

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG HIGH COURT DIVISION, PRETORIA

4/8/2014

Case Number: 9666/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO

(3) REVISED

2014-08-08

DATE

A handwritten signature in black ink, consisting of a stylized 'H' followed by a long horizontal stroke and a small flourish at the end.

SIGNATURE

In the matter between:

INDUSIT BELEGGINGS CC

Applicant

and

TILICO CLOTHING (PTY) LTD

(In Business Rescue)

1st Respondent

DANIEL GERHARDUS CLAASSEN

2nd Respondent

CORNELIUS JOHANNES MOOLMAN

3rd Respondent

COMPANIES AND INTELLECTUAL PROPERTY

COMMISSION

4th Respondent

JUDGMENT

MNGQIBISA-THUSI J:

1. The applicant seeks the following relief:

1.1 that the first, second and third respondents and all other persons occupying through them the property situated at Shop 17, Komati Shopping Centre, 27 Rissik Street, Komatipoort ("the property"), be ordered to vacate the property forthwith;

1.2 That should the first, second and third respondents and all other persons occupying through them fail to vacate the property as contemplated in subparagraph 1.1 above, the sheriff be authorised to evict the said parties and persons from the property;

1.3 That the South African Police Service be authorised to assist the sheriff in giving effect to subparagraph 1.2 above should the sheriff deem such assistance to be necessary;

- 1.4 That the first respondent, alternatively, the second respondent, further alternatively, the first and second respondents, jointly and severally the one paying the other to be absolved, be ordered to pay the costs of this application.
- 1.5 That no costs be ordered against the second respondent unless he opposes this application in which event the second respondent be ordered to pay the costs *de bonis propriis*.
2. The third respondent is the only director of the first respondent. On 29 April 2013, the second respondent was appointed as first respondent's business rescue practitioner.
3. In view of the fact that the first respondent has gone into business rescue proceedings, the applicant was granted an order by Judge Baqwa in terms of section 133(1)(b) of the **Companies Act 71** of 2008, giving it leave to bring this application also against the first respondent.
4. The following issues are to be determined:
- 4.1 whether the applicant concluded a valid lease agreement with the first respondent.
- 4.2 whether the lease agreement has been validly cancelled.

Factual background

5. On 7 March 2011 the applicant and the third respondent concluded a written lease agreement which agreement provided, *inter alia*, that:
 - 5.1 the lease agreement would be for a period of 5 years;
 - 5.2 the initial rental amount would be R31 240.00 plus 14% VAT per month with an escalation of 6% per annum.
 - 5.3 rental would be payable on the third day of each month.
 - 5.4 in the event of the lessee (the third respondent) defaulting on the rental and failing to remedy the default, the applicant would be entitled to cancel the agreement without further notice.
 - 5.5 The agreement can only be validly amended in writing.
6. It is the applicant's contention that shortly after the conclusion of the agreement the third respondent had requested it to send the rent invoices to the first respondent for payment. It was submitted on behalf of the applicant that it had agreed to the arrangement without giving it much thought. However, during March 2013, the third respondent defaulted on his payments for rent and despite several reminders to pay, it failed to do so. As a result the applicant had issued summons in the Barberton Magistrate's Court under

case number 1085/2013 in which it sought payment of arrear rental from and the eviction of the first and second respondents. The respondents filed a notice to oppose and the applicant filed an application for summary judgment which it however later withdrew.

7. During October 2013 the applicant launched eviction proceedings against the third respondent in the Mbombela Magistrate's Court under case number MRC451/2013. After the third respondent opposed the application, the applicant applied for summary judgment. In opposing the summary judgment application, the third respondent raised a special plea in which he contended that the original written agreement it concluded with the applicant was orally varied in terms of which the third respondent substituted him as the lessee of the property. This application was also withdrawn.
8. It is the applicant's contention that it never concluded a lease agreement with the first respondent as alleged. The following submissions were made on behalf of the applicant.
9. At the beginning of the hearing the respondents raised the special plea of lis pendens with reference to the Mbombela matter. It was submitted on behalf of the respondents that one of the prayers sought in the Mbombela matter was the eviction of the first and third respondents. Counsel for the applicant contended that the relief for eviction was withdrawn from the bar at the last hearing of the matter. The issue was resolved when the applicant formally withdrew the prayer for eviction in the Mbombela matter.

10. On behalf of the applicant it was submitted that the applicant the applicant did not conclude an oral lease agreement with the first respondent as this would have been contrary to the provisions of the agreement which expressly stipulates that any variation of the agreement has to be in writing. In this regard the applicant relies on clause 16.1 of the agreement which provides that any variation to the agreement has to be in writing. It was argued that the first respondent by its own conduct when it went into business rescue, it did not recognise the applicant as its creditor hence it did not give it notice as an affected party.
11. It was further submitted on behalf of the applicant was entitled to the relief sought for the eviction of the first respondent and the third respondent and all persons occupying the property through them in that:
 - 11.1 the applicant has cancelled the lease agreement by giving notice to the first respondent after it defaulted in its rent payments.
 - 11.2 in view of the cancellation of the agreement the respondents were in unlawful occupation of the property.
12. With regard to the respondent's claim that it had a counterclaim against the applicant in that the applicant had committed a spoliation which caused it to suffer loss, it is contended on behalf of the applicant that the respondents had not quantified their damages and therefore could not set-off an eviction against a spoliation claim.

13. On behalf of the respondents it was argued that the applicant is seeking final relief in a matter where there was a reasonably foreseeable dispute of fact. It was submitted that from the time the agreement was concluded, the first respondent had occupied the property with the knowledge of the applicant and invoices were issued in its name. As a result in the Barberton matter the applicant had sought relief against the first and third respondents as it was aware that the first respondent was the lessee. It was argued on behalf of the respondents since the applicant was seeking a final order and there was a dispute of fact, the respondents' allegations should be preferred and that therefore that the court should decide the matter on the respondents' version which is that the applicant and the third respondent had entered into an oral agreement varying its terms by substituting the third respondent with the first respondent as lessee.
14. It was further submitted that since the first respondent had gone into business rescue in April 2013, the applicant could not seek its eviction from the property. Furthermore it was submitted that applicant had committed a spoliation act against the first respondent in allowing the first respondent's competitors to trade on the property, entitling the first respondent to a substantial claim for damages.
15. Where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant, which have been admitted by the respondent together with the facts alleged by the

respondent, justify such order. *Plascon-Evans Paints v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623(A).

16. From the evidence before me it is not in dispute that:

16.1 the applicant (as owner/lessor) and the third respondent (the lessee) concluded a lease agreement over the property.

16.2 the written agreement provides that the agreement can only be varied or amended in writing.

16.3 the rental on the property is in arrears.

16.4 the property which is zoned for commercial purposes and therefore the provisions of the **Prevention of Illegal Evictions from and Unlawful Occupation of Land Act** 19 of 1998 do not apply.


17. With regard to the existence of a factual dispute, I am satisfied, based on the facts that the respondents have not raised a genuine dispute of fact which cannot be resolved on paper. The respondents' contention that the first respondent was substituted as lessee in terms of an oral variation agreement between the applicant and the third respondent does not hold water. Clause 16.1 of the lease agreement clearly provides that any variation to any term of the lease agreement has to be in writing. Nothing turns on the fact that the applicant issued the invoices for rent in the name of the first respondent. There is no evidence to suggest, as contended by the respondents, that the applicant, in agreeing to issue the invoices in the first respondent's name knowingly colluded with the third respondent in order to defraud the receiver

of revenue. Therefore, the first respondent is bound by the terms of the written lease agreement and cannot claim that the agreement was orally varied.

18. I am satisfied that the applicant has given notice to the third respondent as lessee and cancelled the agreement in an e-mail dated 18 July 2013, alternatively when it issued summons on 26 July 2013 in the Barberton matter or on 11 October 2013 when it delivered a letter of cancellation to the third respondent or on 21 October 2013 when it issued summons in the Mbombela matter. In terms of the agreement, all what the applicant had to do in order to terminate the agreement was to inform the third respondent of its intention to cancel the agreement in the event of the third respondent defaulting on his payments.
19. In view of the third respondent's breach of the lease agreement by failing to pay the rent due and the consequence of the applicant cancelling the agreement, I am satisfied that the third respondent and all occupiers through him, inclusive of the first respondent, are in unlawful occupation of the property as the applicant as owner of the property has withdrawn his permission for their occupancy of the property.
20. Accordingly the following order is made:
 1. that the first, second and third respondents and all other persons occupying through them the property situated at Shop 17, Komati Shopping Centre, 27

Rissik Street, Komatipoort ("the property"), vacate the property within seven days of this order;

2. that should the first, second and third respondents and all other persons occupying through them fail to vacate the property as contemplated in subparagraph 1 above, the sheriff is authorised to evict the said parties and persons from the property;
3. that the South African Police Service is authorised to assist the sheriff in giving effect to subparagraph 2 above should the sheriff deem such assistance to be necessary;
4. that the first respondent and third respondent jointly and severally the one paying the other to be absolved, are ordered to pay the costs of this application.


NP MNGQIBISA-THUSI
Judge of the High Court

APPEARANCES:

For Applicant: Adv Myburg

Instructed by: Marais Attorneys

For first and third respondents: Advs Greyling and Fisher klein

Instructed by: Karien Schutte Attorneys