IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case No: **9080/2010**

In the matter between:

BELMONT GUEST HOUSE (PTY) LTD Appellant

and

STEPHEN MALCOLM GORE N.O. First Respondent

MUHAMMAD RUSHDI RAJAH N.O. Second Respondent

In their capacities as liquidators of Erf 289,

Bantry Bay (Pty) Limited (In liquidation)

Master's Reference Number: C757/2008

JUDGMENT DELIVERED: 12 AUGUST 2011

FOURIE, J

[1] The appellant ("Belmont") appeals, with the leave of the court *a quo*, against the judgment and order of eviction handed down by Fitzgerald AJ on 23 September 2010. In terms of the order, Belmont and all persons holding through it were evicted from certain immovable property known as Erven 676 and 677 Oranjezicht, Cape Town ("the property"). The eviction application was brought by first and second respondents, the liquidators of Erf 289, Bantry Bay (Pty) Limited ("the company"). The company is the registered owner of the property.

[2] The following chronological summary of relevant events, which are either common cause or not disputed, provides the background to the eviction application:

(a) Since approximately 1991, Mr C R Jacobs and Mrs T Jacobs personally owned the property.

(b) In 1997, and for estate planning purposes, the property was transferred to and registered in the name of Exquisite Hotel Properties (Pty) Limited ("Exquisite"). At all relevant times Mr and Mrs Jacobs were the directors of Exquisite.

(c) Since 1997, Exquisite from time to time let the property to Belmont who conducted the business of a boutique hotel from the property. At all material times Mr and Mrs Jacobs were also the directors of Belmont.

(d) On 20 September 2006, the last written agreement of lease of the property ("the lease") was concluded between Exquisite (as landlord) and Belmont (as tenant).

(e) On 6 December 2006, the company became the owner of the property when it was registered in the company's name, pursuant to a deed of sale concluded between Exquisite and the company on 26 May 2006, in terms of which the property was purchased by the company for a purchase price of R10 million.

(f) In January 2007, Belmont ceded and assigned all its rights and obligations in and to the lease, to Exquisite.

(g) On 30 July 2007, an order was made by Allie J under case number 3770/07, confirming that the parties to the lease are the company (as landlord) and Exquisite (as tenant).

(h) On 6 May 2008, Exquisite and Belmont concluded a management agreement in terms of which Belmont would

conduct the business of a boutique hotel from the property, for which Exquisite would pay a monthly management fee to Belmont. To date Belmont has remained in possession of the property from which it conducts the business of a boutique hotel.

(i) On 20 June 2008, the company cancelled the lease with Exquisite.

(j) On 25 June 2008, Exquisite was provisionally wound up at the instance of the company.

(k) During November 2008, the company was provisionally wound up at the instance of Standard Bank, which order was made final on 12 December 2008.

[3] In the eviction application the respondents, in their capacity as liquidators of the company, sought the eviction of Belmont on the basis enunciated in cases such as **Graham v Ridley** 1931 TPD 476; **Chetty v Naidoo** 1974 (3) SA 13 (A) and **De Villiers v Potgieter and Others NNO** 2007 (2) SA 311 (SCA), namely that, as the company is the registered owner of the property and Belmont is in possession of the property, they are entitled to the eviction of Belmont and the restoration

of the property. It is of significance that Belmont, who bears the onus of proving its entitlement to possess the property, concedes that there is no contractual nexus between it and the company which entitles it to occupy the property.

[4] Belmont opposed the eviction application on the following two grounds:

(a) First, it raised the defence of *lis alibi pendens*, namely that there are pending proceedings in this court, including proceedings relating to its eviction from the property, which should be finalised before the eviction application is heard.

(b) Second, Belmont contended that it is, in any event, vested with an enforceable right to lawfully occupy the property.

[5] As far as the second ground of defence is concerned, the learned judge, in my view correctly, held that there is no basis upon which Belmont is lawfully entitled to the possession of the property *vis á vis* the company. It is common cause that the company is the registered owner of the property and Belmont concedes that there is no contractual nexus between it and the company which entitles Belmont to possess the

property. As appears from the summary above, Belmont ceded and assigned its rights and obligations in and to the lease agreement to Exquisite during January 2007. Subsequent thereto the parties to the lease were the company (as landlord) and Exquisite (as tenant). The lease was cancelled by the company on 20 June 2008.

[6] Belmont has placed reliance on the management agreement which it concluded with Exquisite on 6 May 2008, for its continued possession of the property. However, the management agreement only affords Belmont a personal right against Exquisite. It does not provide Belmont with any right *vis á vis* the company, as the owner of the property, to remain in occupation of the property.

[7] In these circumstances Belmont is in the same position as a subtenant who, upon the cancellation of the lease between the landlord and the tenant, has no legal entitlement to remain in possession of the property. See **United Watch and Diamond Company (Pty) Ltd & Others v Disa Hotel Limited and Another** 1972 (4) SA 409 (C) at 417D.

[8] I therefore conclude that there is no merit in Belmont's second ground of defence.

[9] This brings me to Belmont's remaining ground of opposition. The defence of *lis alibi pendens* is dilatory in nature and is explained as follows in Herbstein and Van Winsen, **The Civil Practice of the High Courts of South Africa**, 5th Edition, Volume 1, page 310:

> *"If an action is already pending between parties and the plaintiff brings another action against the same defendant on the same cause of action and in respect of the same subject-matter whether in the same or in a different court, it is open to the defendant to take the objection of lis pendens, that is, that another action respecting the identical subject-matter has already been instituted. Thereupon the court, in its discretion, may stay one action pending the decision of the other."*

It is trite that the exercise of the court's discretion in this regard, is based upon considerations of convenience and the determination of what is just and equitable in the peculiar circumstances of the matter.

[10] In raising this defence, Belmont points to the following proceedings which have also been instituted in this court and are still pending:

(a) Case Number 13749/2007

This is an action by Exquisite (prior to its liquidation) for the payment of damages by one Kenyon and five other defendants (including the company), caused by misrepresentations allegedly made by the defendants in the course of certain business transactions, including the sale of the property by Exquisite to the company on 26 May 2006. The action is defended.

(b) Case number 9762/2008

This is an application by the company (prior to its liquidation) for the winding up of Exquisite. A provisional order was obtained, but the matter became opposed. Opposing affidavits were filed, but to date no replying affidavit has been forthcoming.

(c) Case number 15946/2008

This is an application by the company (prior to its liquidation) against the liquidators of Exquisite, as well as Belmont and Mr and Mrs Jacobs. Wide-ranging relief is sought against the various respondents, including the eviction of Belmont, Mr Jacobs and Mrs Jacobs from the

property. The latter three parties have opposed the application and replying papers have not yet been filed.

[11] It is Belmont's case that, subsequent to the institution of action by Exquisite under case number 13749/2007, fraud was discovered on the part of a former director (Kenyon) of the company, which would entitle Exquisite to have the original sale of the property by it to the company, set aside. I should add that, to this end, Exquisite addressed a letter of cancellation to the company on 6 May 2008. However, no further steps were taken by Exquisite or its liquidators to pursue any relief consequent upon this purported cancellation of the agreement of sale of the property.

[12] What Belmont contends, is that the learned judge *a quo* ought to have suspended the present eviction application brought by respondents, to enable the aforesaid pending proceedings to be finalised as follows:

(a) First, the pending application for the liquidation of Exquisite under case number 9762/2008, should be disposed of.

(b) Once the order provisionally winding up Exquisite, has been discharged, the directors of Exquisite will be in a position to pursue Exquisite's claim for restitution of the property

against the company, based on the fraudulent misrepresentations previously referred to. This would require the summons in Exquisite's existing action under case number 13749/2007, to be amended to incorporate a cause of action for the cancellation of the original agreement of sale.

(c) When Exquisite succeeds with its amended claim for restitution against the company under case number 13749/2007, the legal effect will be that the lease agreement that existed between Belmont and Exquisite prior to the sale of the property, is restored. This would then enable Belmont to successfully oppose the application for its eviction under case number 15946/2008.

[13] It will be immediately apparent that the requisites for a plea of *lis alibi pendens* are not present with regard to the three pending matters referred to in paragraph 10 above. As far as the action under case number 13749/2007 and application under case number 9762/2008, are concerned, Belmont is not even a party to these proceedings. It can also not by any stretch of the imagination be said that the causes of action in those two matters are similar to the cause of action in the present eviction application. With regard to case number 15946/2008, it is an application

brought against Belmont and three other respondents, which is not confined to eviction. The papers therein are extremely voluminous with many aspects not germane to eviction. It is clearly far more convenient to allow the present eviction application between respondents and Belmont to proceed, than to suspend same pending the determination of case number 15946/2008, the latter involving three additional parties and six diverse causes of action.

[14] Counsel for Belmont was accordingly constrained to argue that a court, in dealing with an eviction application, has a general discretion to refuse the granting of an order on the grounds of equity and fairness. He further submitted that the court *a quo* erred in not exercising this discretion in favour of Belmont, by, at least, suspending the present eviction application pending the final determination of the other three matters which are pending in this court.

[15] It does not appear that the matter was argued on this basis in the court *a quo*, nor does the notice of appeal seem to include a ground of appeal along these lines. Furthermore, it appears that a court, in any event, has no equitable jurisdiction to refuse a claim for ejectment.

See W E Cooper, **Landlord and Tenant**, 2nd Edition, page 179, and the authorities there cited. In the latter regard it should also be borne in mind that the property is a commercial property, with the result that the provisions of section 26 of the Constitution and Act No. 19 of 1998, do not find application.

[16] Counsel for Belmont relied on the case of **E P Du Toit Transport (Pty) Ltd v Windhoek Municipality** 1976 (3) SA 818 (SWA) as authority for the existence of a discretion of this nature. However, what was decided in that case is that, where ejectment has been ordered, the court has a discretion in proper cases to suspend execution of the order. It accordingly provides no support for counsel's submission.

[17] It rather seems to me that, what Belmont seeks to invoke, is the power of the High Court to prevent the abuse of its process by staying proceedings in certain circumstances. The nature of this power and the circumstances in which it will be exercised, is succinctly described as follows in Herbstein and Van Winsen, **The Civil Practice of the High Courts of South Africa**, supra, page 306:

"...the power to do so will be exercised sparingly and only in exceptional cases. This should be done with very great caution and only in clear cases. Proceedings will be stayed when they are vexatious or frivolous or when their continuance, on all the circumstances of the case, is, or may prove to be, an injustice or serious embarrassment to one or other of the parties...".

[18] It should, however, be borne in mind that, although a stay of proceedings can be ordered when same are vexatious or an abuse of the process of the court, it cannot be granted in the exercise of an inherent discretion merely to avoid injustice and inequity. See **Fisheries Development Corporation of SA Limited v Jorgensen & Another; Fisheries Development Corporation of SA Limited v AWJ Investments** (Pty) Ltd & Others 1979 (3) SA 1331 (W) at 1340, where it was emphasised that the courts do not act on abstract ideas of justice and equity, but on legal principle. The court referred to the following remarks of Innes CJ in **Kent v Transvaalsche Bank** 1907 TS 765 at 773-774:

"The court has again and again had occasion to point out that it does not administer a system of equity, as distinct from a system of law."

[19] I am, in any event, not convinced that the bringing of the present eviction application by respondents amounted to vexatious conduct or an abuse of the process of the court. Nor am I convinced that there is any room, in the peculiar circumstances of this case, for the court *a quo* to have exercised any inherent discretion which it may have had, by suspending the present eviction application pending the final determination of the other three pending matters.

[20] In arriving at this conclusion, the following facts and circumstances are of importance:-

(a) The subsequent winding-up of the company has brought about a *concursus creditorum* which requires respondents as liquidators to liquidate the assets of the company expeditiously and inexpensively for the benefit of the creditors as a whole. To this end, the liquidators are required to sell the property, but due to Belmont's occupation thereof, they are unable to guarantee any purchaser vacant possession of the property. The issue with regard to Belmont's eviction should accordingly be dealt with as soon as possible and not be delayed by requiring litigation between third parties to be

disposed of before the adjudication of the current eviction application.

(b) There is no certainty or probability that the other pending matters will be successfully concluded, as envisaged by Belmont. As set out above, the course suggested by Belmont can only be successful:

If the order provisionally winding-up Exquisite, is discharged;

If the directors of Exquisite then succeed in having the summons in case number 13749/2007, successfully amended to incorporate a cause of action for the cancellation of the original agreement of sale concluded by the company and Exquisite;

If Exquisite succeeds with its amended claim for restitution against the company under case number 13749/2007;

If the lease agreement that existed between Belmont and Exquisite prior to the sale of the property, is then restored.

Apart from the uncertainty regarding the fate of the anticipated litigation, it will no doubt also be far more expensive and protracted than the adjudication of the current

eviction application. It is impossible to venture a guestimate as to the period of time required for this intended litigation to be finally completed.

(c) In the event of the sale of the property by Exquisite to the company being set aside, as envisaged by Belmont, Exquisite will be required to repay the purchase price of R10 million. There is no suggestion as to how Exquisite, which has been under provisional liquidation for a number of years, will be able to repay the purchase consideration to the respondents. The Standard Bank enjoys a real right in respect of the property, as it has a mortgage bond registered in respect thereof, and it would accordingly not be possible for the property to be re-transferred to Exquisite without this debt being settled. On the papers before the court, there is simply no indication that Exquisite would be in a position to do so.

(d) It is significant that, although Exquisite has been in provisional liquidation for a period of three years, the two erstwhile directors of Exquisite, Mr and Mrs Jacobs, have never attempted to have the Exquisite liquidation application enrolled in order to have the rule nisi discharged. Also, no

steps have been taken to prosecute proceedings under case number 13749/2007, based on fraudulent misrepresentation giving rise to a cause of action for cancellation of the original sale of the property and the restitution of the property to Exquisite. On the contrary, Exquisite has, at all relevant times, sought the enforcement of the deed of sale together with a claim for damages.

(e) The bringing of the present eviction application by respondents, was no doubt the correct procedure to be followed by them in the execution of their statutory duties as liquidators of the company. In this regard their conduct can certainly not be branded as vexatious or an abuse of the process of the court.

(f) Considerations of justice and equity certainly militate against the granting of a stay of the present eviction application pending the final determination of the three other matters. Why should the creditors of the company be prejudiced merely to afford Belmont, who has no right in law to possess the property, the opportunity of attempting, at great cost and by means of time-consuming litigation, to enhance its non-existent claim to possession of the property?

(g) Even if the litigation under case numbers 9762/2008 and 13749/2007, is successfully determined, as envisaged by Belmont, it will not, as a matter of law, result in the automatic revival of the lease agreement that had existed between Belmont and Exquisite.

[21] Further to paragraph 20 (d) above, I should add that Belmont's counsel submitted that, in view of the provisional winding-up of Exquisite, Mr and Mrs Jacobs, as the erstwhile directors of Exquisite, became *functus officio* and had no standing to oppose the winding-up of Exquisite. For this submission he relied on the decision in **Volkskas Bpk v Darrenwood Electrical (Pty) Ltd** 1973 (2) SA 386 (T). However, as explained by **Henochsberg on the Companies Act** (Meskin), Volume 1, page 736, the directors of a company cease to be such functionally, officially and nominally at the commencement of the winding-up, except for their retention of residuary power to cause the company to oppose the confirmation of a rule *nisi* operating as a provisional winding-up order. There was accordingly no legal impediment preventing Mr and Mrs Jacobs from enrolling the Exquisite liquidation application in order to have the rule *nisi* discharged.

[22] I am, for the above reasons, of the opinion that there is no merit in Belmont's first ground of opposition. In this regard it should also be borne in mind that, in deciding this matter, the presiding judge *a quo* exercised a discretion, and unless a court of appeal is satisfied that this discretion had not been exercised judicially, it would not be entitled to interfere. (See **Osman v Hector** 1933 CPD 503). I am not persuaded that the learned judge *a quo* failed to exercise his discretion judicially. On the contrary, I am satisfied that the court *a quo* properly considered all the relevant facts and circumstances in exercising its discretion and that there is no room for a finding that such discretion was not exercised judicially.

[23] It follows that the appeal falls to be dismissed. Respondents as successful parties, are entitled to their costs of appeal. Counsel for respondents sought a punitive costs order, but, in my view, there are not sufficient grounds for an order of that nature to be made.

[24] In the result the appeal is dismissed with costs.

P B Fourie, J

I agree

V Saldanha, J

I agree

M I Samela, J