REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2010/50597

DATE:12/08/2011

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

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DATE SIGNATURE

In the matter between:

SCANIA FINANCE SOUTHERN AFRICA (PTY) LTD Applicant

and

GO-LINER TOURS (PTY) LTD Respondent
(Registration number: 2007/016621/07)

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] In this opposed application the essential issue is whether the respondent has breached the lease agreement in any way or to such material extent as to entitle the applicant to cancel the agreement.

[2] The applicant claims the return of some twelve (12) buses identified in the notice of motion and founding papers. It is common cause that the applicant leased the buses it claims to the respondent pursuant to a number of written lease agreements concluded between the parties between June 2008 and December 2009.

[3] The application was initially launched on urgent basis during December 2010. The urgent application was set down for 18 January 2011 but was never argued. The parties by agreement referred the matter to the normal opposed motion court. Costs were reserved.

[4] The applicant contends that the respondent has failed to make payment of the rentals due in terms of the various lease agreements. As a consequence, the applicant submits that the respondent has committed other breaches of the lease agreements entitling the applicant to cancel the lease agreements and claim the return of the buses. On 9 December 2010 the applicant's attorneys of record addressed a letter to the respondent's attorneys purporting to cancel the agreement in terms of clauses 6(4) and 6(5) of the General Terms and Conditions, Annexure "C".

[5] The respondent, on the other hand, is opposing the application on several grounds. In short, the respondent denies that there was a valid

termination of the lease agreement on several basis, and informed the applicant's attorneys in December 2010 that any legal action for the return of the buses will be defended. The respondent argues that there is a series of lease agreements on which the applicant relies in the founding papers, but that the applicant has failed to prove a valid termination in respect of any one of the 12 agreements. The respondent also denies that it has failed to make payments under the agreement even though the respondent admits that it encountered financial problems at some stage.

DISPUTES OF FACT AND THE APPLICABLE LEGAL PRINCIPLES

[6] Indeed a careful study of the voluminous papers, namely the founding papers, answering affidavit, and a challenged replying affidavit, shows that there are plainly factual disputes in the versions of the parties, as briefly demonstrated later hereunder. In dealing with disputes of fact in motion proceedings, Conradie J in *Cullen v Haupt* 1988 (4) SA 39 (C) at p 40F-H, said:

> "*I have consulted some of the better known decisions concerning the referral of applications to evidence or to trial. The leading decision in this regard is, of course, Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1162, where Murray AJP said that if a dispute cannot properly be determined it may either be referred to evidence or to trial, or it may be dismissed with costs, 'particularly when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop'. The next of better known cases on this topic is that of Conradie v Kleingeld 1950 (2) SA 594 (O) at 597, where Horwitz J said that a petition may be refused where the applicant at the commencement of the application should have realised that a serious dispute of fact would develop.*"

More recently in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para [26], Harms DP said:

> "*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 well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise in the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (NDPP), together with the facts alleged by the latter, justifies 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 …*"

DISPUTES OF FACT IN THE PRESENT APPLICATION

[7] I deal with a few only disputes of fact in the present matter. In para 14 of the founding affidavit the applicant avers that in June 2010 the respondent experienced severe financial restraints, and the applicant provided the respondent with a moratorium of three months. In the answering affidavit the respondent alleges that it entered into the moratorium because the financial difficulties were occasioned by the applicant's repossession of three buses. The respondent proceeds further to state that the applicant however continued to debit the respondent's bank account. In this regard the respondent annexes documentary proof of such debits. Second, the applicant on various allegations, and in paragraph 28 of the founding papers concludes that the respondent cannot afford the continuing use of the buses having regard to its financial position. However, in the answering affidavit, the

respondent denies vehemently the allegation, and states that it is capable of meeting its financial obligations, and has continued to make payments despite the applicant's attempts to ensure that the respondent fails in its endeavours. The respondent states that it has continued to make payments in terms of the agreements to the applicant despite the fact that the amounts remained in dispute, and the parties were attempting to resolve the issues. In regard to the applicant's assertion that the respondent was in arrears with its payments, the respondent attaches to the answering papers an accountant's report, Annexure "LG7". The latter report sets out a number of discrepancies in the applicant's accounting. For example, the report mentions that:

> "*Based on the audit carried out in the Scania Finance Southern Africa (Pty) Ltd statements for Go-Liner Tours for the period July 2008 to September 2010 we observe that Scania Finance were charging debit orders for the buses under finance leases at a much higher rate than the ones agreed upon and signed for on the original contracts … The differences are huge such that we have failed to come up with an audit trail and subsequently do not understand what has been going on as the table below shows:*"

The report then proceeds to table the amounts paid by the respondent as against those recorded by the applicant. It shows a variance of R3 545 277,06. In this regard, the respondent, correctly in my view, argues that it is clear that the accounting should be resolved by accountants. This will undoubtedly require discovery of all the relevant invoices, payments, allocations, credits, and insurance payouts.

7.1 The third dispute relates to the applicant's contention that it had valid reasons, and proceeded to cancel the agreement on 9

December 2010 because of the respondent's alleged failure to make payments. The respondent denies the allegation. The respondent asserts that the applicant has not demonstrated which of the lease agreements have been allegedly cancelled, and has chosen instead to effect a single termination letter in respect of 12 separate agreements, on the version on the applicant. The respondent consistently denies that the amounts due to the applicant have not been paid and states that a proper reconciliation of the account is called for. On a proper reading of the applicant's letter of cancellation, Annexure "E6" to the founding papers, it appears doubtful whether it was in fact a true cancellation of the agreement. The relevant paragraph thereof, paragraph (5) reads as follows:

> "*Your client has failed to honour its obligations in terms of the lease agreement concluded with our client and our client is entitled to terminate the agreement immediately*." (underlining added)

It is not unequivocally conveyed that the applicant in fact cancels the agreement. The contentions of the respondent may have merit. In *Spies v Lombard* 1950 (3) SA 460 (T) at 486H, Van den Heever JA said:

> "*Before he can claim cancellation, it seems to me, appellant has to establish that the misuse is so serious in degree as to justify the invocation of that remedy. The test to be applied has been propounded in the authorities and cases by the use of different expressions. I do not*

> *propose to enumerate them as to my mind they all convey the same notion.*"

In the present matter and, in my view, the reliance by the applicant on *North Vaal Mineral Co Ltd v Lovasz* 1961 (3) SA 604 (T) is slightly misplaced.

ADDITIONAL DISPUTES OF FACT

7.2 Indeed there are other glaring disputes of fact on other issues. These include whether or not the applicant refused to inspect the buses; whether or not the buses are currently serviced and in a roadworthy condition; whether or not the respondent has insurance cover for the buses; whether or not the respondent has paid the licence renewal fees for the buses; whether or not some of the buses are in the possession of the applicant; and the correctness of the certificate of balance issued by the applicant etc.

[8] In my view, all the abovementioned disputes of fact are clearly not capable of resolution on affidavits when regard is had to the legal principles stated earlier in this judgment. Neither are the disputes of fact capable of resolution by a common-sense approach as suggested in *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154G-H. These are genuine disputes of fact. The respondent's allegations do not *prima facie* amount to "*bald or uncreditworthy denials, raises fictitious disputes of fact, are not palpably implausible, far-*

fetched or so clearly untenable that the court is justified in rejecting them merely on papers", as stated in *NDPP v Zuma (supra)*.

CONCLUSION

[9] For all the above reasons, I conclude that the disputed issues raised in this application ought properly be ventilated in a trial. In view of the importance of the matter to both parties, as well as the amount involved and the property of the applicant, and in the exercise of my discretion, it will be unfair to summarily dismiss the application. This is so in spite of the rather strong indications, as argued by the respondent, that the applicant must have foreseen timeously that such disputes of fact will arise in application proceedings. I have in coming to the above conclusion not considered the replying affidavit since the respondent contends that it was filed out of time with no accompanying application for condonation therefor.

ORDER

[10] The following order is made:

1. The application is referred to trial.

2. The notice of motion and the founding affidavit shall stand as simple summons and the answering affidavit as entry of appearance to defend.

3. The applicant shall file its declaration within twenty (20) days of this order.

4. Thereafter the applicable provisions of the Uniform Rules of Court are to apply.

5. The costs of the proceedings to date, including the costs previously reserved, and the costs of today, are reserved.

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D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR THE APPLICANT ASSISTED BY	N v R POTGIETER SC H A VAN DER MERWE
INSTRUCTED BY	SENEKAL SIMMONDS INC
COUNSEL FOR THE RESPONDENT ASSISTED BY	A P JOUBERT SC N ADAMS
INSTRUCTED BY	TASNEEM MOOSA ATTORNEYS
DATE OF HEARING	30/3/2011
DATE OF JUDGMENT	12/8/2011