Republic of South Africa
In The Western Cape High Court of South Africa

In the matter between: Case No: 25461/2010

Micromath Trading 10 CC t/a St George's Hotel Applicant

Versus

The Patrick Partnership First Respondent

Smith Tabatha Buchanan Boyes Second Respondent

Judgment delivered: 29 March 2011

Louw J

[1] At all material times the first respondent was the owner of the building known as the Absa Centre situated in the centre of Cape Town. In terms of a lease agreement, the applicant traded as the St George's Hotel in parts of the building.

[2] A dispute between the applicant and the first respondent resulted in arbitration proceedings which were settled on 4 December 2009. The settlement was made an award by the arbitrator on the same day.

[3] The settlement provided that the applicant would vacate the hotel premises on 31 March 2010 and that the first respondent would on that day buy from the applicant the assets, furniture and fittings in the premises for an amount of R2,3m; that the first respondent provide security for the amount of R2,3m plus a further amount of R450 000 in regard to a MTN World Cup contract which the applicant had and that the first respondent would employ all staff members currently employed by the applicant.. The security was to be provided by no later than 31 January 2010, either by way of an irrevocable bank guarantee or by paying the amount into the trust account of the first respondent's attorneys, the second respondent.

[4] The settlement further provided that the R1m security held in terms of the lease agreement by the first respondent would be released to the applicant on or before 31 March 2010.

[5] The first respondent failed to provide security by 31 January 2010 and on application brought by the applicant, this court made an order on 18 February 2010 in terms whereof the settlement and arbitrator's award was made an order of court and, in addition, the first respondent was directed to furnished the security by no later than Thursday, 25 February 2010.

[6] During March 2010 the first respondent deposited an amount of R2m 750 000 into the second respondent's trust account. This amount covered the security for the sale of the assets at R2, 3m as well as the further amount of R450 000 relating to the MTN World Cup contract.

[7] A number of disputes arose between the parties in relation to the implementation of the settlement agreement and the applicant did not vacate the premises on 31 March 2010.

[8] On 12 April 2010 the applicant's attorneys wrote to the second respondent as follows:

> 'We indicated that our client considers your client's refusal to abide by the terms regarding the employment of existing staff to be a clear and flagrant repudiation by your client of its obligations in terms of the arbitral award. Our client has elected to accept this repudiation.'

[9] On 23 April 2010 the applicant's attorneys again wrote to the second respondent as follows:

> 'Our position remains that your client repudiated the agreement by advising that it, as the nominated operating company, did not intend to offer our client's employees employment as stipulated in the agreement. Once our client accepted such repudiation, the agreement was no longer of any force and effect and does not revive simply because your client wants to change its mind.'

Later on in the same letter the attorney refers to the settlement as 'the now defunct agreement'.

[10] The applicant remained in occupation and continued to conduct the hotel business from the leased premises on a month to month lease. The date upon which the applicant would vacate the premises was from time to time extended. Further disputes arose between the parties regarding the payment of arrear electricity charges and the amount of rental which was due.

[11] Mr Engers who appeared with Mr. Coughlan on behalf of the applicant submitted that the parties by their conduct and by express agreement acknowledged that the settlement and order made pursuant thereto, remained in force, subject only to the date of vacation. The MTN World Cup contract fell by the wayside and it is common cause that the security relating thereto was no longer an issue.

[12] On 6 August 2010 the applicant's attorneys wrote to the second respondent that the applicant would be vacating the premises on 14 August 2010 and requested that the second respondent release the deposits of R1m and R3,2 m when the applicant vacated the premises. In response thereto the second respondent wrote on the 12th August 2010 that it no longer held the security for the payment of the assets and the MTN World Cup contract and proceeded as follows:

> 'We are still of the opinion that the court order remains as regards the fixtures and fittings in the amount of R2,3m when your client vacates the premises. This is with the proviso that indeed your client has not

removed the items listed in clauses 3.1, 3.2 and 3.3 of the arbitrator's award/court order. Again our client has not been allowed to carry out a full and detailed asset register and inspection.

Our client remains bound by the court order in relation to the payment of the above assets if indeed they exist at the premises when your client vacates.'

[13] Pursuant to the applicant finding out that the second respondent no longer held any amount by way of security, the applicant launched the present application in November 2010. The applicant seeks orders:

1. Holding the first and second respondents in contempt of the court order of 18 January 2010; and
2. Compelling the first respondent to comply with the court order and to reinstate security for payment of the assets in the sum of R2, 3m.

[14] The basis for the final relief sought by the applicant is the settlement agreement which was made an order of court. It is clear from the papers that the applicant cancelled the settlement agreement during April 2010. The only question which remains is whether the agreement was subsequently revived by the conduct of the parties. The first respondent did not pursue in argument the defence based on section 197 of the Labour Relations Act.

[15] The revival of the settlement agreement is in dispute. Mr. Manca on behalf of the respondents submitted that, because of the numerous factual

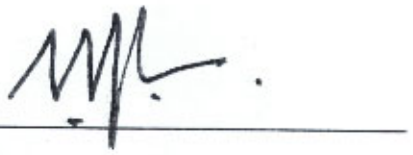
disputes, this is not an issue which can be decided on the papers. Mr. Engers submitted, however, that this is a case where the disputes raised by the first respondent are palpably implausible, clearly untenable and amount to mere assertions devoid of detail so as to constitute bold denials that merit rejection on the papers. In this regard he pointed out that the first respondent gave no reasons for retracting the security which was in place. In my view, it is not possible to decide on the papers whether the parties, expressly or through their conduct, reinstated the agreement or whether they were simply engaged in a process of negotiating a basis upon which the applicant would vacate the premises. There simply are too many variables on the papers. The applicant has consequently not on these papers established that it is entitled to an order that the security be re-instated.

[16] As far as the contempt of court proceedings are concerned, it is clear that since the second respondent is neither a party to the settlement nor a party to the court order of 18 February 2010, it cannot be held in contempt of court. As far as the first respondent is concerned, it is clear that it cannot be held to have been in wilful disregard to the court order. There is at least a dispute between the parties on the question whether the settlement and court order in regard to the furnishing of security remained in place. It follows that even if it were to be found that the court order remained in operation, the first respondent cannot be held to be in wilful contempt of that order.

[17] The following order is consequently made:

1. The application is dismissed.

2. The applicant is ordered to pay the first respondent's costs.



W.J. LOUW
Judge of the Western Cape High Court