IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CIRCUIT LOCAL DIVISION, GEORGE)

CASE NUMBER: 16698/2010

DATE: 16 NOVEMBER 2010

In the matter between:

VIEWS OF THE WAVES AT WILDERNESS DEVELOPMENTS (PTY) LTD Applicant

and

LEILANI RESTAURANT (PTY) LTD Respondent

J U D G M E N T

FOURIE, J:

The applicant has approached the court on an urgent basis for an order ejecting respondent with immediate effect from the two restaurants and the kitchen in the building known as The Views Boutique Hotel, Wilderness, Western Cape Province. Respondent opposes the application. Due to time constraints during a busy circuit, I do not intend traversing the allegations of the parties in any great detail. I will merely summarise the main issues and provide brief reasons for the order which I

intend to make. I, therefore, accept that any person interested in this judgment is fully conversant with the content of the affidavits filed by the respective parties.

It is common cause that applicant is the registered owner of the immovable property on which the boutique hotel, which includes the two restaurants and kitchen, has been erected. It is also common cause that respondent is currently in occupation of the two restaurants and the kitchen ("the restaurants"). The respondent's defence against the applicant's *rei vindicato* is that the parties concluded a verbal agreement of lease during February 2010, in terms of which applicant let the restaurants to respondent for a period of 10 years, with an option to renew it for a further 10 years. Applicant denies the existence of the lease agreement and it is common cause between the parties that respondent has the onus of proving the existence of the verbal agreement of lease.

Applicant seeks final relief on motion and, as I have indicated, it is faced by a dispute of fact on the papers. Applicant, however, contends that when this defence of respondent is scrutinised, it does not create a real dispute of fact. Applicant accordingly argues that it is entitled to final relief by way of these motion proceedings. Respondent, on the other hand,

contends that a genuine dispute of fact has arisen, which bars the applicant from seeking relief of a final nature by way of these proceedings.

I should mention that at the outset, Mr Coetsee, for applicant, reiterated that applicant does not seek a referral of any issue for the hearing of oral evidence and that it accordingly stands or falls by the decision to have the matter adjudicated on the affidavits alone. The attitude of Mr Massel, on behalf of respondent, was that by virtue of the dispute of fact, coupled with applicant's decision not to seek an order referring any issues to evidence or trial, the application should be dismissed with costs.

It is trite law, as emphasised by Corbett, JA in Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) SA 623 (A), that, where in proceedings on notice of motion, disputes of fact have arisen on the affidavits, a final order may only be granted if those facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent, justify an order. Mr Coetsee, however, emphasised the well-known exception to this general rule, which was enunciated by Corbett, JA in Plascon Evans as follows at 634I-635C:

"In certain instances the denial by the respondent of the facts alleged by the applicant, may not be such as to raise a real, genuine or *bona fide* dispute of fact. Moreover, there may be exceptions to this general rule as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers."

The approach which a Court should follow in circumstances such as the present, was conveniently summarised as follows, with reference to the authorities, by Van Reenen, J, in Nampesca SA Products (Pty) Limited & Another v Zaderer & Others 1999 (1) SA 886 (C) at 892I-893B:

"Where there are disputes of fact, a Court can decide the issues only if it is satisfied that there are no real and genuine disputes of fact; that the respondent's allegations are so far-fetched or untenable that their rejection merely on the papers is warranted, or that *viva voce* evidence will not disturb the probabilities appearing from the affidavits. Although it is undesirable to endeavour to resolve disputes of fact on affidavit without the hearing of evidence and seeing and hearing witness before coming to a conclusion, it is equally undesirable

to accept disputes of fact at face value, because if that were done, an applicant could be frustrated by the raising of fictitious issues of fact by a respondent. Accordingly a Court should in every case critically examine the alleged disputes of fact in order to determine whether in truth there is a dispute of fact that cannot be satisfactorily determined without the aid of oral evidence."

In view of the aforegoing, I am called upon to adjudicate this matter, not by deciding whether the existence of the lease agreement relied upon by respondent, has been proved on a balance of probabilities or not, but by deciding whether the respondent's allegations in this regard are to be regarded as fictitious or so far-fetched or untenable that they do not create a real and genuine dispute of fact, with the result that their rejection merely on the papers is warranted. At the risk of being guilty of repetition, I wish to emphasise that the finding which I will in due course make, is not whether or not the existence of the alleged agreement of lease has been proved, but whether respondent's reliance thereon, together with applicant's denial thereof, give rise to a *bona fide* dispute of fact.

The respondent's version as to the conclusion of a verbal

agreement of lease during February 2010, has to be scrutinised against the following backdrop provided by the common cause facts:

(a) There are three separate legal entities which occupy space in appellant's immovable property, namely;

(i) The Views Boutique Hotel (Pty) Limited.

(ii) The Views Spar (Pty) Limited.

(iii) The respondent.

(b) Respondent took occupation of the restaurants in October 2009. Since then it has conducted the business of a restaurateur from these premises under the name and style of the "Sails" and "Flagship" restaurants.

(c) Respondent paid the expenses relating to the fixtures and fittings of the two restaurants, amounting to approximately R4 million.

(d) At some stage during 2009, Mr Du Toit, the director of applicant, made application to the National Department of Trade and Industry ("DTI") for a monetary grant of R10

million. In order to qualify for this grant, the various businesses conducted on the immovable property of applicant would need to operate as one entity. After Mr Bloemsma of respondent had been advised by Du Toit of the DTI's requirement, negotiations relating to a possible merger of the businesses of applicant, respondent and The Views Spa (Pty) Limited, took place. These negotiations were unsuccessful and finally broke down during the middle of 2010.

(e) After these negotiations had broken down, applicant's attorneys addressed a letter to respondent on 16 July 2010, notifying the latter that there is no formal lease agreement between applicant and respondent, and, by necessary implication, the occupation of the restaurants by respondent is on a month to month basis. Notice was then given to respondent to vacate the restaurants on or before 31 August 2010.

(f) Respondent's attorneys responded by means of a letter dated 30 July 2010, in which they recorded respondent's instructions that a lease agreement in respect of the restaurants is in existence. Details of the conclusion of the agreement of lease and its material terms, were set out as follows in this letter and I quote from pages 21

and 22 of the papers, particularly as from paragraph 8 of the letter:

"8. From the last quarter of 2009 until the end of the first quarter in 2010, our respective clients negotiated the terms of the lease agreement. Our client, duly represented by Mr Johan Bloemsma and your client, duly represented by Mr Theo du Toit, concluded an oral agreement of lease in and around February 2010. The material terms of the lease agreement are, *inter alia*, as follows:

8.1 The premises let by your client to our client, are those currently occupied by our client and from which our client owns and operates two restaurants, namely Sails Restaurant and Flagship Restaurant, both of which include space of two outside decking areas.

8.2 The effective commencement date of the lease is 1 October 2009.

8.3 The tenure of the lease is for a period of 10 years from commencement of the lease, with an option to renew by our client for a further 10 years on the same terms and conditions.

8.4 The rental payable by our client, monthly in arrears, is as follows:

8.4.1 For the month of October 2009, R24 997,00.

8.4.2 For the month of November 2009, R33 712,00.

8.4.3 For the month of December 2009, R128 702,00.

8.4.4 For the month of January 2010, R151 003,00.

8.4.5 For the month from February 2010 and for each consecutive month thereafter until expiration of the agreement, an amount of R132 000,00 as rental and an amount of R8 000,00 for lights, water, maintenance, insurance and other ancillary building costs not directly related to the premises.

8.5 Our client will pay amounts due to the Council for water and electricity consumed by it on the restaurant premises.

8.6 The rental payable by our client to your client will escalate at 9% per annum on the anniversary of the commencement date of the lease.

8.7 Our client would improve the premises let to it. The amount spent by our client on the

premises would be regarded as a contribution towards the rental for the entire period of the 10 year lease.

9. We point out that our respective clients, duly represented, agreed that the parties would meet in good faith in an attempt to agree by way of negotiation a reduction of the rental payable from 1 October 2010. The rental amount would be a reasonable rental in the form of a base rental plus turnover rental, having regard to, *inter alia*, the premises, affordability, our respective clients' cash flow requirements and a return on investment for shareholders of your client. Our client tenders to meet with your client in order to reach agreement of the reduced rental."

The central theme of Mr Coetsee's submissions in argument on behalf of applicant, was that, although it was initially the intention of the parties that a lease agreement would be entered into, the application for the DTI grant meant that a lease agreement was not on the table any longer and, therefore, there would not have been any negotiations for a lease agreement between applicant and respondent. He argued that what the papers show, is that negotiations for a merger between the businesses to be conducted from these

premises were afoot and when these negotiations finally broke down in July 2010, there was no agreement of lease in existence and, at best for respondent, it then occupied the premises in terms of a tacit monthly tenancy, terminable on one month's notice.

It would be apposite at this stage to have regard to what appears to be a change in stance by applicant in regard to the nature of respondent's occupation of the restaurants. In the founding affidavit, Du Toit, on behalf of applicant, took the position that in view of the pending DTI grant, the parties anticipated the conclusion of a contract for the management of the restaurants and not for the leasing of the restaurants. He contended that respondent took occupation of the restaurants without a lease agreement being entered into. In paragraph 6.11 of the founding affidavit, Du Toit says that:

> "A lease agreement for the restaurants was, therefore, not an option and was not considered."

Further in paragraph 7.3, Du Toit categorically states that:

> "No contract of lease was entered into between applicant and the respondent, not in writing or verbally or tacitly."

In paragraph 18.1 of applicant's replying affidavit, however, it is conceded by Du Toit that it was initially the intention of the parties that a lease agreement would be entered into, but that the application for the DTI grant meant that a lease agreement was no longer on the table. This was also the submission of Mr Coetsee at the hearing of the matter. From this it follows that respondent is, at least, correct in its contention that it took occupation of the restaurants at a time when it was the intention of the parties that a lease agreement would be entered into. This much is clear from paragraph 22.8 of the replying affidavit where Du Toit concedes that:

> "It was indeed a matter of the respondent renting from the applicant on a month to month basis in anticipation of the merger and the payment of the DTI grant."

In regard to this change of stance, Mr Massel, who referred to it more enthusiastically as a *volte-face*, also pointed to documentation annexed to respondent's answering affidavit, indicating payments made by respondent to applicant for the period October 2009 up to and including January 2010, which were referred to by applicant as rental. See Annexures JB3A and JB3B to respondent's answering affidavit, in which the payments are referred to as "contribution to rent as detailed in cash flow forecast". There is much to be said for the

submission of Mr Massel, that this change of stance was probably brought about by applicant being faced with its own invoices for payment of rental, annexed to the replying affidavit as JB3A and B.

Respondent also alleges in its opposing affidavit that:

> "Prior to this application and attorneys having been introduced, the applicant has received rental and other payments without demure."

The other payments referred to by the respondent were made in respect of services such as electricity, water, etcetera. Mr Coetsee submitted that these rental payments should be seen for what they are, namely contributions towards applicant's cash flow, pending the payment of the DTI grant. However, the fact of the matter is that these amounts were paid by respondent to applicant as a *quid pro quo* for the right to occupy the restaurants. It, therefore, constituted rental payments which is the label given to it by applicant.

It should also be borne in mind that in the letter of respondent's attorneys dated 30 July 2010, it is alleged that the parties agreed during February 2010 that these amounts in respect of the period October 2009 to January 2010, would be

payable in arrears as rental. Payment thereof was made on 16 February 2010, see Annexure JB4 to the opposing affidavit, in an amount of R385 769,16, which corresponds exactly with the amount indicated as the rental due on applicant's tax invoice, as per Annexure JB3B. To this extent the objective facts support the existence of the terms of the verbal agreement of lease contended for by respondent, as set out in subparagraphs 8.4.1 to 8.4.4 of respondent's attorneys letter dated 30 July 2010.

To summarise, at this stage one has a situation where the respondent took occupation of the restaurant in October 2009, with the parties intending to conclude an agreement of lease. Respondent spent approximately R4 million in kitting out the restaurants and has been conducting the business of a restaurateur on the premises since October 2009 to date hereof. Applicant now concedes that, at least until middle 2010, respondent occupied the restaurants as a lessee, although applicant maintains that it was only a monthly tenancy by virtue of a tacit lease which had come into existence. During the period of its occupation of the restaurants, respondent also made payment of amounts to applicant, which, as I have already described, applicant attached the label of rental payments.

It is now necessary to scrutinise respondent's contention that during February 2010, the parties reached agreement on the additional contentious terms, recorded in the letter of respondent's attorneys dated 30 July 2010. In particular, that a lease for a period of 10 years, with an option to renew for a further 10 years, had been agreed upon, at a monthly rental of R132 000,00 with effect from February 2010, together with payment of an amount of R8 000,00 per month in respect of ancillary expenses. In this regard, Mr Coetsee argued that it would not have made sense for the parties to have negotiated a merger for purposes of the DTI grant, on the one hand, while, on the other, a verbal agreement of lease on these contradictory and contentious terms would have been concluded.

I believe that it is important to bear in mind that there is no consensus on the papers as to the actual knowledge of the respective role players and their state of mind at the crucial stages of the relevant events. Contrary to Du Toit's contention that the parties were involved in protracted negotiations and extensive planning from May 2009, to ensure a successful application to the DTI for a grant, Bloemsma maintains that, although he was made aware during mid 2009 of an application to the DTI for a grant, he was unaware of the terms and conditions that the DTI attached to the application, nor, says

he, did he have sight of the application to the DTI. He says that it was only in early 2010, that Du Toit advised him that, in order to qualify for the grant, the various businesses would need to operate as one entity.

Applicant has, in reply, annexed e-mails as Annexures R3 and R6, in an attempt to show that before May 2009, Bloemsma did not only have knowledge of the DTI application, but that he was also involved therein. In paragraph 25.4 of the replying affidavit, Du Toit also alleges that:

> "There is more proof available that Bloemsma was part and parcel of the discussions and negotiations regarding the DTI grant that preceded the start of 2010."

This additional proof, was, however, not annexed to the replying affidavit, apparently to avoid prolixity. Du Toit further stated that such correspondence would be made available at the hearing of the application, but no further documents were forthcoming. Annexures R3 and R6 to the replying affidavit, do not necessarily gainsay Bloemsma's version in any material respects. R3 is dated 8 April 2009 and relates to a budgeted 10 year income statement of the restaurants "for inclusion into the structure we discussed last month". It does not refer to the DTI grant at all and does not say what the nature of the

structure referred, to would be. In the ultimate sentence, Bloemsma does refer to the structuring of a "combined entity", but the e-mail is silent as to the nature or purpose thereof, nor does it disclose that it would be in regard to the DTI grant. Annexure R6, dated 27 March 2009, was sent to various parties, including Bloemsma, by one Gail Mills of applicant, requesting more information "for the DTI subsidy application", but it does not show that Bloemsma was at that stage aware of the terms and conditions of the relevant DTI application.

An important factor to bear in mind, in my view, is that the Court has not been presented with any documentation relating to the DTI application and the grant thereof. In this regard documentation of the following nature comes to mind. The written application made to the DTI; the conditions for approval laid down by the DTI; the letter of approval and any conditions attached to such approval; correspondence between the parties, in particular between applicant and respondent prior and subsequent to the application being made and the approval thereof by the DTI; minutes or notes or memoranda relating to meetings and discussions between applicant and respondent and correspondence between applicant and/or respondent, with third parties regarding the prospective DTI grant.

What I basically have is the say-so of the parties. This illustrates the disadvantage of a Court having to decide a disputed matter on affidavit. Not only is such documentary material absent, but the Court does not have the advantage of seeing and hearing the witnesses and having their credibility tested by means of oral evidence and cross-examination.

To return to the crucial issue, i.e. can the version of respondent, regarding the conclusion of the oral agreement of lease, be dismissed out of hand as fictitious, far-fetched or untenable. It may be that this version can be criticised as improbable in certain respects. Particularly, seen from the applicant's point of view, it seems rather improbable that, while applicant was aware that to qualify for the DTI grant the businesses had to be conducted as an entity, it would have concluded a 10 year lease whilst still awaiting the outcome of the DTI application. However, viewed from the perspective of the respondent, the conclusion of the agreement of lease seems not only to have been logical, but imperative from a business point of view. It seems rather improbable that respondent would have invested R4 million on the strength of a tacit monthly tenancy, which could at any stage be terminated on one month's notice by applicant, especially in circumstances where the parties actually envisaged the conclusion of an agreement of lease, particularly at the time

when respondent first took occupation of the restaurants.

I should add that the change of stance of applicant, referred to earlier, raises some concern. The initial version of applicant was that, as applicant was in the process of applying for the DTI grant prior to October 2009, when respondent took occupation of the restaurants, there was no talk at all of an agreement of lease to be entered into. In the founding affidavit, as I have indicated earlier, Du Toit says that what was anticipated was a contract for the management of the restaurants. In the replying affidavit, however, he concedes that it was initially the intention of the parties to conclude a lease.

On applicant's version the parties were involved in negotiations and planning to ensure a successful application for a DTI grant since May 2009. So why would it then have been the initial intention to conclude a lease? Be that as it may, one also has to take into account the respondent's version of events regarding the DTI grant. Bloemsma states that Du Toit had intentionally misled the DTI into believing that the property and the businesses thereon were owned by one entity. He says that it was only after Du Toit became aware of the DTI grant being awarded to applicant, that he commenced negotiations between applicant and the other businesses for a

merger.

Bloemsma then asks what appears to be a valid question, namely, if there was no lease agreement, why would applicant wish to merge its business with respondent who has no security of tenure and may at any stage be ejected at will by applicant. According to Bloemsma, these negotiations broke down during middle 2010, with the result that respondent is still entitled to occupation in terms of the concluded agreement of lease.

On reflection, I am not convinced that this version of respondent can be described as fictitious or so far-fetched or untenable that it can be rejected merely on the papers. As I have indicated, there are not only disputes of fact as to the crucial issues, but the probabilities can also be said to be in favour and against both versions. However, neither version is, in my opinion, so improbable that it can be rejected out of hand. I am of view that the only way in which the truth can be established is to hear oral evidence after proper discovery of all relevant documentation by the parties. However, as indicated earlier, this is not the route that the applicant wishes to follow. I may add that, as the applicant had been fully apprised of the basis of respondent's defence prior to the bringing of this application, I may, in any event, have been

rather hesitant to refer the matter for the hearing of oral evidence.

I should add further that, in paragraph 18.5 of its replying affidavit, the applicant has criticised the material terms of the lease agreement on which respondent relies in various respects, but what this amounts to is an invitation to the Court to determine the probabilities. That the Court cannot do, as motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. See the remarks of Harms, DP in NDPP v Zuma 2009 (2) SA 277 (SCA) at 290.

It follows that the application cannot succeed. The application is, therefore, dismissed with costs, including the costs of 14 September 2010.

_____

FOURIE, J