

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2014/45450

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

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DATE

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SIGNATURE

In the matter between:

UKUBEKEZELA LOGISTICS

Applicant

And

UMZOBANZI COAL & ENERGY

Respondent

J U D G M E N T

FISHER AJ:

[1] This application involves the validity of a written lease agreement concluded between the parties in respect of a property in Emalehleri (*“the property”*), on which an opencast coal mine is situated.

[2] The facts as they emerge from the papers are as follows:

1. The property is owned by the State and falls under the control of the Ehalehleri Municipality and the Mphumalanga Provincial Government.
2. During August 2013 the Respondent obtained a mining permit in terms of section 27 of the Mineral & Petroleum Resources Development Act, 2002, to mine for coal on the property.
3. The mining permit allowed, *inter alia*, for a crushing and screening plant to be constructed on the property.
4. On 20 August 2014 the parties entered into the written lease agreement, which is in issue in these proceedings.
5. The salient terms of the lease agreement are as follows:
 - 5.1 the lease would endure for a period of 12 months, commencing on 20 August 2014 and terminating on 20 August 2015;

- 5.2 there was an option to renew the lease period for a further 24 months;
- 5.3 the lease was “*designed*” to endure for “*the life of mine and exclusive right of the coal*”;
- 5.4 the rental was an amount of R4 104 000, which was to be paid “*upfront*” by no later than 48 hours after the signing the lease;
- 5.5 the property would be used by the Applicant only for the purposes of crushing, screening, coal blending; and distribution.
- 5.6 after the expiry of the lease period it would continue as a monthly tenancy, terminable by either party giving to the other two calendar months written notice.
- 5.7 The monthly rental for the monthly tenancy was calculated in terms of a formula that related in some manner to tonnage of coal.

[3] The amount on R 4 104 000.00 was paid under the loan agreement by the Applicant.

[4] The Applicant states that that it has, since the conclusion of the lease agreement, come to its attention that the Respondent is not the owner of the property or the holder of some title thereto. On this basis the Applicant contends that:

1. because the Respondent enjoys no right, title or interest over the property it could pass no title to occupy the property and the lease agreement is thus invalid;
2. the Respondent should have disclosed to the Applicant that it had no such right to conclude a valid lease and had it done so, the Applicant would not have signed the lease agreement;
3. the failure so to disclose constituted a fraudulent misrepresentation by the Respondent.

[5] The Applicant claims the following relief:

1. that the lease agreement be declared a nullity;
2. that the Respondent be ordered to repay to the Applicant the amount of R4 104 000.00 together with interest thereon on the basis of such invalidity;

3. that the Sheriff attach sufficient coal at the mine to satisfy the judgment debt and that the Court provide directions as to the execution to be levied in relation to the coal so attached.

[6] The Applicant launched the application on what it terms a “*semi-urgent*” basis. The case which it seeks to make out for urgency is that the Respondent’s only asset is the coal that is being mined on the property and the coal reserves are being depleted at a rapid rate. It contends that, if the matter were heard in the normal course, all the coal will have been mined and there would be no asset to attach in execution of the debt.

[7] There is no indication that there has been any attempt by any person to evict the Applicant from the property or to disturb its occupation in any manner. The case of the Applicant is based on the premise that a lessor is required by law to be the holder of some right, title or interest over the property and that, if this requirement is not fulfilled, the lease is invalid.

[8] Mr Tshavhungwa, on behalf of the Respondent, submitted that there was no relevance in this case to be accorded to the fact that the Respondent was not the owner of the property or the holder of some title thereto. In this he is correct. A main obligation of a lessor is to make available the undisturbed use and enjoyment of the property and to warrant against eviction [see: **Southernport Developments (Pty) Ltd v Transnet Ltd** 2005(2) 202 at para [6] (SCA)]. To conclude a valid lease, a lessor is neither required to be the owner or holder of some title to the property nor

does he warrant that he has such right as an essential term of the lease agreement. In this matter it was not the Applicant's case that there was a term of the lease agreement that went further than providing the usual warranty against eviction.

[9] Accordingly, the lease is not a nullity and neither has any misrepresentation or non-disclosure on the part of the Applicant been established.

[10] It bears mention that the Applicant would not have been entitled to the attachment of the coal even if it had been successful in establishing its claim for the money judgement. It has not even attempted to make out a case for anti-dissipatory relief – which, in essence, is what is asked for in seeking such attachment. It has furthermore not gone any way to establish a basis on which the matter should be dealt with as one of urgency. This application is ill-founded on every aspect of the relief claimed.

[11] In the circumstances I make the following order:

1. The application is dismissed.
2. The Applicant is to pay the costs of the application.

DC FISHER
Acting Judge of the High Court

APPEARANCES:

For the Applicant:

Mr Z Omar, instructed by Zaheer Omar Attorney, c/o Swanepoel Attorneys
(Tel: 011-333 1715; ref: J Swanepoel)

For the Respondent

Adv T C Tshavhungwa, instructed by PGR Attorneys
(Tel: 011-2435027; Ref: A Petini/MAT1308)

DATE OF HEARING

20 May 2015

DATE OF JUDGMENT

23 June 2015