IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 40515/2013
DATE: 29/10/2014

In the matter between:

REDEFINE PROPERTIES LTD Applicant

and

UNIVERSAL SERVICE & ACCESS AGENCY OF SOUTH AFRICA Respondent

JUDGMENT

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED. ✓
27/10/2014
DATE SIGNATURE

DAVIS, AJ

INTRODUCTION:

[1] The Applicant is the lessor and the Respondent is the lessee of a certain immovable property situated in the Thornhill Office Park, Midrand, Gauteng.

[2] The relationship between the parties is governed by a written Agreement of Lease dated 19 August 2010.

[3] The rental and other amounts payable by the Respondent to the Applicant are provided for in clauses 4, 5 and 6 of the agreement read with item 9 of the schedule to the agreement.

[4] In addition to the monthly rental payable in respect of the office area, the storage area, the covered parking bays, the shaded parking bays and the open parking bays which constitute the leased premises, the agreement also provides for the payment of a contribution towards the municipal and utility charges levied on the premises.

[5] The relevant portions of the aforesaid terms of the lease agreement read as follows:

> *"4. RENT AND PAYMENTS*
>
> *4.1 The rental and other amounts payable by the tenant to the landlord as set out in item 9 of the schedule (read with clauses 5 and 6 of the Standard Terms and Conditions of Lease) shall be payable monthly in advance on or before the 1st day of each calender month ...*
>
> *5. VALUE-ADDED TAX*

5.1 All amounts referred to in this lease, unless otherwise stated, exclude Value-Added Tax ('VAT') payable in terms of the Value-Added Tax Act, No. 89 of 1991 as amended and any other rates, taxes or imposts which may be payable thereon...

5.3 In respect of any amounts payable by the tenant under this lease which are not quantified herein and which attract VAT, the tenant shall pay to the landlord the total of each such amount and the VAT thereon at the prevailing rate from time to time ...

5.4 In the event of any other form of tax, imposed by ... local ... authority, being payable by the landlord on the rent or on any other amount due by the tenant in terms of this lease, the tenant shall refund to the landlord on demand the amount of such tax or other amount so payable by the landlord ...

22. MUNICIPAL CHARGES, LEVIES AND UTILITIES (CHARGES PAYABLE BY THE TENANT)

22.1 Upon the tenant taking occupation of the leased premises ... the tenant shall be liable for and shall on demand pay –

22.1.1 any charges arising out of the use of electricity, water and gas in respect of the leased premises ...

22.1.2 the basic and service charges in respect of the services referred to in clause 22.1.1 above; and

22.1.3 the levy (including park- or sectional title-levy), rates, taxes or fees including those contemplated in clause 22.3 (if then in force), below, or a contribution to such levy, rates, taxes or fees determined on the basis contemplated in clause 22.2 below ...

22.2 The tenant's consumption of electricity, water and gas shall be determined in accordance with separate sub-meters ...

22.3 The tenant shall be liable for and pay to the landlord on a monthly basis 100% (One Hundred percent) of any levy (including park- or sectional title-levy), rates and fees due by the landlord to any competent or the relevant local authority. If at any time after the date of occupation or the commencement date ...

22.3.1 any levy (including park- or sectional title-levy), rates, taxes or fees payable by the landlord to any authority or precinct manager in respect of the leased premises, the building or the site are increased above those applicable at the effective date ... then the landlord shall be entitled to

recover from the tenant from time to time with effect from the date on which the increase, deposit, levy, rates, taxes or fees as the case may be, becomes effective 100% of such amount ..."

DISPUTES:

[6] The Applicant's case is that, in breach of the agreement, the Respondent has failed to pay rental and other charges on the due dates thereof and was in arrears therewith in the sum of R645 540.41. The Applicant relied on a reconciliation, detailing the arrear amount annexed to its Founding Affidavit as Annexure "PS3" thereto.

[7] Annexure "PS3" constitutes a schedule of debits and credits in respect of the lease agreement from 1 October 2012 to 1 June 2013, starting with a nil balance and ending with the claimed amount. In respect of each month, items relating to municipal sewerage, municipal water, municipal rates, office rent, store room rent, parking bay rent (in the various categories thereof) are debited together with VAT thereon (including VAT on the items of municipal rates). Payments are then credited against the amounts.

[8] The Founding Affidavit was deposed to on 11 June 2013, the Notice of Motion was dated 1 July 2013 and was served on 4 July 2013. On 6 July 2013 the Respondent made payment to the Applicant in the amount of R552 399.00, leaving a balance of R98 766.11.

[9] The Respondent contended that the amount paid was not as a result of the launch of the application but was the result of a verification and reconciliation process conducted by the Respondent in compliance with its obligations in terms of the Public Finance Management Act, No. 1 of 1999 (the "PFMA") and Treasury Regulations and pursuant to documentation obtained and an analysis of the Applicant's November 2012 tax invoice which included "*... amongst other things, back-charge of property rates for the period from September 2010 to October 2012*".

[10] As a result of the abovementioned reconciliation and payment, the Respondent contended it has paid everything that it was obliged to do.

[11] In particular, the Respondent contended that the municipal rates levied by the local authority constitute the supply of goods or services falling within Section 11 of the Value-Added Tax Act, No. 89

of 1999 which is taxed at 0%. The rates are therefore colloquially said to be "*zero-rated*".

[12] The Respondent further contended that a prior "*VAT ruling*" by the South African Receiver of Revenue dated 1 November 2009 which provided that VAT must be levied on the total rental consideration charged by a lessor (including the contribution to municipal rates) in terms of Section 7 of the Value-Added Tax Act, (at the standard rate of 14%), has been withdrawn.

[13] The Respondent further contended that a later VAT ruling by the Commissioner of the South African Revenue Services dated 11 December 2013, was only valid from that date (which post-dates the amounts claimed by the Applicant) and does not avail the Applicant.

[14] The VAT ruling of 11 December 2013 was precipitated by a request from the Applicant, formulated by the SARS Manager: Interpretation and Rulings as follows:

> "*Redefine requests a VAT ruling in respect of whether or not Redefine, as the landlord, should charge VAT at the standard rate on rates recovered from commercial tenants despite the fact that a 'municipal rate' as defined in the Value-Added Tax*

Act No. 89 of 1991, ('the VAT Act') is subject to VAT at the zero rate."

[15] The Manager: Interpretation and Rulings made the following ruling:

> *"5. 5.1 Redefine is required to levy VAT in terms of Section 7(1)(a) at the standard rate on the total rental charge for the letting of the property (i.e. including the rates).*
>
> *5.2 This VAT ruling is –*
>
> *5.2.1 effective from 11 December 2013 and*
>
> *5.2.2 subject to the standard conditions and assumptions as set out in Annexure "B"."*

[16] The aforesaid Annexure "B" determines that the ruling is based on the terms of the Applicant's current standard agreement and that it shall only apply to the Applicant and pursuant to Section 82(4) of the Tax Administration Act, the ruling may not be cited in any proceeding before the Commissioner or in courts of law other than in a proceeding involving the Applicant.

[17] Apart from the fact that the ruling does not apply to the period in respect of which the Applicant seeks to recover payment from the Respondent, the contents thereof and conclusion therein, on a first

reading, appears to offend the decision in **Commissioner, South African Revenue Service v British Airways plc** 2005(4) SA 231 SCA.

[18] In the end, I was however not called upon to decide the issue as Mr Cohen who appeared before me on behalf of the Applicant stated that the Applicant "*was prepared to afford the Respondent the benefit of the doubt*" regarding this issue. *Ex facie* the Applicant's reconciliation the outstanding amounts relevant to the VAT issue are R9 693.39, R27 254.56 and R9 628.34 (totalling R46 576.29) which also appear as individual items on Annexure "US2" to the Answering Affidavit, being the Applicant's disputed tax invoice for November 2012 as referred to in the Respondent's Answering Affidavit. When these amounts are deducted from the initial balance of R98 766.11 and, as I understand Mr Cohen, proper provision is made for the credit of interest thereon, the outstanding balance at the time amounted to R51 109.20. The Applicant therefore argued that the Respondent still remained indebted to the Applicant. Before me and on the assumption that the amount was arithmetically calculated correctly, there appeared to be little dispute about this.

[19] The Respondent's principal complaint was that it was improper for the Applicant not to invoice the Respondent timeously and monthly in

respect of the amounts due but to only "*suddenly*" demand payment of a huge amount not budgeted for as part of the Respondent's cash-flow position. The Applicant countered that the local authority had levied the "*back-charges*" and imposed same on the Applicant as part of the levying of arrears rates and taxes and the Applicant had simply simultaneously so invoiced the Respondent. The Respondent further contended that, as an organ of state subject to the PFMA, it was obliged to responsibly investigate, verify, calculate and reconcile all the amounts charged before making payment thereof and that this process took some time, resulting in payment only having been made on 6 July 2013. Lastly the Respondent contended that, had the Applicant timeously prior to the hearing of the application indicated its willingness to give the Defendant the proverbial benefit of the doubt regarding its argument on the levying of VAT on the municipal charges, it might have resulted in the aforementioned balance being paid. There was however, no indication why the Respondent had not in any event made the aforementioned calculations, excluding the VAT on the municipal rates items and interest thereon and made or tendered payment of the amount of R51 109.20 previously.

[20] As can be seen from the abovementioned discussion, virtually the only outstanding issue is that of costs.

[21] Whether or not the Applicant precipitated the initial payment of R552 399.00 by way of the launching of its application or not, the fact is that this amount was only paid on 6 July 2013, that is after the launch of the application. The amount which was then paid, was in respect of amounts already levied in November 2012. The payment can only amount to an admission of the fact that the Respondent was indeed in arrears with amounts due by it to the Applicant. Accordingly I see no reason why the Applicant should not at least be entitled to costs of the application until date of the aforesaid payment.

[22] The next question is then whether the Applicant should be entitled to costs for the remainder of the application in pursuance of payment of the amount of R98 766.11 which, by its own concession, was at date of the hearing of the application, reduced to R51 109.20. The Respondent argues that this concession and reduction should have the result that the Applicant should be disallowed its costs.

[23] It is of course to be commiserated that an opposed motion proceeds in the High Court for recovery of an amount which (on either of the two calculations of balance due after the payment of 6 July 2014) falls within the jurisdiction of the Magistrate's Court. I considered awarding costs to the Applicant on the Magistrate's Court scale only

but am of the view that the costs upon the employment of counsel, having regard to the initial intricacy of the VAT issue as well as the importance of the matter for the Respondent, would in any event have been allowed even in the lower court. I also considered whether a limitation of the recovery of costs by the Applicant should be ordered pursuant to the limitation of the amount claimed.

[24] Regarding the issue of substantial success and, as debated with counsel, there is very little difference between the present circumstances and those where a party had for example initially claimed R98 766,11 and only been successful in an amount of R51 109.20. The general rule regarding costs is that it should follow the event and such an applicant would have been substantially successful entitling an award of costs in its favour. In the exercise of my discretion and having taken all the circumstances of the case into consideration I am of the view that the same principles should apply in casu and that there should not be a limitation on the Applicant's costs or the scale thereof.

[25] Whilst interest had been calculated during the period preceding the launch of the application in accordance with paragraph 4.3 of the agreement between the parties, the Applicant has claimed in its Notice of Motion *mora* interest in terms of the provisions of the

Prescribed Rate of Interest Act, No. 55 of 1975. I am of the view that the Applicant is, since the launch of the Application entitled thereto.

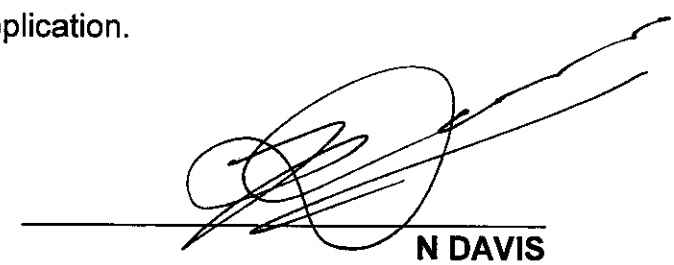
[26] Accordingly I make an order as follows:

26.1 The Respondent is ordered to make payment to the Applicant of the following:

26.1.1 The amount of R51 109.20;

26.1.2 Interest on the aforesaid amount at the rate of 15.5% per annum from 4 July 2013 to 31 July 2014 and at the rate of 9% per annum from 1 August 2014 to date of payment thereof;

26.1.3 Costs of the application.



N DAVIS
ACTING JUDGE OF THE HIGH COURT

DATE MATTER HEARD: 20/10/2014
DATE JUDGMENT DELIVERED: 29/10/2014