Reportable

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no:A150/2012

DORMELL PROPERTIES 282 BK	Appellant
V	
EDULYN (EDMS)BPK	First Respondent
ALWAYN GIDEON BAMBERGER	Second Respondent

CORAM	The Hon Ms Justice T C **Ndita**
FOR THE APPLICANTS	Adv J P **Steenkamp** - 021 422 5875
INSTRUCTED BY	Ben Groot Attorneys - 021 914 0513
FOR THE RESPONDENTS	Adv Wilem **Coetzee** - 021 424 0506
INSTRUCTED BY	Gerhard Gous Attorneys - 021 887 6625
DATE OF HEARING	27 July 2012
DATE OF JUDGMENT	27 November 2012

Reportable

THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

A150/2012

In the matter between:

DORMELL PROPERTIES 282 BK	Appellant
and	
EDULYN (EDMS) BPK	First Respondent
ALWYN GIDEON BAMBERGER	Second Respondent

JUDGMENT delivered this 27th day of November 2012

NDITA; J

[1] The appellant is the registered owner of Cobble Walk shopping mall situated at Sonstraal Heights, Durbanville in the province of the Western Cape. It is common cause

that respondent leased a portion of the business premised under a written agreement concluded on 16 September 2008. The First Respondent conducts a restaurant business on the leased premises under the name Silverspoon Cafe, shop 26, Cobble Walk Center. Second Respondent is the director of First Respondent and bound himself as surety for the obligations of First Respondent in terms of the lease agreement. It is the Appellant's case that it cancelled the lease agreement due to the First Respondent's breach, thus it applied to this court for its eviction. In response to the application, Respondents raised several defences and disputed the validity of the cancellation on the basis that the Appellant was not entitled to cancel the agreement without first putting First Respondent to terms, and for this reason it refused to vacate the premises. Furthermore, according to the Respondents, Appellant fraudulently misrepresented the occupancy levels of the mall and created an impression that it was fully let and vibrant. In addition, Appellant did not provide the First Respondent with free and undisturbed possession in that during the occupancy, building works were incomplete resulting in work being carried out whilst the First Respondent was already trading. A further defence was premised on the fact that the appellant had instituted action for arrear rental in the Belville Magistrate Court and the matter was still pending. According to the Respondents, because the eviction application was based on the same facts as the action before the magistrate, the matter was therefore *lis pendens*. Without resorting to oral evidence, Steyn J, upheld the *lis pendens* defence and further held that there was a dispute of facts which could not be resolved without recourse to oral evidence. In the result, the application for eviction was refused. This appeal against the order so granted is with the requisite leave of the court a quo.

[2] The issues that arise from the defences raised by the Respondent can be best understood against the following facts: The lease agreement which is subject of this appeal entitled the First Respondent to remain in occupation of the business premises for a period of five years. The Second Respondent bound himself as Surety and Co-principal debtor for the due and proper fulfilment of all the obligations of the First Respondent by signing a Deed of Suretyship on 22 October 2008. The lease commenced on 1 November 2008 and was, but for the cancellation, supposed to terminate on 31 October 2013. The monthly rental for the internal area was R24 213.60 whereas the amount for the external area was R2907.00 inclusive of VAT. The cost for a parking bay was R450.00 excluding VAT. The First Respondent was also responsible for the payment of utilities enjoyed. The said amounts were payable on the first day of every month. It is common cause that the First Respondent failed to make rental payments for the months of November and December 2008, and between January and March 2009, effected payment of approximately half of the amount of the agreed rental. First Respondent in a letter dated 21 January 2009 advised Appellant that for the months of December and November 2008 it would not be making rental payment due to the incomplete and substandard building work rendering trading difficult and use of the parking bay impossible. Furthermore, for these reasons, it would reduce the rental from December 2008, by fifty percent. In addition First Respondent invited Appellant to advise it within seven days whether it accepted the proposal outlined above. Appellant declined the proposal in a letter dated 25 January 2009, wherein it stated that in the light of the rejection, it held First Respondent liable for the full rental amount. When First

Respondent failed to tender payment after the rejection of its proposal, Appellant launched action in the Magistrate Court for the recovery of the arrear rental in the sum of R91 154-84. On 9 March 2009 the Appellant cancelled the agreement and called upon First Respondent to vacate the premises with immediate effect. The First Respondent refused to vacate the business premises, and is still in occupation.

[3] As earlier stated in this judgment, one of the bases on which the Appellant's application was dismissed by the court a quo was the existence of factual disputes which could not be resolved on the papers. The approach to such disputes in an application for final relief as enunciated in **Plascon-Evans v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A), 634 is that the Court is obliged to accept the respondent's version unless it is far-fetched or untenable. As will become clear later in this judgment, there is no genuine dispute of facts with regard to the facts pertaining to the conclusion of the lease agreement. Given that the parties rely on a written agreement and that the facts relating thereto are not in dispute, in my view the only real disputes that arise are purely legal. The disputes can be said to revolve around first, whether or not the First Respondent was entitled to remit reduced rental as building had not been completed at the shopping centre at the time of Respondent's occupation; second, whether certain terms and conditions were incorporated into the agreement by reference, and, third whether there was a misrepresentation inducing the contract. Even then, such disputes pertain to questions of law and are not factual.

[4] I turn to firstly consider the facts pertinent to the Appellant's defence based on misrepresentation. The First Respondent relies for its failure to make full rental payment for the months of November 2008 to March 2009 on the fact that it was induced to enter into the agreement by the Appellant's misrepresentation that the premises were fully let. According to this proposition, based on the misrepresentation First Respondent was entitled to reduce the amount of the monthly rental. To this end the Respondents state that:

"10.2 Voordat ek die aanbod om te huur onderteken het op 12 September 2008 het ek baie moeite gedoen om die lewensvatbaarheid van die onderhawige winkelsentrum, Cobblewalk te ondersoek. Tydens gemelde ondersoek het ek vasgestel dat die gemiddelde huur van Cobble Walk meer as R100.00 per vierkante meter hoër is as soortgelyke winkelsentrums in dieselfde omgewing, maar dat 'n besigheid in Cobblewalk nogtans winsgewend kan wees indien Cobble ten volle uitverhuur is, m.a.w, indien daar genoeg voete deur gemelde sentrum beweeg. Voordat ek die aanbod om te huur onderteken het, Nolene Hancke ("Hancke") namens Applikant my meegedeel dat Cobblewalk ten volle uitverhuur is en dat verder 'n waglys van huurders is wat die betrokke perseel wil hê waarin ek belangstel en dat ek drie dae tyd het om die aanbod te onderteken.

10.3 Gemelde voorstelling was vals deurdat daar op daardie stadium slegs 40% van die totale vloeroppervlakte verteenwoordig. Hancke het geweet dat gemelde voorstelling vals was en het gemelde voorstelling gemaak met die doel om my te oorreed om die aanbod om te huur namens die Eerste Respondent te onderteken. As verteenwoordiger van Eerste Respondent was ek inderdaad deur gemelde wanvoorstelling oorreed om die aanbod om te huur te onderteken. Indien ek geweet het dat gemelde voorstelling vals was, sou ek nie die aanbod

om te huur onderteken nie tensy die huurgeld verminder was met R100.00 plus BTW per vierkante meter totdat Cobble Walk ten volle uitverhuur is."

It is trite that a party who has been induced by fraudulent misrepresentation to enter into a contract is entitled to cancel the contract and claim damages. **Christie, The Law of Contract in South Africa,** 6th edition page 281 succinctly lays out the effect of misrepresentation and fraud as follows:

" A party who has been induced to enter into a contract by the misrepresentation of an existing fact is entitled to rescind the contract provided the misrepresentation was material, was intended to induce him to enter into a contract and did so induce him to a contract and did so induce him. If the misrepresentation was fraudulent or negligent the innocent party is also entitled to damages."

[5] In the present matter, it may well be that the appellant made a misrepresentation about the occupancy levels of the business premises at the Cobble Walk mall thereby inducing First Respondent to enter into the contract, but that is not necessarily relevant for the eviction proceedings. This is particularly so because First Respondent remains in occupation based on a contract of lease it also acknowledges. The issue is whether or not at the time of the cancellation it was in breach of the terms thereof.

[6] The terms governing the agreement between the parties referred to as the **Offer to Lease Premises (the Lease Agreement)** are central in considering whether the provisions of the document styled **"Memorandum of Agreement of Lease"** and having

as an annexure a document entitled **'General Terms and Conditions of Lease'**, were incorporated by reference. Clause 9 of the lease agreement stipulates that:

"9.1 ....

..... Upon acceptance hereof by the Landlord, this offer shall become a binding agreement, mutatis mutandis with the terms and conditions of the Landlord's Agreement of Lease assigned to this project. (a copy of the Lease can be viewed at the following address: Suite OG, Nautica, The Waterclub, Beach Road, Granger Bay, 8005

9.2 The parties agree that after acceptance hereof they will sign the Lease for the premises whereupon this agreement will fall away. Any failure to sign shall not, however, affect the validity of the Agreement, but the duty to sign shall be enforceable at the instance of either party and pending such signature the provisions of 9.2 shall apply. Should there be any conflict between this Agreement and the Lease, the terms of the Agreement shall apply."

[7] First respondent signed the **Memorandum of Agreement of Lease** and the annexed General Terms and Conditions on 21 October 2008 but Appellant did not append its signature on the document. According to Appellant, based on First Respondent's signing of the same, the parties were bound by the provisions of Clause 18.1 thereof which state that:

" Save as otherwise provided for in the agreement the Tenant shall not have any claim, or right of action of any nature whatsoever, whether for damages, or a remission of rental, or cancellation, or specific performance or otherwise (not limited by the eiusdem generis) against the Landlord, and/or the Specified Person, nor shall it be entitled to withhold, or defer payment or rent, nor shall it be entitled to a remission of rent."

In seeking to enforce the eviction, and despite the appellant not having signed the Memorandum and General Terms and Conditions, it contended that it was the intention of the parties that they be incorporated into the original contract ('Offer to Lease Premises'). In addition, because First Respondent had appended his signature it was bound thereby. It is accepted that express terms may be incorporated into a contract by reference to one or more other documents. Scott JA in **Industrial Development Corporation of SA (Pty) Limited v Silver 2003 (1) SA 365** (SCA) at para [2] of the judgment (p368), discussed the matter and held:

[6] Incorporation by reference, as the name implies, occurs when one document supplements its terms by embodying the terms of another. Leaving aside for the moment the admissibility of extrinsic evidence that may be necessary to complete the identification of a document whose terms are sought to be incorporated, the first enquiry is whether the deed of suretyship may be supplemented in this way."

However mere reference to a document does not on its own have the effect of making that document a part of the contract. The reference to the document should be such that it shows the intention to incorporate the clause contained in it, into the contract. The original lease agreement specifically provides that failure to sign the Memorandum and General Terms and Conditions does not render the original lease agreement invalid but places the duty to sign at the instance of either party, and pending such signatures, the original agreement remains valid. Stated differently, for as long as the parties have not signed the Memorandum and General Terms and Conditions, the original lease agreement stands. This provision places a duty on the parties to sign the Terms in order for them to be binding. In my view, that is the clear intention of the parties and none of

the parties has, on these papers, alleged the existence of extrinsic factors necessary to prove otherwise. Given that only the First Respondent signed them, it clearly cannot be said that they were incorporated by reference. Besides, the document reveals that First Respondent deleted a provision relating to air conditioning, thereby indicating that it only accepts the terms in so far as they excluded the deleted provision. For them to be so incorporated, not only should Appellant have signed, it also had to accept the amendment or change so effected by First Respondent. There therefore has been no conscious acceptance of the terms as part of the contract by both parties, thus the reference is insufficient to incorporate the General Terms and Conditions into the lease agreement. Similarly, the appellant cannot rely on the *caveat subscriptor* rule as a basis for the validity of the General Terms and Conditions as the lease agreement mandates that they should be signed by both parties in order for them to be binding. In any event, the original lease agreement remains valid.

[9] It is arguable as Mr Steenkamp contended, that the general terms are what the parties were referring to in Clause 9.1 and 9.2. Equally, that may not be the case as it is not clear from the provisions of the above clauses whether that is what the parties had intended. For this further reason it cannot be held that Terms and conditions were part of the initial agreement.

[10] One of the Respondent's defences is that the agreement was not lawfully cancelled as First Respondent was not placed on terms prior to the cancellation. Although the agreement does not contain a provision pertaining specifically to cancellation, it can be accepted that like any other contract, even if the lease contains

no cancellation clause, the lessor is entitled to terminate the agreement where there is material breach of the lease. (See **W E Cooper, Landlord and Tenant**, 2nd edition, at page 266). I indicated earlier in this judgment that First Respondent offered a reduced rental due to incomplete building works in the premises. In response thereto, Appellant in a letter dated 11 February 2009 stated as follows:

"Your offer of settlement of November, December and January is not accepted and we accordingly hold you liable for full settlement of all amounts due to date. We will arrange for the credit to be passed to your account for the 13 days pro rata rent and parking rent for the month of November 2008 and this credit will appear in your next statement. We look forward to payment of all outstanding amounts by 15 February 2009, failing which we will take further action to recover all amounts due."

The above letter unequivocally put to the Respondents to terms. I do not believe that there is merit in this defence.

[11] The Respondent persisted on appeal with the defence that the matter is lis pendens before the Belville Magistrate's Court. The summons issued in pursuance of the action brought by the appellant in the magistrate's court reflects that the relief sought by it was payment of arrear rental in the sum of R91 154-84 plus interest and a confirmation of the rent interdict couched in the following terms:

"And further take notice that you, the defendant, and all other persons are hereby interdicted from removing or causing or suffering to be removed any of the furniture of effects in or on the premises described in the particulars of claim endorsed hereon which are subject to the plaintiff's hypothec for rent until an order relative thereto shall have been made by the court."

The principles applicable to a plea of lis pendens are trite and are that there must be:

1. pending litigation;

2. between the same parties or their privies;

3. based on the same cause of action; and

4. in respect of the same subject-matter.

Relying on the decision of the Supreme Court of Appeal in **Savvas Socrarus v Grindstone Investments 134 (Pty) Ltd**, case no 149/10 delivered on 10 March 2011, the court a quo held that because the proceedings in the magistrate's court had at the time of the launching of the application not been completed, it was premature for the applicant to seek the eviction of the First Respondent.

[12] The **Grindstone** matter referred to by the court a quo is clearly distinguishable from the present case. In the former , **Grindstone** approached the Mthatha High Court during March 2009 seeking confirmation of the lease agreement and the eviction of **Mr Socratus. Mr Socratus** brought it to the attention of the court that during June 2008, **Grindstone** had commenced litigation in the magistrates court for an order cancelling the lease agreement and the eviction of the appellant. Although this was disputed by **Grindstone**, it transpired that there were no less than three separate proceedings, all based on the cancellation of the agreement and two included eviction of **Mr Socratus** from the leased premises. It will be recalled that Appellant in the magistrate's court sought to recover arrear rental from First Respondent and the issue of cancellation and eviction did not arise at all. In the present proceedings, Appellant sought only the eviction of First Respondent. In the premises, the causes of action are entirely different. Having held that the *lis pendens* defence is not sustainable for the present purposes, all

that is required of Appellant is to successfully establish that some rental was owing, on the basis of which it was entitled to cancel the lease.

[13] The Respondents contended that the appellant did not give free and undisturbed possession of the leased premises mainly because of the incomplete building work which gave rise to ongoing repairs at the time of its occupation of the premises, thus it was entitled to reduce rental to fifty percent of the agreed amount, that being an abatement *pro rata* to its reduced enjoyment of the *merx* in line with the *exceptio non adimpleti contractus.* The main problems cited by First Respondent for the abatement of rental for the month of November 2008 is that the 3-phase electricity implementation was completed on November 6, 2008, as a result of which it could not obtain a Health certificate necessary for trading during that month. In addition, the air-conditioner in the front portion of the premises was out of order and, because of the construction work, First Respondent had to park outside. For the month of December, the First Respondent's major complaint was that the mall had not been marketed effectively and the air conditioning was still faulty. Similarly, during the month of January, the marketing was still ineffective. As a consequence of the above, the Respondent outlined the abatement as follows:

"November 2008

No rent we will compensate the direct cost.

No parking payment.

December 2008

Rent to be reduced to 50% less additional expenses occur (sic) plus direct cost.

No parking payment.

January 2009

Rent reduced by 50% plus direct cost.

No parking payment.

PAYMENT

Electronic payment has been made and copy of proof attached.

If you do not accept our settlement in respect or advice in writing within 7 days of this payment with your offer and conditions. (sic) We accept that you agree with the situation".

It is common cause that Appellant did not this settlement and proceeded to litigation.

[14] Be that as it may, Appellant in its replying affidavit concedes that because the original contractor responsible for the building works at the Cobble Mall was liquidated, it employed various subcontractors to complete the building works. Furthermore, Appellant contended that whatever maintenance problems there had been did not have any influence on trading by the tenants.

[15] The law relating to the *exceptio non adimpleti contractus* as set out in **Thomson v Scholtz** 1999 (1) SA 232 SCA AT 247 A – C is that:

"Where a lessee is deprived of or disturbed in the use or enjoyment of leased property to which he is entitled in terms of the lease, either in whole or in part, he can in appropriate circumstances be relieved of the obligation to pay rental, either in whole or in part; the Court may abate the rental due to him pro rata to his own reduced enjoyment of the *merx*. This is true not only where the interference with the lessee's enjoyment of the leased property is the result of *vis major* or *casus fortuitus* but also where it is due to the lessor's breach of contract e g because the leased property is not fit for the purpose for which it was leased, or as in this case, because the performance rendered by the lessor is incomplete or partial. (See the cases cited

by Piek and Klein supra at 380 footnote 112.) The lessee would be entirely absolved from the obligation to pay rental if he were deprived of or did not receive any usage whatsoever. That would simply be a manifestation of the exception, more particularly of the first proposition in *BK Tooling (cf Fourie NO en n' Ander v Potgietersrusse* 1987 (2) SA 921 (A)."

The Court further emphasised that a lessee who has not received beneficial occupation need not quit before he was entitled to refuse to pay rental or claim a remission and further held that:

"To award the landlord full rental when he failed to give his tenant full occupation is to offend against the first proposition in BK Tooling; and to deny a tenant a reduction of rental pro rata to his diminished enjoyment of the *merx* is to offend against all authority sanctioning a *remissio mercedis* when the landlord is in breach of the lease."

[16] It must be accepted on these papers that the First Respondent's beneficial enjoyment of the leased premises was to a certain extent diminished. In acknowledgment of this fact, the transaction schedule reflects that the appellant credited First Respondent for the 13 days delay in the installation of the 3-phase power. Similarly, the first respondent received credit for the non-use of the parking. This Court was however not requested to determine the abatement of the rental *pro rata* First's Respondent's reduced enjoyment of the *merx*. The question is whether or not Appellant has established that some rental was owing at the time of the cancellation of the contract. The payment schedule referred to above clearly reflects that no payment was tendered by First Respondent for the months of November and December 2008. The actual rental amount owing cannot be established on these papers. However, it is

common cause that the First Respondent occupied the premises and was trading during the aforesaid months. Clause 6.2 of the lease agreement provides that:

"In addition to the rental and Marketing Fund contribution as stipulated in "H1" below, the Tenant shall be liable for the cost of its own electricity and water consumption plus, on a monthly basis, a 'pro rata' share (the ratio between the area of the premises and the aggregate leasable area in the development) of the increases in assessment rates , as well as a 'pro rata' changer for refuse removal, sewerage and other fees levied by the local or regional authority and not directly recovered from the Tenant and not specifically provided for in the Landlord's Lease Agreement referred to in 9.3 ("the Lease").

[17] Applying the principle set out in the **Scholtz** judgement, it is eminently clear that First Respondent cannot be entirely absolved from the obligation to pay rental and utilities for the months of November and December because he received usage of the business premises, albeit partial. On the Respondents' version, it is clear that at least for the months of November and December no payment was tendered for water and electricity, whereas First Respondent was in full occupation of the premises. At the barest minimum, such payment was owing at the time of the cancellation. Even if one accepts that First Respondent was entitled to an abatement of rental, it would in my view be untenable to expect the lessor to foot the bill for the water and electricity usage of a trading Respondent. Having held that some amount was owing, it follows that Appellant was on this basis entitled to cancel the lease and evict First Respondent.

[18] In any event on the Appellant's version and accounting the shortfall in the payment of rental by First Respondent between the commencement of the lease and

March 2009 was R71 240.49. However, even accepting Respondent's version i.e., as to the reduced rental it should have paid as a result of the alleged defects in the premises and alleged misrepresentations made by the Appellant, there was a shortfall in its (reduced) payments over the same period of R7 220.49. In my view, this shortfall alone constituted a material breach of the original lease entitling the Appellant to cancel same and seek First Respondent's eviction.

[19] As to the costs, the Second Respondent bound himself as Surety and Co-principal debtor for First Respondent. In terms of clause 12 of the Deed of Suretyship, he undertook to pay all costs of any action instituted against him and First Respondent by the Landlord on attorney and client scale. There is no reason why he should not be bound by that undertaking.

[20] In the circumstances I propose the following order:

The Appeal is upheld with costs such costs to be paid jointly and severally by the Respondents, and the order of the court a quo is substituted with the following:

1. The First Respondent and all those who occupy by, through or under it, are evicted from the premises situate at Shop 26 Cobble Walk, corner of De Villiers Road and Verdi Boulevard, Sonstraal Heights, Durbanville with effect from ten (10) days of date of this order and are ordered to give the appellant undisturbed possession thereof.

2. The Sheriff of the Court, and/or his deputy and or South African Police Services are authorised and directed to do all things necessary to give effect to the aforesaid order.

3. The First and Second Respondents shall pay the costs of the application on the attorney and client scale, jointly and severally, the one paying the other to be absolved.

NDITA; J

I agree.

Bozalek; J

I agree and it is so ordered.

Veldhuizen; J