek a referral rather than, to use his words, "run the risk" that if the court found that there was a dispute of fact that could not be resolved on affidavit that the application was dismissed.
8. After having been stood down the matter on various occasions during the course of the day to enable the applicant and the first respondent to engage with each other on the formulation of an appropriate order (such as to whether to oral evidence on certain issues or to trial), the parties became *ad idem* that there should be a referral to oral evidence on the limited issue whether there was and remains an oral agreement in place between the applicant and the first respondent that entitles the first respondent to remain in occupation of the premises.
9. The parties left it in the hands of the court to formulate the precise ambit of such issue to be decided by way of oral evidence. After I reserved judgment, the parties again considered their position and with my leave placed before me

¹ Reported on SAFLII as [2016] ZAGPJHC36 (8 March 2016), paragraphs 25 to 27, applying *Law Society, Northern Provinces v Mogani* 2010 (1) SA 186 (SCA) para 23 and *De Reszke v Maras and others* 2006 (1) SA 401 (C) para 33.

their proposed formulation of the issue to be referred to oral evidence. I adopt that formulation, and add the usual ancillary relief.

10. The parties also made submissions as to the incidence of costs that should follow upon such a referral, particularly in relation to the hearing of 25 January 2021. The applicant submitted that the costs should be costs in the cause as that was, Mr Nel submitted, the usual costs order. Mr Riley for the first respondent submitted that the applicant should be ordered to pay the costs in relation to the hearing of 25 January 2021. Mr Riley submitted that the applicant had only made the election to seek a referral on the day of the hearing and should have taken cognisance of *Molotsi* earlier and so should have made the election earlier for a referral to oral evidence.
11. It may transpire, with the benefit of hindsight following oral evidence, that the defence raised by the first respondent of an oral agreement was opportunistic and had no merit. It may also transpire after the benefit of oral evidence that the defence was well-founded. Or it may transpire after the benefit of oral evidence that although the defence fails, it was nonetheless of sufficient merit that it warranted a referral to oral evidence. Accordingly, the outcome of oral evidence will inform the incidence of costs and so it would be premature at this stage to make any order relating to the incidence of costs.
12. I also take into consideration that Mr Nel did, albeit only at the commencement of argument, make the election and did not persist in seeking to argue the matter on its merits. The applicant, in the present circumstances, should not be faulted for adopting the more cautious approach that he did.

13. Costs is a matter of discretion. I am reticent to grant a costs order in the context of the present matter where it is common cause that the parties resided together from August 2001 until November 2017. The present application is fallout of that long-term relationship of some seventeen years. There may be more at play than commercial concerns as between lessor and lessee. To grant a costs order at this stage may further embitter the parties and prove to be an obstacle to conductively resolving the dispute.
14. The parties in their formulation of the referral also seek that the costs of the urgent application be determined by the court hearing the oral evidence. The court hearing the oral evidence on the issue as referred would not only determine that issue after hearing evidence, but will consider whether to grant the eviction order after a consideration of all the affidavits together with the oral evidence.² There does not appear any reason why that court would not be able to also determine the incidence of costs in relation to the urgent application, as the parties have already agreed. A specific order in relation thereto appears unnecessary. Nonetheless, I make provision for the parties' agreement in my order.

In the circumstances, the following order is granted:

1. The issue of whether or not an oral lease agreement exists between the applicant and the first respondent, the terms thereof, and whether the termination thereof was lawful, in respect of the premises situated at 1

² *Lekup Prop Co No 4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA) at 258l.

Marquise Place, Jukskei Park, Randburg, Johannesburg, Gauteng is referred to oral evidence on a date to be arranged with the Registrar.

2. Unless this court otherwise directs, in relation to the issue referred to oral evidence:

2.1. the applicant and the first respondent will be entitled to call any witness who deposed to any affidavit in the application proceedings;

2.2. the applicant and the first respondent are obliged to make available for cross-examination such witnesses who deposed to affidavits in these proceedings to the extent that such party persists in seeking to place any reliance on that person's evidence in the affidavits;

2.3. the applicant and the first respondent are entitled to call any further witnesses who were not deponents to affidavits in these application proceedings:

2.3.1. provided that such party has at least thirty court days' before the date of the hearing of the oral evidence served on the other party a statement of the evidence in-chief to be given by such person;

2.3.2. but subject to the court, at the hearing of the oral evidence, permitting such further witnesses to be called notwithstanding that no such statement has been served in respect of his or her evidence;

- 2.4. the applicant and the first respondent may subpoena any witness to give evidence at the hearing or to furnish documents whether such person has consented to furnish a statement or not in relation to the issue referred to oral evidence;
 - 2.5. that a party has served a statement in terms of sub-paragraph 2.3 above or has subpoenaed a witness shall not oblige such party to call the witness concerned;
 - 2.6. Uniform Rule 35 will be applicable to the discovery of documents on the issue referred to oral evidence.
3. The incidence of costs, including any costs arising from the hearing of this application on 25 January 2021, will be determined after the hearing of oral evidence.
 4. It is recorded that the parties have agreed that the costs of the urgent application of 28 November 2020 under case number 40638/2020 are to be determined by the court hearing the application under this case number 42594/2019.

Gilbert AJ

Date of hearing: 25 January 2021

Date of judgment: 28 January 2021

Counsel for the Applicant:	J C J Nel
Instructed by:	D L Wilson Attorneys
Counsel for the First Respondent:	N Riley
Instructed by:	Bolus Attorneys