IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, HELD AT PRETORIA)

Case No: 7680/2014

In the matter between:

24/10/2014

COMMUNITY PROPERTY COMPANY (PTY) LTD Applicant

and

E. E. TRADING ENTERPRISE CC Respondent

T/A E. E. ENTERPRISE

(REGISTRATION NUMBER: 2007/008434/23)

JUDGEMENT

F DIEDERICKS (AJ):

This is an application brought by Applicant wherein Applicant seeks the relief as outlined in Prayers 1, 2 and 3 of the Notice of Motion.

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The relief sought is predominantly that the Respondent and all persons in possession of and/or occupying the immovable properties situated at **SHOP 68, CENTRAL CITY SHOPPING CENTRE, STAND 425, UNIT E, MABOPANI, PRETORIA** ("the Property") by, through or under the Respondent, be ordered to vacate the Property forthwith.

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In terms of prayer 2 the Sheriff of this Court should be authorized to evict the Respondent from the said Property.

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The parties have filed a Founding Affidavit as well as Replying Affidavit by the Applicant and the Respondent has filed its Answering Affidavit.

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The Respondent did not according to the practice manual file any Heads of Arguments although the Applicant has filed its Heads of Argument duly and in time and same is bound in on pages 161 – 172 of the paginated papers.

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In so far as the Respondent has not complied with time frames and/or the practice manual with regard to the filing of Heads of Arguments it seeks condonation thereof. The stance of Applicant is that they are not opposing such condonation and wish to proceed.

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In so far as it is necessary the condonation is hereby granted.

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The parties have however agreed to overcome the problem regarding Heads of Argument by Respondent, and agreed to prepare a stated case to present to this Court. Subsequent thereto a stated case was prepared and duly signed by both Counsel representing the parties and was handed up to Court. This stated case is marked Annexure "A", for identification purposes.

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The issues that are common cause between the parties are tabled in paragraphs 2.1 up to 2.15 of the stated case.

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I do not deem it necessary to repeat same and the contents thereof as reflected in Annexure "A" should be read into this judgement as if repeated.

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The disputes between the parties which this Court is requested to adjudicate on is listed in paragraph 3 of the stated case and are the following.

11.1 The Applicants *locus standi*, which dispute is to be found on page 92 of the Answering Affidavit incorporated herein, more particularly in paragraph 7.2 thereof;

11.2 The right of the Deponent to Applicants Founding Affidavit to depose to an Affidavit on behalf of the Applicant, which dispute is to be found on page 92 of the Answering Affidavit incorporated herein, more particularly paragraph 7.3 – 7.4 thereof;

11.3 Whether any other interpretation than the one contained in the Lease may be considered and if that be the case, whether Respondents Attorneys interpretation of the Contract should be accepted; and

11.4 Whether Applicant is obliged to consent to a renewal of the Lease in the future.

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FIRST DISPUTE:

This dispute is the question whether the Applicant has *locus standi* in this application.

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The Respondent referred this Court to the person that deposed to the Founding Affidavit of Applicant a certain Mr Stephen Matabane.

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It was pointed out that in accordance with paragraph 1.1 of the Particulars of Claim this deponent is an adult male and Regional Manager of the **PUBLIC INVESTMENT CORPORATION (PIC) SOC LTD** with its principal place of business at 72 Graystone Drive, 5th Floor, Sandton, Johannesburg.

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The argument of Respondent regarding the *locus standi* goes along the line that it is clear from the agreement between the parties that the Company referred to above; PUBLIC INVESTMENT CORPORATION (PIC) SOC LTD was never a party to the agreement.

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In this regard the Court was referred to Annexure SM2 to the papers where it is clearly stipulated who the parties to the Contract were.

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It was pointed out to Respondents Counsel that it is clearly stipulated that the Landlord, according to the Memorandum of Agreement of Lease, is **COMMUNITY PROPERTY COMPANY (PTY) LTD.**

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It was also pointed out to Counsel of Respondent that it is in fact this legal entity that is sited as the Applicant in the papers. The Company known as PUBLIC INVESTMENT CORPORATION (PIC) SOC LTD is nowhere sited as a party claiming to be an Applicant with *locus standi.*

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It was pointed out to Respondents Counsel that from the contents of the agreement between the parties, which lays the foundation to the *locus standi* of the Applicant, that this document clearly lends the Applicant *locus standi* in this Application.

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During argument Advocate for the Respondent realised that Respondent had it wrong in this respect and this point was then abandoned. In my view, quite rightfully so.

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SECOND DISPUTE:

The second dispute as mentioned above revolves around the right of the deponent to Applicants Founding Affidavit to depose to an Affidavit on behalf of the Applicant, which dispute is to be found on page 92 of the Answering Affidavit incorporated herein, more particularly paragraph 7.3 – 7.4 thereof.

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As mentioned above the identity of the Deponent of the Founding Affidavit was one Stephen Matabane.

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In order to further identify himself, he elaborated in paragraph 1.1 about his position and for which Company he works. He further mentions in paragraph 1.2 that PIC was appointed as the Management Agent of the Applicant.

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In paragraph 1.3 he states clearly that the Applicant authorized the launching of this Application for the eviction of the Respondent.

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In paragraph 1.4 he states that he is duly authorized to depose to this Affidavit on behalf of the Applicant. He also mentions that the facts contained in this (his) Affidavit falls within his own personal knowledge and belief and are both true and correct.

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Respondents query in this regard revolves around the failure to attach a Confirming Affidavit by the Applicant confirming the authority of Stephen Matabane to depose to this Affidavit. The Applicant on the other hand held the view that a witness need not to be authorized to testify, since every person, except for spouses, are competent and compellable witnesses.

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In the following extract from the decision of GANES & ANOTHER V TELECOM NAMIBIA LTD 2004(3) SA 615 (SCA) at 624 paragraphs G-H it was held by the Supreme Court of Appeal as follows in this regard: "In my view it is irrelevant whether Hanke had been authorized to depose to the Founding Affidavit. The deponent to an affidavit in motion proceedings need not be authorized by the party concerned to depose to the Affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorized."

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It is common cause between the parties that in accordance to paragraph 1.3 of Applicants Founding Affidavit, the Applicant authorized the launching of this Application for the eviction of the Respondent. This in itself was not challenged.

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Having said the above it is quite clear from the abovementioned decision of the Supreme Court of Appeal that it is therefore not necessary for a deponent to an Affidavit in Motion proceedings to be authorized by the party concerned to depose to such an Affidavit.

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The Court therefore finds that there is no substance in this point *in limine* and that the deponent therefore had the authority to oppose to the said Affidavit.

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THIRD DISPUTE:

The third dispute is the question whether any other interpretation than the one contained in the Lease may be considered and if that be the case, whether Respondents Attorneys' interpretation of the Contract should be accepted.

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Although this dispute is quiet widely defined the crux of this dispute is very short.

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The crux of this dispute is, what was the term/duration of the Contract. Was the duration of the Contract the time as contemplated in paragraph 3.1 or is there any possibility that the term could be interpreted to be that the period of 3 (three) years as contemplated in paragraph 3.1 would only start at the date on which the parties signed the Contract, which is respectively the 25th March 2011 (signed by Respondent) and the 20th May 2011 (signed by the Landlord).

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Paragraph 3.1, under the heading, **COMMENCEMENT, OCCUPATION AND DURATION OF LEASE:** reads as follows:

"3.1 The lease shall be for an initial period of **3 (three) years** and shall commence on **01 June 2010** and is scheduled to terminate on **the last day of May 2013.**"

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In simple terms the duration of the Contract of Lease would be 3 (three) years, starting the 01st June 2010 and ending the 31st May 2013. The Respondents argument goes along the line that due to the fact that the Respondent itself only signed the Contract on the 25th March 2011, the Contract in fact therefore started running on this date and would only end on the 25th March 2014. Alternatively if the date of signature by the Landlord is taken as a starting date the Contract would have started on the 20th May 2011 and would have run out on the 20th May 2014. Incidentally both these dates have already passed on the date of this judgement.

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Before I deal with the Applicants response to this argument it must be pointed out that both parties to the Agreement signed the Agreement at the last page

thereof, page 22 of the paginated papers, and also fixed their initials to all the preceding pages as well as the Annexure to the Contract. It is furthermore conspicuous that the parties specifically also attended to amendments to their signed Contract and affixed their initials next to this particular amendment which can be found on page 1 of the Memorandum of Agreement of Lease where the words "linen and bin" was deleted and substituted by the words E. E. Enterprise.

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Of significance is the fact that the argument forwarded by Respondent is that the Contract Period is 3 (three) years.

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Logic dictates that the only way in which the Respondent could have determined that this period was in fact 3 (three) years, was if he has read paragraph 3.1 of the Contract. That is the only place in the Contract where reference is made to the fact that the duration is 3 (three) years.

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Logic further dictates that had the Respondent read paragraph 3.1 to determine the duration of the Contract, he would obviously have altered the dates as reflected in paragraph 3.1. The same would apply to the Applicant.

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The parties would therefore in my view, have altered the duration period with regard to the starting and ending time of the Contract to coincide with the dates on which they have signed the Contract. They refrained from doing so.

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The reason for them refraining from doing so calls for speculation. It can be speculated that the Respondent refrained from doing so on account thereof that he realised that he is now for the first time moving his business to the particular premises alternatively starting his business at the particular premises and would have the advantage of first trying out the success of this premises on a much shorter period.

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The same argument applies to the Landlord.

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As mentioned above such an interpretation can lead to various speculations and would lead to uncertainty between the parties. The Applicant on the other hand simply contended that the Contract should be interpreted in the words expressed by the parties as reflected in paragraph 3.1.

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The Applicant argued that according to our Law, when a Contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suite between the parties and no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence.

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In this regard the Court was referred to the case of UNION GOVERNMENT V VIANINI FERRO-CONCRETE PIPES (PTY) LTD 1941 AD 43 AD 47.

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Applicant further referred to the "golden rule" of interpretation that the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the instrument. See COOPERS & LEIBRANDT V BRYANT 1959 (3) SA 761 (A) AD 767 E – 768 E; ENGELBRECHT V SENWES LTD 2007 (3) SA 29 (SCA) and BRINK V PREMIER OF THE FREE STATE 2009 (4) SA 420 (SCA). To my mind the words used in paragraph 3.1 is quite clear and there is nothing ambiguous to be found therein or any indication that if I should follow the litteral interpretation thereof that it should lead or it would or could lead to an absurdity or some repugnancy or inconsistency with the rest of the instrument.

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I am thereof of the view that no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added or varied by parol evidence rule.

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I am with of the view that Respondents attempts to introduce inadmissible parol evidence, based on the inadmissible hear-say and inadmissible opinion of its Attorneys should not be followed in the interpretation of paragraph 3.1 of the Agreement.

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I therefore find that the term of the Contract was the term as set out in paragraph 3.1 of the Agreement, starting on the 01st June 2010 and it terminated on the last day of May 2013.

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As far as it is necessary I accept that as from the termination day there was merely a tacit month to month agreement between the parties which was terminated during June 2013.

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FOURTH DISPUTE:

In terms of this dispute the crux thereof would be that this court is expected to declare that a party to a contract can be forced to enter into a contract with another party against its will to do so.

It is trite that Courts will refrain from formulating contracts on behalf of parties and/or refrain from forcing a party to enter into a contract against its will.

I therefore find that there is no substance in law to make such an order.

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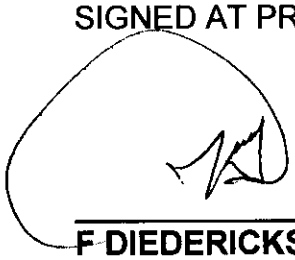
I therefore find that the Respondents are presently unlawfully occupying the premises and an Order in terms of Prayers 1, 2 and 3 of Applicants Notice of

premises and an Order in terms of Prayers 1, 2 and 3 of Applicants Notice of Motion is therefore granted.

SIGNED AT PRETORIA ON THIS 22nd THE DAY OF OCTOBER 2014.



F DIEDERICKS (AJ)