



IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, PIETERMARITZBURG

Case no: 13452/2013

In the matter between:

ITHALA DEVELOPMENT FINANCE

CORPORATION LIMITED

APPLICANT

and

MOHAMED HUSSEN WARSAME

RESPONDENT

JUDGMENT

Delivered: 10 June 2014

MBATHA J

[1] This is an opposed application, whereby the Applicant seeks the following order:

- (a) That the Respondent forthwith vacate the premises occupied by him, described as shop C7, Ithala Centre, Estcourt, KwaZulu-Natal; and

- (b) That the Respondent pays the costs of this application on an attorney and client scale.

[2] The Respondent has raised a defence that he concluded a further three (3) years lease, following the termination of the written lease with the Applicant. This being a verbal agreement.

[3] Applicant has advanced that the issues which require determination are the following:

- (a) Whether the Respondent has satisfied the onus resting on it in proving the existence of oral lease; and
- (b) Whether the doctrine of estoppel precludes the Applicant denying the existence of such oral lease.

[4] The Respondent states that the issues that require determination are the following:

- (a) Whether a verbal agreement was concluded for a further three (3) years lease, following the termination of a written lease agreement;
- (b) Whether any such agreement is precluded by the provisions of the written lease agreement; and
- (c) If so whether such provisions are enforceable in the circumstances of the case.

[5] The Applicant avers that the onus in respect of all issues rests on the Respondent; whereas the Respondent submits that the Applicant bears the onus to prove a termination of the Respondent's right to possess.

I am of the view that the onus lies on the Respondent as he alleges the existence of an oral agreement and he must therefore bear proof thereof.

[6] Briefly, the summary of the fact are as follows:

- (a) The parties hereto entered into a written lease agreement for a period of 36 months commencing from 1 April 2009 and terminating on 31 March 2012. This lease was terminated by the effluxion of time on the 31st of March 2012;
- (b) The lease was not subject to any renewal period, though the Respondent remained in occupation of the premises and continued to pay rent;
- (c) The parties agreed that any occupation post the expiration of the lease agreement, shall be construed to be a monthly tenancy at the last monthly rent payable in terms of the lease, plus 25% and otherwise on the terms and conditions of the lease;
- (d) The parties agreed that the lease agreement will under no circumstances be tacitly relocated; and
- (e) The lease was subject to a non-variation provisions and an undertaking by the Respondent to pay legal costs on attorney and client scale.

[7] The dispute relates only as to whether after the termination of the written lease agreement, the parties entered into an oral agreement or not.

[8] The Respondent was already in occupation when the lease agreement was concluded. He remained in occupation of the premises to date. The lease agreement terminated on the 31st of March 2012. It is noted that new developments have come since to place, a new three (3) story building is to be constructed by the Applicant at the cost of R40 758 793, 34. For this project to come into fruition, it involves the demolition of the Ithala Centre in Estcourt, where the Respondent is a tenant. A notice of termination was given to all tenants including the Respondent. It is important to note that already at that stage; the Respondent was already on a month to month tenancy. The notices of termination were dated the 5th of July 2012. All other tenants complied, except for the Respondent.

[9] Subsequently, thereafter, the Applicant sought to evict the Respondent in this Court under case no. 3775/2013. Respondent raised a defence that he had concluded a verbal agreement with the Applicant, in terms of which he was entitled to occupy the premises. The action was withdrawn. Respondent was afforded a new notice giving him three (3) months' notice to vacate the premises. The expiry date of the notice being the 30th of November 2013. Respondent did not move after receipt of that notice.

[10] The Respondent alleges that he was assured by the employees of the Applicant that this oral agreement will be reduced into writing. On the

strength thereof, he continued to be in occupation of the property and was invoiced for such occupation. As proof of such facts, his rental continued to increase. This has raised the question whether the Applicant wants to unlawfully evict the Respondent from the premises. He further submits that he was entitled to a six (6) months period notice in terms of para 32 of the agreement, which states that in the event that the landlord wishes to terminate the lease for purposes of re-building, including demolition, Applicant should afford the tenants six (6) months' notice.

11.1 The termination date of the lease was the 31st of March 2012. The letter telefaxed on the 24th of May 2013 from the Respondent to the Applicant has a heading "Application for renewal of the lease, shop no.7". The request is that he be afforded another lease for a period of three (3) years. It does not say, "I have a verbal lease agreement with you". This does not go with the spirit of a person who already has a verbal agreement with the Applicant. In that the letter he categorically states that his lease terminated on the 30 of April 2012.

11.2 Then there is a letter from Van Rooyen, attorneys, dated 30 July 2012 which was sent to, specifically to Mr Sifiso Radebe, purportedly from various tenants of the Applicant in the same complex. In that letter, one group disputes the month to month tenancy and the other group demands the completion of their terms of leases.

[12] I have looked at the terms of the lease agreement. The lease ended on the 31st of March 2012. In terms of the lease agreement there is no renewal period.

- (b) Clause 3 thereof is couched in the peremptory terms – “the lease shall commence and terminate on the dates provided for in the Schedule. The preamble gives the said dates”
- (c) Clause 7 of the agreement requires that the tenant give not less than three (3) months’ notice in writing to the lessor of its intention to do so. The letter sent by the Respondent to Sifiso, is making such a request at the end of May 2012, long after the expiration of the lease. Respondent signed the contract and accepted the terms thereof. The said terms of the contract are binding upon both parties to the contract.
- (d) The Respondent relies on a verbal request and vague promise, of which he knows very well that he cannot rely upon it. Clause 20 of the lease agreement state as follows in paragraph 20.1.3:

“No new agreement in respect of the subject matter of this agreement, if entered into after the expiry of this agreement; shall be of any force or effect unless, it is reduced to writing and signed by or on behalf of the parties. Furthermore, clause 20.2 thereof states that the parties confirm that they have agreed that this agreement shall under no circumstances be capable of being tacitly relocated.”

[13] The Respondent avers that post the end of the lease agreement, the rental escalated, as proof of existence of an oral agreement. This month to

month rental issue is provided for in the lease. Clause 21 basically states that such indulgences shall not be construed as a waiver of the Lessors' rights.

[14] The Respondent also relies on a letter addressed by Van Rooyen attorneys that the Landlord may terminate this agreement or any renewal thereof by giving the Lessee six (6) months' written notice, should the landlord wish to demolish the building or premises. In my view, this is not applicable to the Respondent. The Respondent is no longer a lessee as his lease terminated by the effluxion of time on the 31st of March 2012.

[15] I cannot find anything unlawful in the eviction of the Respondent. The premises are being demolished and rebuilt; he is thwarting such progressive developments at the expense of the Applicant, other contractors and government departments. His affidavit is not convincing as to the existence of the verbal case agreement.

[16] I cannot see why the doctrine of estoppel should operate in this case, when it is clear that there is no verbal agreement between the parties, nor is there any form of evidence before this Court that suggests that it was the intention of the parties to enter any verbal agreement into a written agreement, more so in the light of the developments that the Applicant was undertaking with the Department of Transport, and more so as the lease agreement with the Respondent expired on the 31st of March 2012.

[17] I find that the Applicant had no legal duty to inform the Respondent that it would not renew the lease; the written agreement itself placed that duty upon the Respondent.

[18] The Respondent who is relying on the doctrine of estoppel, he must prove that there was a representation by words or conduct of a certain factual position – **Road Accident Fund v Mothupi** [2000] 3 All SA 181 (A); 2000 (4) SA 38 (SCA).

18.2 If he relies on a representation by words, the Respondent must show that the representation was clear and unequivocal and that he or she reasonably understood the representation in the sense alleged.

- (a) The Respondent merely refers to a certain Sifiso Radebe, representing the Applicant; he does not mention the terms of the agreement or rather the content of their discussion. There is no clear, certain and unequivocal terms that were agreed upon;
- (b) There must, therefore, have been a causal connection between the representation and the act. This entails proving that reliance was not actuated by some external influence or factor other than the misrepresentation. **Stellenbosch Winery LTD v Blachos t/a The Liquor Den** [2001] 3 All SA 577 (A); 2001 (5) SA 597 (SCA);
- (c) The representation should have been made by the owner or a person entitled to deal with the property; and Sifiso is no such person

- (d) That the person who made a representation could be the defendant by means of a representation.

[19] It is important to note that the doctrine of estoppel cannot be used to make what is illegal, legal and cannot replace statutory requirements for the validity of contracts. **Trust Bank van Afrika BPK v Eksteen** (1964) 3 All SA 507 (A), 1964 (3) SA 402 (A), **Provincial Government of the Eastern Cape and Other v Contract Props25 (PTY) LTD** (2001) 4 All SA 273 (A), 2001 (4) SA 142 (SCA).

[20] The increase in rental is a consequences of a month to month rental, occasioned by the failure to give a notice of renewal of the contract irrespective whether its 25% or not. The Respondent is even unclear as to what were those re-assurances and representations were.

[21] I find that there is no evidence on these papers that suggests the existence of an oral agreement between the parties nor does the agreement cater for such an indulgence. The agreement also has a non-variation clause.

[22] *Locus standi* of the Applicant was never an issue with the Respondent in concluding the previous agreements. Whether that part of the leased premises was to be demolished or not, the contract ended on the envisaged date. The Respondent now alleges the existence of an oral agreement, which is non-existence.

[23] I therefore find that the Respondent has failed to prove the existence of an oral agreement and that he cannot rely on the doctrine of estoppel in so far as that alleged oral contract is concerned. The contractual relationship was governed by the written lease agreement, which specifically precluded a tacit relocation and a renewal, therefore, the conclusion of an oral agreement would be contrary to what is provided in the lease agreement. The written lease specifically states, that any variation thereto, any offer to renew the lease must be in writing. As rightfully referred to **Brisley v Drotsky** 2002 (4) SA 1 (SCA).

[24] The Respondent is bound by the terms of the written agreement between him and the Applicant. I therefore cannot accept the submissions made on behalf of the Respondent in this matter.

[25] I make the following order:

- (a) The Respondent is forthwith directed to vacate the premises occupied by him and described as shop C7, Ithala Centre, Estcourt, KwaZulu-Natal;
- (b) The Respondent to pay the costs of the application.

MBATHA J

Date of hearing: 20 March 2014

Date of Judgment: 10 June 2014

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