Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2024-055504

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED. YES

7/6/24
DATE

[redacted]
SIGNATURE

In the matter between:

MINING AND ENERGY ACUITY (PTY) LTD First Applicant

RARANG PORTIA RALEFATANE Second Applicant

and

DENEL SOC LTD t/a
DENEL INDUSTRIAL PROPERTIES Respondent

Coram: Maenetje AJ

This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploading on Caselines. The date and time for hand-down is deemed to be 10h00 on 7 June 2024.

JUDGMENT

Maenetje AJ:

[1] The applicants bring an urgent application for a declarator that the first applicant concluded a binding lease agreement with the respondent. The respondent sent an email in which it sought to retract the lease agreement after it was concluded. The applicants also seek orders to enforce compliance with the lease agreement. The enforcement orders in paragraph 3 and 4 of the notice of motion were not persisted in at the hearing of the matter on 6 June 2024. This is because of subsequent developments that I shall deal with below.

[2] As always in this Court, the respondent contends that the matter is not urgent, alternatively that any urgency was lost on 3 June 2024 when the subsequent developments that I have referred to above transpired. I must decide the question of urgency first. The respondent also says that the conclusion of the lease agreement is now common cause. It says that I must, because of this, decline to grant the declaratory relief. It is trite that the Court has discretion whether to grant declaratory relief. I must, however, consider whether on all the facts of this case, it is just and equitable to accept this contention.

[3] I consider it important to highlight an overarching consideration that ought to form the backdrop of the determination of the case. The respondent is an organ of state. Due to the legislative framework that affects the applicants' business activities, especially the Explosives Act, 26 of 1956, the applicants need the infrastructure that the respondent is able to

provide for the storage of the products involved in their trade and for the conduct of their business. The applicants describe the first applicant's business as involving the provision of innovative solutions to the mining industry. It is a registered dealer of explosives, explosive accessories and ancillary services within the mining and construction sectors. It describes itself as a key player in the South African and Southern African markets. It must store the products it deals in, in licensed premises. The respondent is able to provide such premises. It has done so under a previous lease agreement with the first applicant.

[4] Organs of state such as the respondent ought to facilitate the participation in our economy of entities such as the first applicant. They must not frustrate their participation in the economy. Abiding by validly concluded agreements is an important part of such facilitation.

Urgency

[5] The facts justifying the urgency of the matter are straightforward. In early April 2024, the second applicant approached the respondent to lease more facilities that meet the legal requirements for the storage of explosives and other chemical products. It is common cause that these products cannot be stored in any other unlicensed warehouses. They must be stored in licensed premises. The evidence presented to the Court is that the South African Police Service issues such licenses. The parties reached consensus around 10 April 2024. They ultimately concluded an agreement titled "Offer to Lease" in April 2024. The terms of the Offer to

Lease make it clear that it becomes a binding lease agreement upon signature by the parties. It states:

> "This Offer to Lease, once signed by the lessee, constitutes a firm, binding and irrevocable offer which shall upon the signature thereof by the Lessor, or its nominee, constitute a binding agreement of lease between the Lessor and the Lessee. No variations to this agreement shall be of any force or effect unless reduced to writing and signed by both parties."

[6] Both parties signed the Offer to Lease. On its terms, the Offer to Lease became a binding lease agreement upon signature by the parties. The Offer to Lease contains a Schedule 1 that describes the size of the premises rented (650 square metres) and rental at R65,00 per square metre. Schedule 1 to the Offer to Lease also contains a handwritten note, probably by representatives of the respondent, that the premises to be leased would become available on 1 May 2024. I say probably because it is undisputed that the respondent prepared the Offer to Lease and sent it to the applicants. That the leased premises would be available from 1 May 2024 is consistent with an internal email at the respondent which states that the warehouse would only be offered from 1 May 2024.

[7] Out of the blue, the applicant contends, the respondent sent an email dated 13 May 2024 in which it states that the offer must be retracted immediately. It says the warehouse in question is not available as it is needed by PMP for their operations. The applicants' counsel emphasised that this email was sent to various parties and has not been directly retracted by the respondent. The statement regarding PMP utilising the warehouse is important because it also featured later in a letter by the

SAPS of 3 June 2024 retracting the licence issued by it to enable the utilisation of the leased premises to store products such as those the first applicant deals in. The applicants' counsel submitted that this statement in the letter by the SAPS could not have been fortuitously made by the SAPS. It must have come from the respondent in line with its earlier email to retract the Offer to Lease.

[8] It is the retraction of the binding lease agreement, i.e., the Offer to Lease, that created an immediate problem for the applicants. The applicants sent a letter of demand for the respondent to withdraw the retraction. This was unsuccessful. In the meantime, the applicants had ordered products which could arrive any time during this week (of 3 June 2024). They required access to the leased premises to store the products once they arrive. They have made out a clear case that they have no other alternative storage premises for the products. The applicants have also made out a clear case that without access to the leased premises, the first respondent's business would suffer. The respondent does not seriously dispute this. The applicants required the urgent intervention of the Court to avoid this potential hardship.

[9] The matter was called on 4 June 2024. At that point the parties thought the matter could be resolved, especially in the light of the respondent's answering affidavit. The matter was stood down for hearing at 10h00 on 6 June 2024. Discussions to resolve the matter amicably were unsuccessful.

[10] In the meantime, the SAPS had sent a letter dated 3 June 2024 in which it withdrew the licence for the leased premises to store products that on the face of it include products such as those for which the applicants require the leased premises. The letter is headed, "Notification of immediate rescindment of ammonium nitrate warehouse storage licence AN 1001: KL1 transit store, 1 Ruth First Street, Lotus Gardens, Pretoria". One of the reasons that the SAPS gives for its decision conveyed in the letter is that the warehouse is not available since it is utilised by PMP. Another reason is that the warehouse is not suitable to accommodate 3000 tons of ammonium nitrate. But it does not say that this is the quantity of ammonium nitrate that the applicants want to store in the leased premises. It was suggested in argument by counsel on instruction from his attorneys that the applicants are only bringing about 500 tons of ammonium nitrate. It is unclear to the Court whether this latter fact may result in the SAPS reviewing its decision to withdraw the relevant licence.

[11] Both parties agree that once the letter of 3 June 2024 was sent by the SAPS, the first applicant cannot store its products at the leased premises. The applicants say that they will challenge the SAPS' decision reflected in the notification. Until then, they accept that they cannot insist on being granted vacant access to the leased premises. In other words, they cannot persist with the enforcement relief in paragraphs 3 and 4 of their notice of motion.

[12] I am persuaded that the application was urgent when it was launched. The applicants required the intervention of the Court to obtain access to

the leased premises. The question is whether this urgency dissipated on 3 June 2024 upon receipt of the SAPS letter. Counsel for the applicants mounted a spirited defence of the claim for urgency. I am persuaded by one contention that he has made. It is that the respondent has not wholly retracted the threat to retract the binding lease agreement. Although the respondent now says that the conclusion of the lease is common cause, it seeks to vary that lease agreement by varying the size of the premises and rental payable as currently reflected in Schedule 1 to the Offer to Lease. I am not entirely persuaded that this alone retains the urgency of the matter. What I find concerning and justifying the applicants' persistence that the matter remains urgent is that the respondent claims that the Offer to Lease was subject to the applicants signing its standard lease agreement. It has only recently presented such a standard lease agreement to the applicants to sign. But it imposes in that standard lease agreement a varied Schedule 1. It increases the size of the leased space and, consequently, the total rental payable.

[13] It is disingenuous for the respondent to rely on the recently provided standard lease agreement as a basis to avoid compliance with the Offer to Lease. This is because the Offer to Lease expressly required the respondent to furnish the standard lease agreement to the applicants prior to the signing of the Offer to Lease. It states:

> "The Lessor and the Lessee agree that following the Lessor's acceptance hereof, that the Lessee shall sign the Lessor's Standard Agreement of Lease, subject to any changes or amendments agreed to by the parties, within one (1) month of having signed the Offer to Lease. The Lessor agrees to make

> this Standard Agreement of Lease available to the Lessee in advance of Offer to Lease being signed by both parties".

[14] I accept the contention for the applicants that the respondent has not entirely conceded that there is in place a binding lease agreement as envisaged in the Offer to Lease. If the respondent had made such an outright concession, it probably would have conceded prayer 2 of the notice of motion. Since the applicants have submitted that they will be challenging the decision of the SAPS expressed in its letter of 3 June 2024, should the challenge succeed, the applicants may still be met with the argument that there is no binding lease agreement until and unless they sign the standard lease agreement as imposed by the respondent on the applicants. The applicants may then again have to approach a court for the same declaratory relief that they presently seek.

[15] I conclude that in the circumstances the matter remains urgent. In any event, I exercise my discretion to deal with the matter on an urgent basis.

The merits

[16] The respondent only opposes the declaratory relief on the basis that there is no dispute regarding the conclusion and binding nature of the lease agreement. It contends that I must exercise my discretion against considering the declaratory relief for this reason. I do not accept the respondent's contention because it has made it clear that the binding nature of the lease agreement is subject to the applicants signing the respondent's standard lease agreement. However, the standard lease

agreement that the respondent has furnished to the applicants effectively imposes the varied Schedule 1. If the respondent requires a rectification of Schedule 1, it must obtain such rectification in appropriate proceedings for such relief. I am not called upon to determine the claim for rectification. Since the applicants no longer persist with the enforcement relief in paragraphs 3 and 4 of their notice of motion, the defence based on a common mistake and the need for rectification is no longer relevant.

[17] Once I agree to exercise my discretion to grant declaratory relief, there is no defence against granting the declaratory relief in paragraph 2 of the applicants' notice of motion. The grant of the declaratory relief is not a finding by this Court on the claim for the rectification of the Offer to Lease that the respondent may still seek.

[18] The applicants have achieved substantial success in that they have been permitted to have their matter determined by the urgent court and obtained the declarator sought in paragraph 2 of their notice of motion. They are entitled to the costs of the application.

[19] In the circumstances, I grant the following order:

(1) The matter is heard as one of urgency, non-compliance with the prescribed forms, manner of service and time frames are condoned in accordance with the provisions of Rule 6(12) of the Uniform Rules of Court.

(2) It is declared that the lease agreement concluded between the first applicant and the respondent relating to the property described as Magazine KL-1 situated at Denel Industrial Properties, PMP Campus, Pretoria Metal Pressing, 1 Ruth First Street, Lotus Garden, Pretoria, Gauteng during April 2024, i.e., the Offer to Lease, is binding upon the parties and is of full force and effect.

(3) The respondent shall pay the applicants' costs of the application, at a party and party scale, including the costs of counsel.

_____ [redacted] _____

NH MAENETJE
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing	:	6 June 2024
Date of judgment	:	7 June 2024
For the applicants:		E Sithole
Instructed by Leslie Sedibe Inc		
For the respondent:		K Tsatsawane SC
		Lerato Maite
Instructed by Diale Mogashoa Inc		