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

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

_____ _____

DATE SIGNATURE

CASE NUMBER: 30502/2017

In the matter of

BALVEST CC t/a FOURWAYS GARDEN SHOPPING CENTRE (Reg No: 2008/261705/23 — **APPLICANT**

And

RAINBOW PEPPER TRADING 76 (PTY) LTD — **FIRST RESPONDENT**

FOURWAYS GARDENS SUPERMARKET (PTY) LTD — **SECOND RESPONDENT**

ZACHARIADES, ANGELO JAMES — **THIRD RESPONDENT**

JUDGMENT

DOSIO AJ:

INTRODUCTION

[1] This is an application to make a settlement agreement ("the acknowledgment of debt"), entered into between the applicant and the three respondents, an order of court.

[2] The matter is substantially similar to the application which was enrolled under case number 38342/2017 which pertained to a summary judgment application brought by the applicant against the second and third respondents.

[3] The application is opposed.

[4] Condonation is granted to the respondents for the late filing of the answering affidavit.

BACKGROUND

[5] The applicant is the present owner of a shopping centre known as Fourways Gardens Shopping Centre ("the shopping centre"). The second respondent leased two stores in this shopping centre, namely, SPAR and TOPS. Both stores are now being let to the franchisor, The SPAR Group Ltd, who has taken over the management thereof in terms of an option agreement.

[6] On or about the 28th of October 2009, Rainbow Pepper Trading 76 (Pty) (Ltd) ("Rainbow Pepper") , duly represented by Angelo Zachariades ("third respondent"), entered into an agreement of lease ("The Highveld Spar lease") with Highveld Syndication 15 Limited ("Highveld"). Rainbow Pepper in terms of this agreement would lease shop FG09 ("the Spar premises") at the Fourways Gardens Shopping Centre situated at the corner of Uranium and Bushwillow Avenues, Fourways Gardens. The lease agreement was signed by the third respondent on the 28th of October 2009. The Highveld Spar lease was to expire on the 30th of September 2019.

[7] On the 22nd of April 2010 Rainbow Pepper entered into a written agreement of lease with Highveld ("The Highveld Tops lease") in terms of which Rainbow Pepper leased the shop FG07 at Fourways Gardens Shopping Centre. This lease was signed by the third respondent on the 22nd of April 2010.

[8] Rainbow Pepper (trading as Spar and Tops) became lessees of the applicant, when the latter took transfer of the shopping centre in March 2011.

[9] The second respondent took cession of the 2009 lease agreement between Highveld and Rainbow Pepper and the Tops store concluded a new lease on the 15th of March 2016. The third respondent represented the respondents in all these transactions.

[10] A meeting was held on the 8th of November 2015, where the applicant advised that it intended to purchase the land on which the contentious parkings are situated, and that as this process takes time, a ten year lease was concluded with the City of Johannesburg to secure tenure.

[11] On the 23rd of May 2016, Rainbow Pepper and the second respondent, duly represented by the third respondent acting personally, entered into an agreement headed “Acknowledgement of Debt” with the applicant, duly represented by Nicolaos Baltsoucous. The present application pertains to this acknowledgement of debt which is applicable to both the Spar and Tops premises. The amount is for R1 770 410 (one million seven hundred and seventy thousand four hundred and ten rand) as at 1 April 2016.

[12] The acknowledgment of debt was based on an admitted liability, for failure to pay rent for the period 2012 to 2016.

SUBMISSIONS MADE BY THE RESPONDENTS

[13] The application is opposed as the respondents allege that at a meeting held on the 8th of November 2015, the applicant who was represented by Mr Baltsoucous, advised them that he was going to provide security of tenure for the tenants of the shopping centre by purchasing the portion 184 of Zevenfontein, which fell over the parking bays of the Shopping Centre from the local council. Mr Baltsoucous informed the respondents that this purchase, would take a lengthy time to finalise, possibly ten years. During this period, Mr Baltsoucous assured the respondents he had obtained a ten year lease from the city council over the property to be bought and in this way would safeguard the security of tenure of the car park whilst the sale took place.

[14] The third respondent contends that these representations were material because on the strength of the assurances made by Mr Baltsoucous, the third respondent was induced to sign the acknowledgment of debt (which pertained to arrear rental for the period during 2012-2016), the new lease agreement and the cession agreements in March and May 2016.

[15] During the month of December 2016, the third respondent became aware of a planned development by the city council with respect to Uranium Road. Despite being assured by the landlord that the parking lot of the shopping centre was secure, the respondents obtained the exact site drawings pertaining to the development and it became clear that the city council was planning a widening of Uranium Road to such an extent that it was to cut right into a large portion of the parking area of the Shopping Centre.

[16] The third respondent contends that had he known about this state of affairs, he would never have signed any of these agreements and related sureties, nor would the loan by SPAR and subsequent cession transactions have taken place.

[17] Furthermore it was contended that the existing shopping centre was thus built illegally and contravenes the Johannesburg Town Planning Legislation. As proof of these material defects in the building site, reference was made to a report compiled by Mr Hanno van Helsdingen dated the 26th of June 2012.

[18] The respondents content that it also became evident that the council held a full servitude over, alternatively owned the erf, where the parking lot of the shopping centre was located i.e. Portion 184 of Zevenfontein.

[19] The respondents contend further that during 2015 the landlord represented to the respondents that all irregularities had been removed and that security of tenure, in regards to the parking lot was ensured. This was however also found to be another misrepresentation.

[20] The respondents therefore allege that it is clear that there will be a *bona fide* dispute regarding the misrepresentation and that the matter should be referred to trial so that the issues can be properly ventilated. The respondents contend that the misrepresentation made by the applicant's representative results in the acknowledgement of debt being voidable as it was not concluded with a meeting of the minds between the parties.

SUBMISSIONS MADE BY THE APPLICANT IN RESPECT TO THE MISREPRESENTATION

[21] The applicant contends that the purported factual disputes raised by the respondents are illusionary, not factual, and not *bona fide*.

[22] Counsel contended that the alleged dispute would have to relate to the events and facts preceding the conclusion of the acknowledgement of debt. A road widening some 7 months later, by a disassociated third party (the City of Johannesburg), which affects the contentious parkings, cannot affect the admitted liability recorded in the acknowledgement of debt.

[23] Counsel argued that a factual dispute can only exist if the respondent's version is *bona fide*, is relevant to the matter and it not far-fetched or seriously unconvincing. Counsel alluded to the case of *Plascon –Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635 which states that;

> "It is correct that, where proceedings on notice of motion disputes of facts have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavit which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order…In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163-5; *Da Mata v Otto NO* 1972 (3) SA 858 (A) at 882 D-H)…for example, where the allegations or denials of the respondent are so far- fetched or clearly untenable that the Court is justified in rejecting them merely on the papers".

[24] Counsel referred to the case of *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) where it was stated at paragraph [13] that;

> "[13] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed."

<u>The misrepresentation</u>

[25] As regards the defence of a misrepresentation, the applicant's counsel contends that the respondents create the impression that the applicant on the 8th of November 2015 and before the conclusion of the acknowledgment of debt, misrepresented the following to the respondents;

1. The status of the shopping centre,
2. The number of parking bays available at the shopping centre, and

3. That there was security of tenure for the contentious parkings.

[26] Counsel contended that the third respondent and his stores were in occupation at the shopping centre from October 2009 already, and as illustrated hereunder, the number of parking bays have remained unchanged.

[27] Counsel contended that the high-water mark of the supposed misrepresentation, is a representation made that there is security of tenure in respect of the parking lot, and that the applicant misrepresented that a lease agreement was concluded with the City of Johannesburg, in terms of which, the portion of the parking lot, which encroached upon municipal land, would be leased from the City of Johannesburg for a period of ten years.

[28] Counsel contended that such a lease was concluded on the 26th of August 2014, which was long before the alleged misrepresentation in November 2015.

[29] Counsel contended that in order to contextualise the supposed irregularities of the shopping centre, the realisation of the parking bay encroachment, and the steps taken before the applicant became the owner of the shopping centre, the following dates are relevant;

1. In 1997 the site development plan listed 180 parking bays (i.e.21 years ago). There was thus an approved site development plan.

2. When the TOPS lease agreement was concluded between Rainbow Pepper and the previous owner of the shopping centre, on the 22nd of April 2010, there was annexed to that lease agreement a plan which expressly referred to a 2.5 m set-back for future road widening. According to the applicant's council, the third respondent initialled this plan on the left bottom corner. Counsel contends that the suggestion in the answering affidavit, that the respondents were unaware of the possibility of a possible road widening, until 2016, is clearly contrived and stands to be rejected as far-fetched and seriously unconvincing.

3. On the 10th of February 2011, the site layout and town planning schedule were approved.

4. In 2013 the applicant became aware of the contentious parkings being situated/encroaching on municipal land and immediately acted proactively during 2013 to secure the contentious parkings. The correspondence between the applicant and the City of Johannesburg, to support this has been attached and marked as annexure “R14”,“R15”, “R16”, “R17”, “R18”, “R19”, “R20”, “R21”.

   On the 25th of September 2013, the City of Johannesburg explained the process to apply for a lease or purchase of the municipal land containing the contentious parkings, (annexure “R14”).

   On the 9th of October 2013 the City of Johannesburg established the market value for rental for the contentious parkings as per annexure “R15” as being R12 636 per month.

   On the 17th of October 2013, the City of Johannesburg confirmed that the applicant’s application to either acquire or lease the contentious parkings had been circulated, (Annexure “R16”).

   On the 15th of November 2013, the City of Johannesburg confirmed that its property-owning company was in the process of considering the application for lease or sale of the municipal land on which the contentious parkings were situated, (Annexure “R17”).

   On the 13th of December 2013, the City of Johannesburg confirmed that the contentious parkings could be utilised by the applicant, pending transferral thereof to the applicant, (Annexure “R18”).

   On the 11th of March 2014, the City of Johannesburg confirmed that the applicant could utilize the contentious parkings at a rental of R12 636 per month until such time as the long term lease for a period of 9 years and eleven months was concluded, (Annexure “R19”). It was also stated in the letter dated the 11th of March 2014 that the tenant had the option to renew the lease agreement for a further 9 years and 11 months provided that the property would not be needed for future Municipal developments.

On the 4th of April 2014 the City of Johannesburg sent a letter explaining that there had been delays in finalizing the lease agreement, (Annexure "R20").

On the 8th of April 2014, the City of Johannesburg provided approval for the occupation of the shopping centre and all necessary compliance certificates were issued, (Annexure "R21").

On the 20th of May 2014, the City of Johannesburg provided a further rental advising certificate, which ultimately led to the conclusion of the lease agreement referred to below.

On the 26th of August 2014 the applicant and the City of Johannesburg concluded a lease agreement for the contentious parking for a period of 9 years and 11 months.

[30] The applicant's counsel contended that the contentious parkings, and alleged irregularities of the shopping centre are irrelevant to the application under consideration as the acknowledgment of debt pertains to arrears for the rental period 2012 to 2016 which arose before the alleged misrepresentation supposedly induced the conclusion of the acknowledgment of debt

[31] Counsel contended that nowhere is it suggested in the third respondent's answering affidavit that the widening of the road, by the City of Johannesburg in January 2017, was known to the applicant, or its representative, at the time that the acknowledgement of debt was concluded. Accordingly, the development by the City of Johannesburg in December 2016 therefore has no effect on the acknowledgment of the debt concluded on the 23rd of May 2016

[32] Counsel contended that the acknowledgment of debt contains the whole agreement and the *Shifren* clauses.
Clause 11 of the acknowledgment of debt states;

> "This AGREEMENT constitutes the entire AGREEMENT between the parties and that no conditions, stipulations, warranties or representations whatsoever have been made by either party or their agents, other than those such as are included herein."

Counsel contended that this of itself disentitles the respondents to rely on any representations allegedly made, and in light of the *parol* evidence rule, the respondent's cannot place reliance on terms not recorded in the acknowledgment of debt.

[33] Counsel contended that nowhere in the Tops lease agreement concluded on the 15th of March 2016 was the parking lot issue, recorded or dealt with, evincing the conjured nature of the alleged misrepresentation on the parking lot issue. Furthermore, if the sale issue, security of tenure of the contentious parking bays was crucial, it should have been recorded in the lease agreement.

EVALUATION

[34] At the time that the lease was signed for the Spar premises on the 28th of October 2009, a plan which outlined the boundary lines and number of parking bays in the shopping centre was attached to the Highveld Spar Lease.

[35] According to the applicant, (which is not disputed on the papers by the respondent), the initial of the third respondent, in his personal capacity and on behalf of the first respondent is affixed to this plan. The occupation date was with effect from the 22nd of October 2009. Accordingly, Spar was in the premises since 2009 and the respondents must have been aware that the existing roadway, (that is Uranium road) had a 2.5m setback for future widening.

[36] Annexure "A25", dated the 26th of June 2012, is a letter addressed to George Skoutellas from Hanno Van Helsdingen who was employed by Urban Context. The contents of this letter states that the parking is indeed situated in the road reserve of Uranium road and that it did not form part of the initial site development plan. The letter states further that even though a company named Redwall Developments applied to the Joburg Metropolitan municipality to approve a new updated site development plan, the municipality denied it. The contents of the letter explains that the parking requirement for the site was 276 bays and the current site development plan provided for 176 bays.

[37] The letter further stated that the Joburg Roads Agency could not confirm whether the road would be widened in the near future, but should this be required a huge amount of

parking areas would become nullified and it would have a negative impact on the centre.

[38] From the contents of this letter the third respondent must have been aware of the situation. The number of parking bays had not changed since the Spar lease agreement was signed in 2009. These parking issues were realised as far back as 2012. The acknowledgement of debt was signed on the 15th of March 2016 which was four years after the issue of the parking bays came to the knowledge of the respondents. I fail to see, how this can now constitute a misrepresentation in 2016. The respondents cannot say they have been induced into concluding an acknowledgment of debt agreement when they were fully aware of the state of the property when they leased the Spar and Tops premises. Accordingly a reliance on a purported misrepresentation cannot be of assistance to the respondents many years later

[39] None of the lease agreements in respect to the Spar premises or the Tops premises allude to any concerns that the respondents may have had in respect to the parking area. In fact the Spar lease agreement at clause 17. 1 states;

"The LANDLORD undertakes to provide on the property suitable parking in accordance with the SHOPPING CENTRE PLAN for approximately 187 motor cars…".

[40] The same clause is prevalent in the Tops lease agreement . There are no amendments to either lease agreements stipulating any special conditions pertaining to parking bays or parking areas, with specific reference to the applicant's undertaking to provide security of tenure for the tenants of the shopping centre, by purchasing the portion of Portion 184 of Zevenfontein.

[41] If there were any amendments they should have been in writing. Therefore, any prior negotiations have no force or effect unless reduced to writing. The respondents entered the Spar and Tops lease agreements with full knowledge of the number of parking bays at the property.

[42] There is also a letter sent by Mr Johan Jansen van Vuuren dated the 13th of December 2013, which states that;

"The City of Joburg Property Company (SOC) Ltd (JPC) confirms that Balvest can utilize portion adjacent to Erf 1162 Fourways Extension 10 situated on Uranium Street as additional parking for the shopping centre until such time that the process will be finalized and will be transferred to Balvest cc in terms of the Imminent sale agreement".

[43] It is clear from this letter that there could not have been a misrepresentation on the part of the applicant stating that it would buy the property, as the correspondence unequivocally shows that the applicant intended to purchase this property.

[44] It is clear from all the correspondence from the City of Johannesburg, marked as annexures "R14" to "R21", that the applicant was going to buy the property and that the intended sale would have provided security of tenure. The failure of the sale from materialising can have no bearing on the outstanding rental that was due for the period 2012 to 2016. The respondents do not dispute that the amount as per the acknowledgement of debt is due and owing. In fact the respondents have not dealt with this at all, they merely allege the agreement is void and should be set aside.

[45] Clause 1 of the acknowledgement of debt agreement states;

"ANGELO ZACHARIADES (identity number […]) IN HIS PERSONAL CAPACITY AND BEHALF OF RAINBOW PEPPER TRADING 76 (PTY) LTD IN HIS CAPACITY AS DIRECTOR OR RAINBOW PEPPER TRADING 76 (PTY) LTD AND FOURWAYS GARDENS SUPERMARKET of SHOP FG09 AND FG07, FOURWAYS GARDENS hereby acknowledges that he is, and RAINBOW PEPPER TRADING 76 (PTY) LTD is, and FOURWAYS GARDENS SUPERMARKET is ("the debtors"), truly and lawfully indebted to BALVEST CC ("the creditor") its successors-in-title, administrators or assigns as surety and co-principle debtors *in solidum* for arrear rental and other charges for the businesses RAINBOW PEPPER TRADING 76 (PTY) LTD (REGISTRATION NUMBER 2009/003725/07) trading as TOPS SPAR and SPAR FOURWAYS GARDENS ("the business") in the agreed amount of:-
1.1 R1 770 410 (One million Seven hundred and seventy thousand Four hundred and ten rand) as at 1 April 2016."

[46] From the above it is clear the listed parties are liable as surety and co-principal debtors *in solidum.* The respondents cannot now dispute the contents of the acknowledgement of debt as they signed it and acknowledged it. In addition, clause 8 of the acknowledgement of debt states that;

"The debtors agree that this AGREEMENT shall be made an order of court by the Creditor at the Creditor's sole discretion."

[47] Clause 11 of the acknowledgment of debt states that the agreement constitutes the entire agreement between the parties and that no conditions, stipulations, warranties or representations whatsoever made by either party or their agents will be of effect unless they are included herein.

[48] Notwithstanding that there were negotiations between the applicant and the respondents leading up to the signing of the acknowledgment of debt, the respondents cannot rely on these negotiations to stop paying rental due for the period 2012 to 2016. As stated by the learned Boruchowitz AJA in the case of *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* 2009 (1) SA 196 at paragraph [13];

"The appellant is precluded from relying on the alleged oral agreement by virtue of the so-called 'parol' evidence or 'integration' rule…It is a well-established principle that where the parties decide to embody their final agreement in written form the execution of the document deprives al previous statements of their legal effect."

[49] There is nothing in the papers to suggest that the applicant intended to mislead or defraud the respondents. I do not find that the parties were precluded from reaching consensus as regards the terms of the acknowledgment of debt and accordingly I find there are no grounds to suggest that the acknowledgment of debt concluded on the 15th of March 2016 is void *ab initio*.

[50] Even if the respondents' beneficial occupation of the premises leased was affected, this is not a defence in light of the matter of *Tudor Hotel Brasserie & Bar (Pty) Ltd v Hencetrade 15 (Pty) Ltd* (793/2016) [2017] ZASCA 111 (20 September 2017).

[51] In the case of *Greenberg v Meds Veterinary Laboratories (Pty) Ltd* 1977 (2) (T) at 283 – 285 reference was made to the case of *Arnold v Viljoen* 1954 (3) SA 322 (C) where it was stated that;

"I think the test for the tenant's liability for rent is whether he was in occupation or possession of the leased premises and not whether such occupation or possession was beneficial or not. The latter element will of course be a consideration when the tenant's counter-claim for damages comes to be considered…with or without

cancellation, the respondent could only succeed in its claim to be relieved of the payment of rent if it had given up occupation or possession..."

[52] The principle set out in the matter of *Arnold v Viljoen* (*supra*) was again reaffirmed in the decision of *Basinghall Investments (Pty) Ltd v Figure Beauty Clinics (S.A) (Pty) Ltd* 1976 (3) SA 112 (W) where it was held that;

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"A tenant who is in occupation of premises is liable for payment of the rent notwithstanding that he claims that by reason of defects in the premises he had not had full beneficial occupation of them. In such circumstances the landlord is not required to claim some sort of quantum meruit based upon the actual value of occupation to the tenant. He is entitled to claim the full amount of the rent. It is then open to the tenant to establish a claim for set-off or a counter-claim for damages"

[53] From the authorities mentioned at paragraphs [51] and [52] *supra*, it is clear they all say the same thing, and that is, that if you are in occupation of the premises and use them, whether it has defects or not, then you must pay rental.

[54] The defence of a misrepresentation raised by the respondents is rejected on the papers as farfetched and untenable. I do not believe the defence raised is good in law or that a factual dispute arises on the papers that warrants referral to trial. Accordingly the defence of an alleged misrepresentation is dismissed.

COSTS

[55] The applicant's counsel argued that it is entitled to punitive costs for the abortive and frivolous opposition to the application, which costs are in any event catered for in the acknowledgment of debt.

[56] A cost order is within the discretion of the court.

[57] In general a court does not grant punitive costs unless there are special grounds. There is no indication that the respondent's conduct during litigation was reckless or malicious. Accordingly such a request for punitive costs is denied.

ORDER

[58] In the premises the following order is made;

1. That the Acknowledgment of Debt Agreement attached to the founding affidavit marked Annexure “X” is made an order of court.
2. The first, second and third respondents shall pay the cost of this application.

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D DOSIO
ACTING JUDGE OF THE HIGH COURT

<u>Appearances</u>:

On behalf of the Applicant **Adv C Van Der Merwe**
Instructed by KG Tserkezis Attorneys

On behalf of the Respondents **Adv Du Toit**
Instructed by Grosskopf Attorneys
Heard on the 29th May 2019
Judgment handed down on the 2nd of September 2019