



IN THE HIGH COURT OF SOUTH AFRICA

Case No: 48118/13
Date 23/5/14

(GAUTENG NORTH AND SOUTH PROVINCIAL DIVISION)

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED ✓

20/5/2014
DATE


SIGNATURE

In the matter between:

TUTANI INVESTMENTS 49 (PTY) LTD

Applicant

and

EASY STREET TRUCK DEALERS CC

Respondent

JUDGMENT

HASSIM AJ

The application

- [1] The applicant applies for the eviction of the respondent from business premises: namely shop 3 and 4 both situated in The Willow Corner Shopping Centre, Delmas. It also claims ancillary relief.¹ The respondent resists the application.

The facts giving rise to the application

- [2] The facts are largely, if not entirely, common cause. The application in my opinion ultimately rests on two legal points² which I discuss later.
- [3] During or about July 2011 the parties entered into two separate written lease agreements for the hire by the respondent of shop no 3 and shop no.4 (collectively referred to as the leased premises), both situated in The Willow Corner Shopping Centre, Delmas. The lease commenced on 1 December 2011 to endure for five years (i.e. up until 30 November 2016).

¹ In the event of the respondent or any other person or persons claiming occupation through it failing to vacate the premises in question, the Sheriff is authorised and directed carry out the eviction. The applicant also seeks vacant possession of the premises and costs.

² The effect if any of the withdrawal of a previous application for eviction and whether an application in terms of section 32 of the Magistrates' Court Act, No 32 of 1944 reinstates/revives a cancelled lease and whether such an application can be made after the termination of a lease.

- [4] All payments due in terms of the lease agreements had to be paid in advance on or before the 1st day of every month. In the event of a failure to pay any amount due within a period of 7 (seven) days of receipt by the respondent of a written notice calling upon it to pay the outstanding amount, the applicant on the written notice to the respondent is entitled to cancel the lease and claim immediate possession of the premises.
- [5] The applicant is also entitled to cancel the lease agreements in the case of the breach of any other term of the lease agreements regardless of whether the breach goes to the root of the agreement or not. The right to cancel in such cases arises if the respondent has on more than two occasions within a period of 12 months breached any term of the lease agreement and remains in breach despite receipt of a written notice from the applicant to remedy the breach.
- [6] In the event of legal proceedings being instituted, the respondent will be liable for costs on the attorney and client scale.

The first cancellation of the lease agreements

[7] The respondent had failed to pay rent on due date. The respondent persisted in its failure despite the delivery by hand of two written notices³ calling upon it to make payment. The applicant contends that apart from failing to make the payments, the respondent breached other terms of the lease agreements which also entitle it to cancel the leases. The respondent disputes these breaches.

[8] When the respondent, despite written demand, failed to pay the arrear rent and remedy its breach of other terms of the lease agreements, the applicant elected to cancel the lease agreements.

[9] The applicant notified the respondent of the cancellation by the delivery of two notices⁴. The respondent disputes having received these notices.

The first application for eviction

[10] On or about 11 February 2013 the applicant launched an application for the respondent's eviction consequent upon the termination of the lease agreements. In April 2013 the respondent filed an opposing affidavit wherein it disputed having been notified of the cancellation of the lease agreements.

[11] On 30 April 2013 the applicant withdrew the application by the delivery of a notice to this effect. The withdrawal was not accompanied by a tender for the pay of the respondent's costs.

³ One for shop 3 and the other for shop 4.

⁴ *Ibid.*

- [12] The applicant explains that it withdrew the application because it feared that dispute of fact relating to whether the notices were received or not, created a risk of a court finding that the dispute in this regard should be referred for the hearing of oral evidence. In my view the withdrawal of the application was prudent: it ensured a speedy resolution of the dispute and averted unnecessary legal costs.

The present application

- [13] To meet the allegation that the respondent had not received the notices cancelling the lease agreement, the applicant on 30 April 2013 sent two notices to the respondent notifying it among others that rental for both of the shops was overdue and that the respondent was in breach of other terms of the lease agreements as well.
- [14] The respondent was called upon to remedy the breaches and make payment of the arrear rent within seven days. The respondent was also notified that if it failed to remedy the breaches, the applicant would be entitled to cancel the lease agreements. The respondent again disputes that it breached other terms of the lease agreements. If I find that the lease agreements were properly cancelled for the failure to make timeous payment. In view of my decision on the failure to pay rent and the cancellation of the leases on this basis, I do not have to resolve the dispute as to whether the respondent breached other terms of the lease agreements.

[15] The notices⁵ were contained in letters wherein the respondent was called upon to remedy the breaches of the lease agreements, payment of outstanding rent as at 29 April 2013 of R18 362.57 in respect of shop 3 and outstanding rent as at 29 April 2013 of R34 949.12 in respect of shop 4 was demanded. The letters recorded among other things the following:

- (a) The previous application had been withdrawn;
- (b) The previous application had been opposed by the respondent amongst others on the basis that the lease agreements had not been lawfully cancelled alternatively that the applicant was not entitled to cancel the lease agreement because the notices cancelling the lease agreements had not been received by it;
- (c) The withdrawal of the application should not be seen as an acknowledgement that the notices were indeed not received;
- (d) The applicant considers the lease agreements *extant*.

[16] When the respondent failed to comply with the two notices, both leases were cancelled in writing on 21 June 2013⁶ by the delivery of two notices of cancellation and the respondent was called upon to vacate the premises. The respondent failed to do so. Thus this application.

⁵ Both dated 30 April 2013.

⁶ The arrear rental as at date of cancellation, i.e. 21 June 2013 in respect of shop 3 was R1 965.79 and in respect of shop 4, R 41 182. 24. The total outstanding amount was R43 182.24.

[17] The respondent contends that after the lease had been unlawfully cancelled on the first occasion, on 16 October 2012 it tendered in writing to comply “strictly” with terms of the lease agreements because as far as it was concerned the leases had not been validly cancelled and therefore remained in force. The applicant however refused to accept the payments as “rent” because the lease had been cancelled. Because of this tender the respondent claims that the rent was not outstanding. Even if I accept what the respondent claims, there is no explanation why the respondent did not pay what it had tendered after receiving the notices on or about 30 April 2013.

[18] On 7 July 2013 and after the lease agreements were cancelled, the applicant sought and obtained *ex parte* an order in terms of section 32 of the Magistrates’ Court Act No 32 of 1944, authoring the Sheriff to attach the *res invecata illata* to secure payment of the outstanding rental in the sum of R43 148.03⁷ being the amount owing since 1 June 2013.

[19] On 8 August 2013 the respondent paid an amount of R45 648.03. The Sheriff received the payment and recorded that the payment was “for part payment of order. Balance R2 500.00⁸. Sheriff’s cost [sic] paid in full R8 000.00.”

⁷ This was for both shop 3 and 4. There is a difference of 21 cents between this amount and the amount in the notices of cancellation of 21 June 2013.

⁸ The costs of the section 32 application.

- [20] The respondent opposes this application on three grounds. The defence of *lis pendens* is founded in the application which had been withdrawn. The respondent complains that the applicant had failed to tender the costs of the application and therefore the question of costs of that application was alive and therefore the application. I do not agree. Apart from the present application no legal proceedings for the respondent eviction are pending. It is of no consequence that the respondent may have a right to the costs of that application.
- [21] The respondent's further contentions are firstly that the withdrawal of the previous application precludes the applicant from evicting the respondent as the lease agreement was revived. Secondly it contends that an application for eviction is not competent because the lease agreements are still alive despite the applicant having notified the respondent on 21 June 2013 that it had elected to cancel the lease agreements. The respondent rests this defence on the application in terms of section 32 which had been brought on 7 July 2013 (i.e. after the leases had been cancelled) in the Magistrates' Court, Delmas and argues that because such an application can only be brought to secure the payment of arrear rental.

- [22] The respondent correctly argues that rent is only payable if a lease agreement is in existence and also that an application in terms of section 32 of the Magistrate's Court Act is competent only if rent is outstanding. The respondent's argues that the application in terms of section 32 for the attachment of the *res invecata illata* indicates that the lease agreements were *extant* (and not terminated). The respondent's argument as I understand it is that if the lease agreements had indeed been terminated the only claim that the applicant could pursue would be damages for holding over and because this does not constitute rent, section 32 cannot apply. There is no substance in the argument. The application in terms of rule 32 was to secure the payment of arrear unpaid rental and not for compensation for the occupation of the leased premises after the cancellation of the leases on 21 June 2013.
- [23] I turn now to whether the withdrawal of the previous application defeats this application.
- [24] I am mindful that the applicant basis this application on the breaches which formed the basis of the earlier application. In my opinion nothing turns on this.
- [25] The crux of the respondent's case is that the withdrawal of the earlier application precludes the applicant from seeking the respondent's eviction. My understanding of the respondent's case is that the withdrawal has the same effect as the defence of *res judicata*. I have difficulty with this proposition.

[26] I cannot accept that the withdrawal of an application for eviction based on unpaid rental bars the applicant from later applying for eviction for the same outstanding rental⁹. If rent is unpaid an applicant is entitled to cancel the lease agreement, subject only to the cancellation being in accordance with the parties' agreement.

[27] When the applicant withdrew the application, it withdrew its earlier cancellation. This having occurred the parties' relationship continued to be regulated by the lease agreements. (Whether the lease agreement was revived or whether the cancellation was *pro non scripto* is of no moment.) Even if I am wrong in this regard, on the respondent's own case there had been no cancellation.¹⁰ The lease agreements therefore remained in force unless and until they were later cancelled by either of the parties.

[28] I am satisfied that when the leases were cancelled on 21 June 2013 rental for both shop 3 and 4 was overdue. The payment of R45 648.03 on 8 August 2013 does not affect the status of the lease agreements; they had come to an end and the respondent has no right to remain in possession of the premises.

⁹ Unless of course the debt was paid before the later application was made.

¹⁰ Because the respondent had not received the notices cancelling the lease agreements.

[29] Having found that the applicant was entitled to cancel the lease agreements because rent was outstanding, I do not have to determine whether the respondent had breached other provisions of the lease agreements.

[30] I accordingly make the following order:

- (a) The respondent and any person or persons claiming occupation through the respondent vacate the premises described as shop 3 and shop 4 of The Willow Corner Shopping Centre", c/o Second Avenue and Sarel Cilliers Street, Delmas by no later than 31 May 2014.
- (b) Should the respondent or persons referred to in paragraph (a) above fail to do so, the Sheriff is authorised and directed to take all steps necessary to give effect to paragraph (a) above.
- (c) The respondent is to pay the costs of this application on an attorney client scale.

SK Hassim

Acting Judge of the High Court



Date of Hearing: 10 March 2014

Date of Judgment: ²³
~~18~~ May 2014

For applicant: Adv. Gibbs

For respondent: Mr Omar