IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 86043/2015

25/10/2016

(1) REPORTABLE: NO/YES

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

(3) REVISED.

(4) Signature 24/10/2016 Date

REDIFINE PROPERTIES LIMITED **APPLICANT**

and

TIP TOP NAILS CC T/A COLOUR HARMONY **RESPONDENT**

JUDGMENT

KHUMALO J

[1] In this Application the Applicant, Redefine Properties is seeking an order against the Respondent whom it described in its particulars of claim to be Tip Top Nails CC ("the Respondent") for:

[1.1] Payment of an amount of R671 311.24 (Six Hundred and Seventy One Thousand Three Hundred and Eleven Rand and Twenty Four Cents);

[1.2] Interest thereon at the rate of prime plus 2% per annum a *tempora morea*;

[1.3] The immediate ejection of the Respondent and all persons claiming occupation under it from the premises.

[2] Applicant alleges that:-

[2.1] the claim arose as a result of the Respondent's failure to comply with a lease agreement which was concluded on 11 June 2015 supposedly between Applicant and Respondent represented by one Carl Antonie Reichman ("Reichman") in terms of which the property situated at corner 399 George Street and 16th Road, Randjiespark,

Midrand ("the property") was let to the Respondent for a period of 5 years commencing from 1 June 2015 to 31 May 2020 for a monthly rental payable as set out in the agreement.

[2.2] On 25 June 2015 Applicant entered into a Portfolio Transfer Agreement with Fountainhead Property Trust ("Fountainhead") and Fountainhead Property Trust Management Limited. Applicant is the owner of the property.

[2.3] The Respondent duly took occupation pursuant to the agreement and notwithstanding demand, has failed to pay rental that is due and payable for the period June 2015 to October 2015.

[3] The Respondent is opposing the Application. In its Answering Affidavit deposed to by its sole member Joan Yvonne Kahn ("Kahn"), it raises 2 points *in limine* in accordance to which it contests the *locus standi of* the Applicant to sue and or Respondent to be sued, stating that:

[3.1] Applicant **lacks the required *locus standi*** to bring the Application since it is neither the owner nor does it have authority in respect of the property, as certain conditions had to be met for fulfilment of the Portfolio Transfer Agreement. Applicant had failed to attach any resolution or approval to establish its alleged ownership, authority or any rights over of the property.

[3.2] It has **not cited the correct party (misjoinder) since K**ahn is the sole member of the Respondent and she has not signed a lease agreement with either the Applicant or Fountainhead nor is her signature appearing in any of the documents the Applicant relies upon. Reichman, the signatory to the relevant documents had no authority to act on behalf of the Respondent as Kahn has not signed a resolution authorising Reichman to do so.

[3.3] Reichman signed the resolution authorising the conclusion of the lease agreement together with the lease agreement. Therefore the correct party against whom relief is to be sought is Reichman trading as Colour Harmony. Respondent is not the party liable in terms of the lease agreement.

[4] In Reply to the first point *in limine,* Applicant refers to a clause in the Portfolio Transfer Agreement which reads:

> "**FountainHead is, on and with effect from transfer date, substituted by Redefine** as Lessor in respect of the leases. For the sake of clarity, it is recorded that Redefine shall obtain all rights in and to the Leases on the implementation date and any income that accrues in respect of the Asset Portfolio from the accounting Effective Date accrues to the benefit of Redefine and shall be paid over to Redefine on the Redefine Consideration Shares Issue Date or so soon thereafter as it may be received by Fountainhead."

Also to a clause in the lease agreement that reads:

> "Should the landlord at any time during the currency of this agreement sell the property of which the leased premises form part or....then it is specifically agreed that in any of the foregoing circumstances the tenant shall not be

entitled to elect not to be bound to the new landlord, and that this lease shall continue in full force and effect."

[5] The Applicant then attached a letter from a conveyancing firm that alleges that transfer took place on 1 October 2015, and on that basis asserted, to have complied with its obligations, its ownership and *locus standi*.

[6] On the second point *in limine,* regarding Respondent's capacity to be sued, it pointed out that **the Respondent's full names and registration number is reflected in the lease agreement as a tenant of the property that the Respondent has occupied since 7 March 2015 and for which it had paid rental from its bank account since 23 February 2015. A bank guarantee obtained was also issued on Respondent's behalf.** The Applicant alleges that from all these goings-on, it is evident that Reichman was authorized to act on behalf of the Respondent.

[7] The Applicant argued on the basis of the *Turquand* rule argued that the exercise of authority by Reichman depended on an internal act of the Respondent. Accordingly, the Respondent as a bona fide Third Party may assume that the Respondent had complied with its internal act, the resolution in this particular instance; see *One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd and Another* (20028/14) [2015] ZAWCHC 89.

THE ISSUES IN DISPUTE

[8] The court has to determine:

[8.1] whether the Applicant sufficiently established its locus standi or authority entitling it to sue on the basis of the lease agreement?

[8.2] Whether or not Reichman's signing of the lease agreement and the resolution, which documents were specifically prepared for the sole member of the Respondent's signature, binds the Respondent to the lease agreement.

LEGAL FRAMEWORK

LOCUS STANDI

[9] The duty to allege and prove *locus standi in judicio,* rests on the party instituting the proceedings. **The persona or facts that confers *locus standi,* described in the Application or Summons must be in existence at the date of issue,** otherwise the Application or Summons is a nullity. It must therefore **appear *ex facie* the founding pleadings that the parties thereto have the necessary legal standing to sue or be sued;** See *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) at 575H-I; *Trakman NO v Livshitz* 1995 (1) SA 282 (A) at 287B-F; *Friends of the Sick Association v Commercial Properties (Pty) Ltd* 1996 (4) SA 154 (D) at 157H. An objection taken in *limine* to the *locus standi* of a plaintiff or applicant, like an exception, must be dealt with on the assumption that all the allegations of fact relied upon are true; see *Kuter v South African Pharmacy Board* 1953 (2) 307.

APPLICANT'S

[10] Applicant seeks to prove its *locus standi* relying on its ownership of the property. The evidence submitted in that regard is found in its Founding Affidavit, which is only an allegation

that it signed the Portfolio Transfer Agreement with Fountainhead and is the owner. It does not refer to the terms in the Transfer Portfolio Agreement that confers upon it the legal standing required to sue on the lease the Respondent. It therefore does not deal with question posed whether or not the suspensive conditions were fulfilled,

[11] Applicant also went further and alleged that the lease agreement was entered into between itself and the Respondent when in fact it was concluded by Fountainhead Property Trust supposedly with the Respondent. Attached to its Replying Affidavit, was a letter from the conveyancing attorneys advising it that the registration of the property into its name took place on 1 October 2015. No confirmatory affidavit from the conveyancing attorneys is attached confirming the contents of the letter that what is written is factually correct. Neither did the Applicant annex an extract from the Deeds Office or a copy of the Title Deed to its Reply; see *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) at p82.

[11] *Amler's* Precedents of Pleadings on page 277 provides that in accordance with an abstract theory of the transfer of property, the requirements for the passing of ownership in immovable property are twofold, namely delivery – which in the case of immovable property is by registration of transfer in the Deeds Office – coupled with the so called real agreement or "saaklike ooreenkoms". The essential elements of a real agreement (alienation of land) fulfilled. Therefore ownership in immovable property is proved by producing a title deed or the register of the registrar of deeds (or an extract or affidavit authorised by statute); see *MCF Pick n Pay Stores Ltd v Teazers Comedy and Revue CC* [2000] 2 All SA 604 (W) 2000 (3) SA 645 (W). However ownership will not pass, despite registration if there is a defect in the real agreement; see *Mckenna v Shea & Others* [2008] ZASCA 144; 2010 (1) SA 35 (SCA) at para 22 per Brand JA.

[12] It is inacceptable that the Applicant has not attached any of the aforesaid documents to prove its ownership of the property, when it would have been very easy to get an extract from the Deeds Office. More so the Application was launched on 26 October 2015, long after the alleged transfer had taken place.

[13] The Respondent has referred also to certain conditions precedent that the Applicant was to fulfill before the transfer of the property could take place that it alleges were not fulfilled in respect of the approval of all resolutions required to implement the sale of the property through the Portfolio Transfer Agreement. The Applicant has not attached such resolutions to its replying affidavit or dealt with the contention, so failed to show that the conditions for alienation of the property were fulfilled. It had instead tendered a bare allegation that it has met the suspensive conditions of the contract.

RESPONDENT'S & TURQUAND RULE

[14] I must mention that from all the documents that have been furnished by the parties nothing is straight forward. The lease agreement's title reads "Agreement of Lease between Fountainhead Property Trust and Tip Top Nails CC trading as Colour Harmony." The Applicant sent to the Respondent under cover of a letter Applicant had signed off. Both the letter and lease agreement were written on Fountainhead's letterhead. On the line for tenant's signature, only Reichman's signature is appended with an inscription **"on behalf of Colour Harmony"** added next to his signature, indicating the entity he was representing or on whose

behalf he was signing the lease. Reichman then put his signatory capacity to be as "Funder/Partner". There is no indication whose Funder or Partner is Reichman .

[15] The lease agreement as prepared by Fountainhead further states that the tenant, Tip Top Nails CC is represented by Kahn. If the tenant is not a natural person, the tenant shall provide, on the date of signature of the lease agreement, a resolution authorizing the signatory to the lease, to sign the lease on the tenant's behalf. Reichman appears to be the signatory to the lease, as already indicated that his signature is appended to the lease agreement. The resolution to be signed is set up as part of the agreement and referred to as "Annexure D". It details Kahn's particulars, her full names and identity number, in her capacity as sole director/ member of the Respondent / tenant, to be the intended signatory to the lease agreement whose actions that she had already taken on behalf of the Respondent were to be ratified by the resolution. Reichman had signed the resolution, and in obvious deviation from its objective he was also the signatory to the lease agreement.

[16] To justify holding the Respondent liable under these circumstances, the Applicant has alleged that Kahn provided the Applicant with her Identity document and a Telkom Utility Bill and with regard to the signing of the documents by Reichman it relies on the *Turquand* Rule to bind the Respondent.

[17] Unfortunately the fact that the Applicant was furnished with a copy of Kahn's personal documents or particulars does not advance the Applicant's case, since it is the lease agreement upon which the Applicant's claim is founded and it soughts to enforce its rights that determines if there is a relationship between the parties, any rights or obligations. The party that is being sued is the Respondent not its sole member, Kahn.

[18] The Turquand rule (also known as the indoor –management rule), according to the recent case of *One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd and Another* 2015 (4) SA 623 (WCC) at [28], propagates that an outsider transacting with a company may assume that its officers have the powers ordinarily associated with their positions, thus relieving the outsider from having to investigate whether the company's acts of internal management were regular.

[19] The rule is said to have an ameliorative effect, from the perspective of an outsider, which was initially based on the rule of constructive notice, under which knowledge of the contents of the company's articles was imputed to the outsider. The rule of constructive notice was abolished by s19 (4) of the Act. Section 20 (7) of the Companies Act 71 of 2008 provides that **an outsider may presume that the company has complied with any 'formal and procedural' requirements unless he knew or ought to have known of a failure to do so.**

[20] The lessor (Fountainhead) was aware that the resolution authorising any action on behalf of the Respondent that would be legally binding could only be signed by Kahn as the sole member/director of the Respondent as a Close Corporation could only authorise any other person to sign or act on its behalf through its member/s. The requirements that Fountainhead or lessor put in the lease agreement and the contents of the resolution, in respect of the Respondent, are evidence of Fountainhead's knowledge of also the procedures that where to be complied with in the case of the Respondent. It therefore knew or ought to have known that Reichman could not sign the resolution on behalf of the Respondent nor did he have authority to ratify actions that Kahn had already taken on behalf of the Respondent.

He was neither a director nor a member of the Respondent. There was also no resolution authorising him to do so whether as Funder or partner.

[21] It is clearly set out in the lease agreement and very explicitly in the resolution as to who is the representative and the signatory to the lease agreement. Failure to sign the lease agreement as required by the law and agreement was apparent from the documents. Besides the absence of a resolution authorising Reichman to act on behalf of the Respondent, he also made it clear in the lease agreement that he was signing on behalf of Colour Harmony not on behalf of the Respondent. Applicant therefore has the onus to show that, notwithstanding Reichman's apparent lack of actual authority which Fountainhead was evidently aware of when the agreement was purportedly concluded and considering Reichman's declaration that he was signing on behalf of a different entity "Colour Harmony', Respondent must be bound to the agreement, or Reichman's authority should be inferred.

[22] It was argued on behalf of the Respondent that for it to be bound by Reichman's actions, ostensible authority must be inferred from its own conduct. A representation by it not by Reichman that justifies the founding of ostensible authority bestowed on Reichman, the purported agent, that he was acting on behalf of the Respondent (the Company). Reference was made to *One Stop Financial Services* where it was held on [56] that:

> "Another way of looking at this question is by giving due weight to the requirement in s 20 (7) that the third party should have been dealing with the 'company'. The section does not state that the third party may make any assumptions when dealing with a purported representative *per se*. This reinforces the view that in order for s 20 (7) to apply **the third party must establish that he was dealing with someone who had actual or ostensible authority to bind the company,** because only in those circumstances can he say that he was he was dealing with the 'company'. This was the first of the two fundamental questions Claasen J posed in Wolpert, ie, 'when does one deal with or contract with a company? (at 265A). The answer he gave (at 265D – 267A) was that one deal with or contract with a company when the latter is represented by a person having actual or ostensible authority. Once the third party has established the actual or ostensible authority of the representative, he cannot be non-suited because of non-compliance on the part of the company with some formal or procedural requirement which would have been necessary to make the ostensible agent's authority complete.

[23] Failing actual authority as indicated, the Applicant had, in an attempt to establish ostensible authority to bind the Respondent to the lease agreement, alleged that (1) **the Respondent's full names and registration number is reflected in the lease agreement signed by Reichman,** (2) **the Respondent has occupied the property since 7 March 2015 and for which Respondent has paid rental from its bank account from 23 February 2015 and (3) a bank guarantee obtained was issued on behalf of the Respondent and signed by Reichman.** The Applicant alleges that Reichman's authority to act on behalf of the Respondent can be inferred from these events, more so the payment of rental it alleges by the respondent and the provision of a guarantee by the Respondent.

[24] The bank guarantee for the deposit that Applicant is referring to dated 6 March 2015 is signed by Reichman. In the guarantee, the bank confirms to hold a deposit as security at the disposal of Fountainhead **in respect of the agreement of lease between Elite Oil Management (Pty) Ltd,** on behalf of the Respondent and Fountainhead (referred to as the

landlord) over the property. The guarantee instead introduces another entity to the equation to have been the one that had entered into an agreement of lease with Fountainhead on behalf of Respondent. Reichman's signature is affixed on the guarantee without indicating which entity he represents or in what capacity. Whilst in the lease agreement he indicated to be acting on behalf of Colour Harmony. It therefore cannot be concluded that the signing of the guarantee by Reichman establishes a representation/conduct by the Respondent from which Reichman's ostensible authority can be inferred, to bind the Respondent to the lease agreement. It is not a representation by the Respondent and therefore does not amount to conduct from which ostensible authority can be imputed.

[25] In addition, the Applicant reliant on the Tenant/Debtor Transaction Statement it issued for the period March – October 2015 annexed to its Replying Affidavit, alleged that the rental payments indicated in the statement were received from Respondent's bank account. The payments according to it created an appearance that Reichman's had authority to enter into the lease agreement on Respondent's behalf. However the statement shows the name of the tenant to be "Colour Harmony", with no mention of the name of the Respondent anywhere in the statement. According to the statement Colour Harmony is in arrears in the amount of R 671 311.24, the amount claimed from the Respondent. No payment is indicated to have been made by the Respondent or to be owed by the Respondent. The statement also fails to establish the alleged conduct that establishes ostensible authority.

[26] It is also of significance to note that Reichman has signed the lease agreement on behalf of Colour Harmony, the tenant that is evidently reflected in the statement of account. The Applicant then goes and cites the Respondent as Tip Top Nails trading as Colour Harmony. However nothing is said in its founding affidavit about Colour Harmony nor does the Applicant explain the reason for citing the Respondent in that way, also why Reichman's actions on behalf of Colour Harmony would be ascribed to the Respondent.

[27] Consequently, the court cannot find that the Applicant successfully established conduct or representation from which ostensible authority could be inferred, that is representation or conduct by the Respondent that could have **misled the Applicant** into believing that the purported agent Reichman had authority to bind the Respondent. Applicant in that case has failed to establish a contractual claim against the Respondent.

[28] The Applicant has furthermore not succeeded in establishing sufficiently its *locus standi* to bring a claim in respect of, or to exercise any right over the property let. As a result likewise the eviction claim cannot stand on the facts proffered by it.

[29] Under the circumstances I make the following order:-

THE ORDER

[28.1] The Application is dismissed with costs.

N V KHUMALO J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

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