IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

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

_____ _____

DATE SIGNATURE

CASE NO: 71816/13

In the matter between DATE: 2/4/2014

BORN FREE INVESTMENTS 128 (PTY) LTD Applicant

vs

MAKULU PLASTICS & PACKAGING CC Respondent

JUDGMENT

BAM J

1. On 26 November 2013 the applicant instituted action against the respondent by way of motion procedure, applying for:
   (i) an order declaring that any lease agreement the parties may have entered into on the terms of a draft lease agreement, (Attached as "FA 11" to the applicant's founding affidavit), (apparently drafted on 19 November 2009), or on the terms and conditions in paragraphs 4 to 4.10 of the respondent's particulars of claim filed under case

number 32512/2011 in the South Gauteng High Court ("FA 14.2"), has been cancelled on 9 October 2013; and

(ii) that the respondent be evicted from the applicant's immovable property at 23 Derick Road, Spartan, Kempton Park.

2. In the application lodged by the respondent in the South Gauteng High Court under case number 32512/2011, where the applicant was cited as the first respondent, the respondent applied for an order against the third respondent in that matter, the Ehkhurleni Metropolitan Municipality, to secure the supply of electricity services to the premises situated at […….]. That application was apparently disposed of by a full bench of the South Gauteng High Court. With regard to the existence of a lease agreement at the time, the said court ruled that such agreement indeed existed at the relevant time.

3. Further litigation between the parties followed. The respondent issued summons in the Johannesburg court under case number 32512/2011 praying for a declaratory order that the parties entered into a lease agreement for 5 years calculated from 1 October 2009. The applicant defended the case and filed its plea, and a counter claim for the cancellation of the lease and eviction of the respondent from the premises in question. The latter document was signed on 12 December 2011 and served on the respondent's attorneys on 20 December 2011. The pleadings have closed and the matter is pending. It appears that a trial date has been allocated.

4. From a list reflecting rental payments made by the respondent, attached to the applicant's founding affidavit as annexure FA17, it appears that the respondent regularly, on a monthly basis, made payments to the applicant

from March 2010 until August 2013. It is alleged by the applicant that respondent has defaulted with the payments since September 2013.

5. On 9 October 2013 the applicant's attorneys addressed a letter to the respondent pointing out, *inter alia,* the respondent's alleged failure to effect payment for the rent for September and October 2013. The respondent's attorneys, in a letter dated 12 September 2013, addressed to the applicant's attorneys, recorded that the respondent elected to "*henceforth"* pay the rent directly to Nedbank. The reason for this was explained by the respondent to be that Nedbank threatened to take possession of certain machines, used by the respondent on the premises, on account of the parties involved, including the applicant, failed to pay the lease of the machines. For that reason the monthly rental was diverted to Nedbank. The applicant's attorneys were not amenable to accept the explanation and on 9 October 2013 informed the respondent's attorneys that the applicant has elected to cancel the alleged written and/or oral agreements between the parties.

6. The present application was served on the respondent's registered office on 29 November 2013. On 4 December 2013 the respondent's Notice to Oppose was filed. Due to the fact that the respondent failed to file its answering affidavit timeously, the application was enrolled on the unopposed roll of 11 February 2014. On the same date the respondent's answering affidavit was filed, however without any condonation application. The matter was postponed *sine die.* Apparently the parties agreed that the respondent's attorney would file, within a few days, a condonation application explaining the late filing of the answering affidavit. That did not happen.

7. The matter was subsequently enrolled on the opposed motion roll for the week commencing on 24 March 2014. Due to the fact that the respondent did not file an application for condonation for the late filing of the answering affidavit, nor its Practice Note and Heads of Argument, timeously, the matter was stood down until 25 March.

8. On 25 March the respondent applied for condonation, firstly for the late filing of the answering affidavit, and secondly for the late filing of the practice note and heads of argument.

9. The two condonation applications were opposed by the applicant on the basis that no good cause was shown by the respondent for its delay in that no reasonable explanation was advanced for the respondent's failure to comply with the Rules of Court and the Practice Rules, secondly, that the respondent failed to satisfy the Court that it has a *bona fide* defense, and thirdly, that the respondent failed to show that the applicant will not be prejudiced.

10. In the case of *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* 2012(2)SA 637 (CC), at 640H-I, in respect of the first requirement of condonation applications, it was re-stated that an applicant for condonation must give full explanation for the delay and that the explanation must be reasonable.

11. Pertaining the question whether there is a reasonable explanation for the non-compliance with the Rules of Court, the following facts have to be taken into account.
    (i) The main application was served on the respondent on 28 November 2013.
    (ii) The Respondent's Notice to Oppose was served on 4 December 2013.
    (iii) The answering affidavit had to be filed by 30 December 2013;
    (iv) The answering affidavit was served on the applicant's attorneys on 5 February 2014 and filed with the Registrar on 11 February 2014;
    (v) On 11 February 2014 the matter was on the unopposed motion court roll and on that day postponed *sine die*;
    (vi) On 12 February 2014, the applicant's attorneys addressed an Email to the Respondent's attorneys stating, amongst others, that the respondent's attorney undertook to file the condonation application in respect of the late filing of the answering affidavit within 2 days after the postponement date, that the respondent did not pay the rent for January and February 2014, and that the 24th March 2014 was allocated by the Registrar or the hearing of the matter;
    (vii) On 3 March 2014 the applicant served the Notice of Set Down, the applicant's Practice Note and the applicant's Heads of Argument on the respondent's correspondent, Docex;
    (viii) For an unexplained reason only the Notice of Set Down reached the respondent's attorney's offices on 10 March 2014;
    (ix) On 17 March 2014 the respondent's attorney enquired from the applicant's attorneys whether the applicant intended to file a replying affidavit as well as heads of argument

12. The explanation advanced on behalf of the respondent for not complying with the Court Rules in regards to the late filing of the answering affidavit and the respondent's failure to file heads of argument is justifiably criticized by Mr du Preez SC, appearing for the applicant. To some extent the explanation is rather vague and the reasons flimsy. For instance, the reason advanced by the applicant's attorneys that they experienced a very busy time in December and that they were involved in other matters, cannot be a reasonable explanation. The explanation that the respondent's attorneys only became aware of the date of hearing on 10 March 2014 must be considered against the fact that the applicant's attorneys informed the respondent's attorneys already on 12 February of the date of hearing.

13. However, pertaining to the second requirement, concerning a *bona fide* defense, it appears from the applicant's founding affidavit that the issue whether a valid lase contract was at any stage concluded between the parties, and on what basis the respondent still occupies the premises, was the basis of an ongoing dispute since about 2009. This was a crucial question in two cases, of which one is still pending in the Southern Gauteng High Court. I have referred to the two matters herein before.

14. Although the present application for the respondent's eviction is based on the allegation that the respondent failed to pay any rent for September and October 2013, and December 2012, the issue about a lease agreement between the parties is still part of the disputed facts.

15. In my view, although the requirement of a *bona fide* defense was perhaps not adequately addressed by the respondents in the condonation applications, it appears from the applicant's founding papers that it cannot be said that the averments pertaining to a defense concerning the existence of a lease agreement and the payment, or failure to pay the rent, do not constitute a *bona fide* defense.

16. The issue of prejudice to the applicant must be considered against the background of the dispute about the existence of a lease agreement between the parties and the allegations in respect of the payment of the lease amount.

17. If the reasonableness of the explanation would have been the only consideration, the respondent would have been in trouble. However, in exercising my discretion in regards to the question whether the condonation applications should be granted or not, the issue in regards to the existence of a *bona fide* defense tilted the scales in favour of the respondent. The condonation applications were accordingly granted.

18. Although the applicant applied for an order declaring that the lease agreement, if any, was cancelled in September 2013, the basis for the eviction is the allegation made by the applicant that the respondent failed to pay any rent for September and October 2013.

19. The existence of a lease agreement between the parties, if any, and the terms thereof, was at all relevant times integrated aspects, as it was in the preceding and pending litigation between the parties. However, in this

application it is clear that the applicant's case for the eviction is based on *new* grounds being the alleged failure of the respondent to pay the lease for a period after the closing of the pleadings in the South Gauteng case.

20. Accordingly, I agree with the submission made by Mr du Preez that the respondent's contention that the South Gauteng case creates the situation of *lis alibi pendens,* is without substance.

21. The issue of the respondent's alleged failure to pay the lease amount for September and October 2013 to the applicant is clearly the crux in this application. In this regard Mr Verster, appearing on behalf of the respondent, referred to the elaborated and detailed explanation advanced by the respondent in its answering affidavit. The explanation involves action instituted by Nedbank against the applicant, the respondent and a party referred to as PSA for the possession of certain machinery used by the respondent on the premises in question which the respondent allegedly leased from the applicant.

22. It was common cause that the respondent on a monthly basis did pay certain amounts in respect of the lease of the premises and the machinery to the applicant from 2010 to August 2013 although the computation and calculation of the amounts were in dispute. It is however common cause that the applicant accepted the amounts paid by the respondent.

23. Pertaining to the rental amounts the respondent alleged it paid to Nedbank, it is the applicant's contention that the respondent was not

entitled to pay any rental amount due to the applicant to Nedbank. In this regard the applicants argument included the following:

(i) The judgment in favour of Nedbank that prompted the respondent to pay the money to Nedbank was already abandoned at the time the alleged payments were made to Nedbank;

(ii) The payments were not made on behalf of and for the benefit of the applicant;

(iii) The payments were not made before the 3rd of each month and thus In breach of any alleged lease agreement.

24. The applicant further disputed the allegations made by the respondent about the machinery issue and the threats by, and the litigation instituted by Nedbank, that caused the respondent to pay certain rental amounts to Nedbank and not to the applicant.

25. During argument Mr du Preez made a calculation he submitted was based on the figures pertaining to the monthly lease paid by the respondent, as it is reflected in statements drawn up by the applicant. According to Mr du Preez the respondent was in arrears in the amount of R127 000. In this regard it seems that Mr Du Preez calculation differs materially from the averments made by the applicant in its founding papers where reference is made, in the notice of motion, to two months' rental arrears.

26. Mr Verster, appearing on behalf of the respondent, on the other hand, submitted that the respondent overpaid the applicant in the excess of an amount of R400 000. In this regard Mr Verster based his calculations on, amongst others, rental increase over the time on which the parties did not agree.

27. The issues pertaining to the question why the respondent did not pay certain rental amounts to the applicant but instead to Nedbank, the calculation of any amounts due to, or by the applicant, and the terms of the lease agreement, in my view, cannot be resolved on the papers. It appears that, for instance, that the calculation of the rental due, and paid by the respondent, calls for actuarial calculations, which is lacking.

28. The applicant was clearly well aware of the fact that factual disputes would be the course of the day in this application. The applicant, in its founding papers referred to the material disputes between the parties emanating from the litigation in South Gauteng. Despite the anticipated disputes the applicant elected to approach this court by way of motion proceedings, at its own risk.

29. Despite the fact that the parties did not suggest it, I have considered to refer the matter to evidence, or trial, but decided against such order mainly in view of the pending action in South Gauteng between the parties. In my view it will be expedient, and in the interests of justice, and both parties, if the issues between the parties be consolidated and ventilated in the said pending action where the parties surely will adduce oral evidence.

30. I have requested Mr Verster to address me on the question whether penalty costs should not be considered against the respondent for its failure to file its condonation application and heads of argument timeously. In this regard I re-state that the condonation applications were granted mainly because of the fact that the respondent appeared to have a *bona fide* defense.

    Mr Verster said he would abide the court's decision I that regard.

31. In my view the respondent's attorneys' handling of the matter is actually unacceptable. I have already alluded to the rather flimsy explanation advanced by the respondent in that regard. It appears that the respondent should bear the wasted costs caused by the condonation applications.

32. Accordingly I make the following order.
    1. The application is struck off with costs.
    2. The respondent is ordered to pay the applicant's costs in regards to the arguing of the condonation applications on 25 March 2014.

A J BAM

JUDGE OF THE HIGH COURT

28 March 2014