REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

NORTH GAUTENG DIVISION, PRETORIA

CASE NO: 68360/2013
DATE: 10/8/2016

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

TRANSNET SOC LTD	Applicant
and	
STONE SENSATION (PTY) LTD (Registration Number 2..)	1•[1] Respondent
CATHARINE FREDERIKA DYKMAN	2ND Respondent

J U D G M E N T

MSIMEKI J,

INTRODUCTION

[1] The applicant, in this application, seeks an order evicting the first and second respondents from the property situated at [1..]Lynette Street, Koedoespoort ("the property"). The applicant secondly seeks an order directing the respondents, jointly and severally to pay to it an amount of R276.353.98 which, incidentally, was amended as well as costs of suit on the attorney and client scale. The application is opposed.

BACKGROUND

[2] The applicant and the first respondent concluded a lease agreement pertaining to the property on 16 August 2012. The lease agreement ("the lease") would commence on 1 September 2012 and expire on 31 August 2015. There were several problems pertaining to the property prior to the conclusion of the current lease. The property was initially used by the second respondent's husband who carried on business of manufacturing distribution and selling concrete products. A Mr Louis Erasmus (Erasmus), after the death of the second respondent's husband agreed with the second respondent to do business together. Erasmus had his own company Talisman Compressed Air (Pty) Ltd. The company which was run by the second respondent's husband was to be liquidated while two other companies would be formed. The two companies called Rotsvas Holdings (Pty) Ltd and Rotsvas Trading (Pty) Ltd were formed.

[3] Problems arose which resulted in the parting of the second respondent and Erasmus. Erasmus, the second respondent's husband and the second respondent had leased the property from Transnet Ltd. The second respondent formed the first respondent upon picking up problems with Erasmus. The problems led to the first respondent and Transnet Ltd joining forces in order to evict Erasmus from the property. It was not an **easy** battle.

[4] The first respondent and Transnet brought an application under case number 56291/2012 in the North Gauteng High Court, Pretoria, against the two companies that were formed, Erasmus and his company seeking an order evicting them from the property. The matter was settled. Erasmus did not immediately vacate the property. This delayed the first respondent which could not take immediate occupation of the property. The first respondent was delayed by six months while the eviction application was in progress. The property, according to the answering affidavit of Gerhard Reiner Coetzee, in the current application, was maliciously sabotaged by Rotsvas (the two companies that were formed) and Erasmus. The damage to the property that was left behind was huge and considerable (one must at this stage mention that the second respondent formed the first respondent and stood surety for the rental payments, by the first respondent, to the lessor in respect of the property).

[5] The leased property was to be used for "manufacturing of concrete products distribution and selling". The respondents contend that the property, when occupation was finally taken by them, was not fit for its intended purpose. This, according to them, resulted from the expensive damage that was caused by Erasmus when he, too, eventually vacated the property. The respondents contend that for the property to be restored to a position where it could partially be useable they had to part with a considerable amount of money. The respondents refer specifically to the clauses of the lease and then conclude that the applicant breached the terms and conditions thereof barring the applicant from being entitled to the order that it prays for. The applicant disagrees and contends that the breach has been committed by the respondents who must pay the rental that is due owing and payable to it by the respondents who must vacate the property.

[6] In the main, the problems that have to be resolved relate to the interpretation of the lease.

[7] The respondents, to substantiate their contention relating to the damage to the property, have annexed to their answering affidavit, annexures EH8.1-EH8.34 and, annexures AA 15.1-15.30. These, according to the respondents, are respectively photographs of the property when the respondents took over occupation and after the property was partially restored. There is clearly a remarkable difference.

[8] The respondents' case is that:

1. The contract was concluded before the property was damaged, and before occupation was taken by them.

2. Despite the damage the applicant did not cancel the lease.

3. The respondent took occupation in the midst of the problems and negotiations between the applicant and the respondents which resulted in the respondents taking over occupation of the property.

4. The negotiations went on even after occupation was taken. The respondents contend that they were persuaded to go on with the lease by the negotiations.

5. During the negotiations, the applicant changed it's stance and demanded payment of the monthly rental and other charges against the spirit and content of the negotiations.

6. The respondents did not pay the amount that the applicant demanded but, instead, relied on provisions of certain clauses of the lease to justify their non-payment.

7. They were not afforded vacant possession on the agreed date of 1 August 2012.

8. They were and are entitled to remission of rent as a "rental agreement **is a** reciprocal or 'synallegmatic contract' which creates reciprocal duties on the respective parties".

9. The applicant is in default for having breached the terms of the lease and that, therefore, *"exceptio non adimpleti contractus"* is available to the first respondent because the applicant cannot seek to enforce the terms of the breached lease.

10. The respondents cannot be evicted under circumstances where the first respondent is entitled to remission of rent.

11. The applicant's case is based on a contract.

12. "In the context of the photographs and voluminous correspondence, the applicant, according to the respondents, failed to adduce any evidence whatsoever by a person with personal knowledge of the condition of the premises". The respondents contend that they negotiated a lot with Mr Hansie Marais (Marais), of the applicant, who ought to have provided an affidavit but did not. Marais according to the respondents, is fully aware of the state of disrepair of the property when occupation was taken. A lot has been said about him in the answering affidavit but, despite that, Marais's affidavit, according to the respondents, is conspicuously absent. The respondents attorney, Mr Hein Wiese, who is aware of what caused the first respondent to go on with the lease has deposed to an affidavit in support of the respondents' case. Marais and the applicant's attorney of record, according to the respondents', informed the respondents' attorney "that it would be cheaper to restore the premises (meaning the property) to the original condition, than to continue with the litigation opposing Erasmus in his attempt to asset-strip the premises, one month after the first respondent had taken possession of same".

13. The applicant, nowhere, suggests that it ever replaced any materials such as carports, paving or bulkheads and plants and no corroborating evidence is supported.

[9] The respondents rely on the following clauses of the lease:

1. Clause 47.3.2 provides:

"The lessee shall not be liable for the payment of rental for as long as it is deprived of beneficial occupation of the leased premises." (emphasis added).

2. *Clauses 47.5.1 provides:*

"47.5.1 The rental payable by the Lessee, shall be reduced pro rata to the extent of the infringement upon the Lessee's right of beneficial occupation." (emphasis added).

This relates to partial damage to the leased premises.

3. *Clause 47.5.2 provides:*

"The lessor shall repair the damage or restore a *portion of the leased premises at its own cost as soon as is reasonably possible".* (emphasis added).

4. Clause 49.1 provides:

"Should any disputes or claim arise between the parties ....the parties shall endeavour to resolve the dispute by negotiation." (emphasis added).

Further, an arbitration mechanism is provided for by clause 49 for the expeditious resolution of the dispute surrounding the pro rata rental payable.

(10] It was submitted, on behalf of the respondents, that the applicant, despite proof of the extent of the damages and the content of the negotiation, the applicant breached the above clauses. Further, it was submitted that the general rule is that a lessee is entitled to a remission

of rent if either through the lessor's fault, or through *vis major,* the lessee is deprived wholly or partly of the use, and enjoyment of the property let to him. This submission is correct. The applicant's breach of its duty to furnish the property in a condition fit for its intended purpose, according to the submission, on behalf of the respondents "amounts to a breach of a continuing obligation giving rise to the *exceptio non adimpleti contactus".* (See: **Thompson v Scholtz 1999 (1) SA 232 (SCA)).**

[12] It was further submitted, on behalf of the respondents, that certain types of reciprocal contracts do not envisage simultaneous performance. The submission relates to instances where a lessor must perform before rental may be demanded. (my emphasis added). The facts of this case, according to the respondents, seem to demonstrate that this is one of the cases in point.

[13] Advocate S W Davies (Mr Davies), for the respondents, submitted that the applicant could not "seek to enforce payment of rent in terms of a lease agreement, which it brazenly ignored" (emphasis added). Cancellation of such an agreement, according to him, is "invalid". There seems to be merit in the submission. (See: **Ntshiqa v Andreas Supermarket (Pty) Ltd 1997 (3) SA Transkei Supreme Court 60 at 66A-C),** where the court emphasised, as a corollary of the *exceptio non adempleti contractus,* that the aggrieved tenant was entitled to withhold performance as a means of enforcing the landlord's counter performance (See: **Ntshiqa v Andreas Supermarket (Pty) Ltd** *(supra)* **at 67H-68B).**

[14] A claim for remission is not defeated by an agreement to pay rent "without any deduction or abatement whatever" (See: **T H Restaurants (Pty) Ltd v Rana Pazza (Pty) Ltd and Others 2012 (5) SA 378 (WCC)).**

[15] The applicant relies a lot on the following clauses:

1. Clause 20.3 which provides:

"the Lessee shall not be entitled to withhold or delay payment of any moneys by the Lessee to the Lessor in terms of this Lease Agreement by reason of the leased Premises or any part thereof being in a defective condition or in a state of disrepair, or for any other reason whatsoever."

The lease, according to Mr Davies, expressly allows the tenant the common law remission of rental and the landlord's contribution to the costs of rendering the property suitable for its intended purpose.

2. Clause 60.1-60.3 which provide:

"60.1 This Lease Agreement (including all schedules and/or annexures attached to this Lease Agreement) contains the entire agreement between the Parties hereto and no conditions, warranties or representations made by any Party shall be of any force and effect, unless it is in writing and signed by both the Lessee and Lessor.

60.2 No officer, agent or representative of either Party shall have any authority to make representations, statements or warranties that are not herein expressed unless the same are made in writing and signed by a duly authorised person. No waiver by any Party of any of the terms of this Lease Agreement, or of a breach of any of the provisions thereof, shall be deemed to be a waiver thereafter of any such terms or of any succeeding breach.

60.3 No amendment, addition or cancellation of this lease Agreement shall be of any force or effect unless it is reduced to writing and signed by the Parties or their duly authorised representatives."

[16] It is noteworthy that the applicant did not decide to cancel the lease because of the destruction that was caused by Erasmus and the two

Rotsvas companies. This, according to the respondents, happened before the first respondent took occupation of the property. The applicant therefore cannot claim to have cancelled the lease in terms of clause 47.4. In fact, the applicant complains of non-payment of rental.

[17] The facts of the case, according to the respondents Counsel, disclose that clauses 47.5, 47.5.1-47.5.2 *(supra)* are very relevant to the case. These clauses deal with a situation where there is partial damage to the property.

[18] The **views** of the parties regarding this matter are divergent. There are, also, several disputes of fact which are glaring. The correspondence, according to the respondents, demonstrates that the applicant was aware of the disputes even before the first respondent took occupation of the property. With the knowledge of the disputes of fact existing in the matter, according to the respondents, the applicant ignored negotiation and arbitration procedures provided for by clauses 49.1, 49.2, 49.3 and 49.5 of the lease.

[19] Some of the disputes of fact, to mention but a few, relate to:

1. *Pro rata* rental;

2. repairs necessary to render the property fit for its intended purpose;

3. water and electricity;

4. the rate at which the water and electricity would be supplied;

5. the alleged breach of the terms of the lease by the applicant;

6. refusal by the applicant to compensate the respondents for restoring the property so as to make it partially useable; and

7. whether or not the defence of *exceptio non adimpleti contractus* is applicable to this case.

[20] In **Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1162,** Murray A.J.P dealt with the two methods employed when the court is called upon to resolve disputes. A party may institute an action or bring motion proceedings. Motion proceedings are preferable where there are no disputes of fact. This, because the delay and expense involved in a trial action can be avoided. According to the judge, "a *claimant who elects to proceed by motion runs the risk that* a *dispute of fact may be shown to exist'.* Again at 1162 the Court said:

"*...or the application may even be dismissed with costs, particularly when the applicant should have realised when launching his application that* a *serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of* a *protracted enquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the Court to apply Rule 9 to what is essentially the subject of an ordinary trial action".*

[21] The applicant according to Mr Davies was high handed and that this caused the present application. Mr Davies submitted that "the applicant, refused to discuss the respondents' contentions relating to vacant possession, the costs of remedial work, and the *pro rata* rental and purporting to cancel the agreement based *inter alia* on a claim for rental when the respondent was not in possession".

[22] Mr Gerhard Reinier Coetzee, the deponent to the answering affidavit, in paragraph 21.2 says:

"It is not clear on what basis the deponent can act on behalf of the Lessor, and his authority to do so and to institute these proceedings is in dispute, as is his authority to depose to the founding affidavit".

This, clearly, demonstrates that the respondents have properly objected to the deponent's authority to institute the proceedings and his authority to depose to affidavits.

[23] I have, above, demonstrated that there are several disputes of fact which the applicant, in my view, was aware of before it launched this application. The applicant, indeed, as correctly pointed out by Mr Davies, proceeded regardless. Indeed, the applicant took a risk. The application, for that reason, in my view, deserves to be dismissed with costs on a punitive scale.

[24] The authority to institute proceedings, and to depose to affidavits, according to Mr Davies, appears questionable. Advocate T Manchu (Mr Manchu), for the applicant, holds a different view.

[25] Mr Manchu submitted that annexure RA2, to the replying affidavit, resolves the dispute. An artificial person which would be a company or co-operative society, for instance, functions only through its agents and resolutions are required for proper decisions to be taken by them. These resolutions are passed in the manner that is prescribed by their constitutions. Those who represent companies, where proceedings have been commenced by way of petition, have in their affidavits, to demonstrate that they have duly been authorised to do so. This, indeed, is a "salutary rule" which applies also to motion proceedings. (See: **Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk 1957 (2) SA 347 (C) at 351D-H).**

[26] The respondents, in the answering affidavit, challenged the authority of Petrus Jacobus Human, the deponent to the applicant's founding affidavit (See paragraphs 21.2 of the answering affidavit on page 139 of the papers). This, according to Mr Davies, is an express challenge which called for a response which, according to him is lacking. The institution of proceedings and the prosecution thereof must be duly authorised. This is done to show that the institution and the prosecution

of a matter is not done by an unauthorised person on its behalf. It has to appear from the papers that the proceedings have been authorised by the company or the artificial person concerned. To prove that the proceedings have been properly authorised, an official of the company annexes a copy of a resolution to a founding affidavit. (See: **Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk (supra)).**

[27] To deal with the challenge, a special delegation of power was annexed to the replying affidavit as annexure "RA2". Mr Davies submitted that the institution of the proceedings in the name of the applicant does not appear from annexure "RA2". Annexure "RA2", according to Mr Davies, shows that Job Mbetana Malobola, in his capacity as Manager: Legal Services of Transnet Property with authority and powers delegated to him by the Group, Executive of Transnet Property on 21 December 2012 delegated with the authority and power to sub-delegate same further, to Petrus Jacobus Human in his capacity as Acting Regional Manager (Inland Region) of Transnet Property to execute and sign all affidavits in respect of the matter of Transnet Soc Ltd ("The applicant") and Stone Sensation Pretoria (Pty) Ltd ("the Respondent"), Catherine Fredrika Dykman ("the Second Respondent"). Malobola did this on 19 October 2014. Human accepted the delegation in September 2014 before he was delegated in October. The proceedings were instituted on or about 5 November 2013. The replying affidavit was deposed to on 9 October 2014 before the special delegation.

[28] Because of this annexure "RA2" is seen by Mr Davies as questionable. The question is: How could Human accept the delegation before it existed? The delegation, too, seems to relate to the execution and signing of all affidavits and not to the institution and the prosecution of the proceedings. Mr Davies submitted that the board of Directors of the applicant did not authorise the present application. The application, in my **view, was** not authorised and even if **I** am wrong the application is replete with very serious disputes of fact which the applicant, in my view, was aware of even before the application was launched. The

application, again, and on this basis, should be dismissed with costs on a punitive scale.

ORDER

[29] **In the result, the following order is made:**

The application is dismissed with costs on the scale as between attorney and client.

M. W. MSIMEKI

JUDGE OF THE HIGH COURT **OF SOUTH AFRICA**

GAUTENG LOCAL DIVISION **OF THE HIGH COURT,**

PRETORIA