IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 21616/2015

In the matter between:

NICOLENE HAMMAN First Applicant

BERTUS PETRUS VAN DER MERWE Second Applicant

and

Respondent

ALBERTUS BAREND KOTZÉ

JUDGMENT DELIVERED THIS 22ND DAY OF APRIL 2016

RILEY, AJ

[1] On 9 November 2015 the first applicant brought an application for the eviction of the respondent (her father), from commercial premises known as No. 4, 14 Van Riebeeck Street, Rawsonville. The respondent opposes the application. On 16 November 2015 and by agreement between the parties the matter was postponed for hearing to 9 February 2016 on the semi-urgent roll. A time table for the filing of answering and replying papers was worked out and it was *inter alia* agreed that

respondent would report weekly in writing to first applicant on the turn over and sales of the ice cream business conducted at the said premises.

[2] On 27 January 2016 the second applicant brought an application to be joined as the second applicant to the application. On 9 February 2016 the parties agreed that the main application would be postponed to 23 March 2016 for hearing. Respondent was granted leave to file a further answering affidavit by 2 March 2016 and applicants were granted leave to file further replying affidavits before 9 March 2016.

[3] It is not in dispute that in and during the period 1998 the respondent entered into an agreement of lease with the second applicant in respect of premises known as number 2 and thereafter also in respect of the premises known as number 4, 14 Van Riebeeck Street, Rawsonville. This lease terminated in and during 2003. For the sake of convenience, I shall hereinafter respectively refer to the leased premises as unit 2 (i.e. number 2) and unit 4 (i.e. number 4). It is further not in dispute that after the respondent divorced his ex-wife, the first applicant's mother, that first applicant and her mother entered into a partnership agreement and conducted the businesses known as Alta's Food Liner and Nikki's Kafee and Take Aways.

[4] On 18 March 2005 first applicant and her mother dissolved the partnership agreement and it was *inter alia* agreed that the first applicant would become the sole owner of the business known as Nikki's Kafee and Take Aways, which business was conducted from the premises at 14 Van Riebeeck Street; Rawsonville. It was agreed that first applicant would conduct the business in her own name and for her own account.

[5] It is common cause that the second applicant is the registered owner of units 2 and 4 at 14 Van Riebeeck Street, Rawsonville and that at the time when first applicant launched this application a valid and enforceable agreement of lease existed between first and second applicant's in terms of which the first applicant would lease units 2 and 4 from second applicant. This lease expires on the last day of February 2020.

[6] Clause 8 of the lease agreement specifically provides that first applicant may not sub-let the leased premises without the written consent of the second applicant. It is not in dispute that the second applicant has never given the first applicant written consent to sub-let the said premises, nor has first applicant requested such consent.

[7] Respondent concedes that when his lease agreement with second applicant expired in 2003, that first applicant entered into a new contract of lease with second applicant on similar or "*soortgelyke terme*", as he puts it. The parties are also agreed that no written sub-lease was entered into between the first applicant and the respondent.

[8] It is further not in dispute that after the respondent's lease at the Van Riebeeck Street premises came to an end that he conducted an ice cream business known as Milky Lane in Worcester and that in November 2013 he moved premises from Mountain Mill Centre to Stockenstroom Street at Worcester. In October 2014 he sold this business to a certain Kaminisa Hoosen as a going concern.

[9] According to the first applicant she opened the ice cream division of her existing business, Nikki's Kafee and Take Aways, and operated it from unit 4, from about December 2014. As the respondent was unemployed and she was already employing

her mother and brother, she offered him employment as manager of the ice cream division of her business on the basis inter alia that he would be entitled to 60% of all profits generated from it. Respondent disputes that he is in applicant's employ and alleges that he and the applicant had entered into a sub-lease agreement in respect of unit 4 in terms of which it was agreed that she would sub-let the unit to him against payment of the sum of R2000-00 per month on the same terms as the lease agreement between first applicant and second applicant. Respondent further alleges that he is the sole owner of the ice cream business conducted from unit 4 and that he is entitled to the full profits generated by it.

[10] To bolster his claims of ownership of the ice cream business and his averment that he was sub-letting the premises from the first applicant, the respondent further alleges that he effected certain improvements to unit 4 and that he installed power points and air-conditioning units, which work he avers was respectively done by Rawson Elektries BK and SF Refrigeration CC.

General principles applicable to lease and sub-letting

[11] It is accepted law that where a party has a possessory claim in respect of property, that he or she may exercise that right in respect of all third parties. It is further trite law that where a lessee has no right to sub-let, the person to whom he or she gives occupation of the property, let in terms of a purported sub-lease, acquires no rights that may be enforced against the owner of the property and he/she may be evicted by the latter even if the original lease is not cancelled. See in this regard Principles of the Law

of Sale and Lease, Kerr et al p. 76 (1998), **Hissias v Lehman and Another** 1958 (4) SA 715 (T).

[12] In Hissias v Lehman and Another (*supra*) the applicant had in terms of a deed of sale sold an erf to second respondent and Clause 9 of the deed provided that the purchaser undertook not to cede his rights under the agreement or to sell or lease the property, without the written consent of the seller which consent was not to be unreasonably withheld. Whilst the property was registered in the name of the applicant, the second respondent had without obtaining the required consent, leased it to the first respondent and placed him in occupation. Roper AJ held at p. 718C that '… *The applicant has a real right in his property. As dominus he has the right of possession and occupation of it against all the world save and so far as he parted with his right to such possession and occupation. In an agreement such as that contained in this deed of sale the owner in effect says to the purchaser, 'I give you immediate occupation but I will give no right of occupation to any person substituted for yourself in occupation unless this is done with my written consent'. If a person is substituted without such consent, that person as it appears to me, is in unlawful occupation and in position analogous to that of a trespasser."* The applicant was granted an ejectment order. See also **Akoon v Jhavary** 1934 NDP 382.

The factual disputes and the general principles applicable thereto

[13] In the present matter there are three main factual disputes that appear from the papers, namely:

1. Whether the first applicant and/or respondent is the owner of the ice cream business which is operated from unit 4;

2. Whether first applicant and the respondent concluded a sub-lease agreement in January 2015; and

3. Whether the second applicant represented to respondent that his prior consent to conclude the sublease was not required i.e. that the principle of estoppel applies.

[14] I agree with Mr Bothma that the first factual dispute relates essentially to the first applicant and the respondent's entitlement to ownership of and/or the profits generated from the ice cream business, and related thereto, the question whether or not this issue is decisive in the determination of the relief sought in this application. In my view it is not necessary for me to make a determination on the ownership issue to decide whether or not the applicants' are entitled to the relief that is sought in this application. In dealing with the factual disputes I shall however deal with and refer to aspects relating to the ownership issue without making a final determination thereon.

[15] In regard to the approach to be followed by the court relating to the factual disputes in this matter, Ms Marais who appeared on behalf of the respondent, submitted that I should approach the alleged factual disputes on the basis of the well-known

principles laid down in **Plascon Evans Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA (A).

[16] In that matter Corbett JA (as he then was) held at 634E – 635C that:

> "*The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by Van Wyk J (with whom De Villiers J and Rosenow J concurred) in* ***Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd*** *1957 (4) SA 234 (C) at 235E – G to be*
>
> *"Where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts stated by the respondent together with the admitted facts in the applicants justify such an order… Where it is clear that facts, though not formally admitted cannot be denied, they must be regarded as admitted.*"

[17] It is correct that in proceedings on notice of motion where disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicants affidavit have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.

[18] In **Ripoll–Dausa v Middleton N.O. and Others** 2005 (3) SA 141 (C) at 151 G Davis J however held that "*the power of the court to give such final relief on the papers*

before it is however not confined to such a situation. In certain instances, the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact". See in this regard ***Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*** *1949 (3) SA 1155 (T) at 1163 – 5,* ***DA Mata v Otto N.O.*** *1972 (3) SA 858 (A) at 882 D – H. If in such a case, the respondent has not availed himself of his right to apply for the deponent concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court and the court is satisfied as to the inherent credibility of the applicants factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks …*" The learned judge held further that 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.

[19] In the present matter the respondent has not requested that any of factual disputes be referred to oral evidence. Mr Bothma has on the other hand submitted that in the present matter respondent's version must be rejected on the basis that the allegations made by him are far-fetched and manifestly untenable. He submitted further that this was indeed a case where the factual averments made by the respondent are patently *mala fide* and simply designed to subvert the Stellenvale principle (*supra*) and to abuse the Plascon Evans rule to his benefit.

[20] Before considering whether there is merit in Mr Bothma's submissions, it is necessary to consider certain of the events leading up to the launching of this application so that the respondent's conduct can be viewed in its proper perspective.

[21] Applicant avers that after she employed the respondent as manager of the ice cream division, she and her husband went away on holiday for two weeks and on their return on 17 July 2015, she noticed that the respondents' behaviour and attitude had drastically changed towards her. Respondent had adopted the attitude that he was the owner of the ice cream division and that he was not obliged to make any contribution whatsoever to her in terms of their employment agreement. Although respondent continued to make certain contributions to her in respect of the running costs of the ice cream division, he however proceeded to insure the ice cream machine and other assets in the ice cream division in his name, thus effectively ceasing to make the contribution of R600-00 per month towards the insurance premium payable by her.

[22] It further became clear to first applicant that respondent was no longer prepared to comply with his employment agreement with her. Because of their family relationship, she attempted to resolve the situation informally but was unsuccessful. Their relationship however soured further and matters reached a head when first applicant's husband and respondent had words and she was forced to seek legal advice.

[23] On 11 September 2015 first applicant's husband received a letter from respondent's attorney of record in terms of which her husband was *inter alia* advised that he was prohibited from entering onto the ice cream division of Nikki's Kafee and

Take Aways. In the aforesaid correspondence, respondent further avers that he was the sole owner of the ice cream division.

[24] On 17 September 2015 first applicant's attorneys of record addressed correspondence to respondent in which respondent was advised that first applicant insisted that respondent was in the employ of the first applicant and that he had no separate rights in respect of the ice cream division. Respondent was further advised that due to his conduct and attitude towards first applicant and her husband that internal disciplinary proceedings would be instituted against him.

[25] On 29 September 2015 the first applicant gave notice to the respondent to attend a disciplinary inquiry which was to take place at the offices of the first applicant's attorneys of record.

[26] The main thrust of the disciplinary charges against the respondent was that there was a breach of trust in the employer/employee relationship, insubordination on the part of the respondent to his employer, failure to respect his employer's property rights and/or interest and failing to respect his employer's good name, reputation and so forth. The further specific acts of misconduct are set out in the notice marked NH5 to the record and it is not necessary to repeat them at this stage.

[27] On the same day respondent's attorney of record wrote to first applicant's attorney of record and advised that respondent was not and is not an employee of first applicant, that he was the owner of the ice cream division, that he leased the premises and that he would accordingly ignore the notice to attend the disciplinary inquiry.

[28] In accordance with the disciplinary notice first applicant held the disciplinary inquiry in the absence of the respondent. The outcome of the disciplinary inquiry was that respondent was summarily dismissed from first applicant's employ.

[29] On 9 October 2015 first applicant's attorneys, inter alia, notified the respondent's attorneys in writing that the applicant persisted that respondent was in her employ and that he had been found guilty of the allegations as set out in the disciplinary notice and that the respondent had been summarily dismissed. Respondent's attorney of record were further advised that first applicant denied that respondent was the owner of the ice cream division of her business, that in any event, whether or not the respondent was an employee or not, that first applicant was giving respondent notice to vacate unit 4 within twenty-four hours, failing which first applicant would apply for his eviction from the premises.

[30] On 20 October 2015 and in response to the notice to vacate, respondent's attorneys addressed correspondence to first applicant's attorneys in which is inter alia stated that, respondent "*volstaan egter dat hy oor 'n regsgeldige afdwingbare huurkontrak met u klient beskik*".

[31] Considering the respondent's averment of the existence of a "legally enforceable lease agreement" with her, the first applicant through her attorneys, and in a letter dated 23 October 2015, requested the respondent to provide the following specific information regarding the alleged lease agreement:

"1. *Wie was die partye tot die huurooreenkoms;*

2. *Was dit 'n mondeling of skriftelike huurooreenkoms, en indien 'n skriftelike ooreenkoms ontvang ons graag 'n afskrif daarvan;*

3. *Het die partye persoonlik gehandel; en indien nie, verneem ons graag die indentiteit van die derde party/partye;*

4. *Ons verneem graag wat die vernaamste terme van die huurooreenkoms was en spesifiek ook:*

4.1 wat die huursaak was;

4.2 wat die huurprys was;

4.3 wat die terme van betalings was, weekliks of maandeliks;

4.4 wat die termyn van die huurooreenkoms was, hetsy bepaald of onbepaald."

[32] Instead of responding to the reasonable request by first applicant's attorneys, respondent's attorneys replied *inter alia* that; "*u kliënt is deeglik bewus van die huurkontrak, waar ons klient sy besigheid bedryf*" and further "*Die besonderhede wat u van ons kliënt versoek, is binne u kliënt se kennis*".

[33] It is clear that first applicant was at a very early stage trying to establish the basis and validity of the respondents claim that a sub-lease existed. The response and attitude of the respondent to decline applicant's invitation to provide the information to first applicant does not make sense particularly in the context of the defence later raised by him. If it is so that a valid and enforceable sub-lease existed, then one would have reasonably expected him to provide the requested information. It is further significant

that the respondent did not at this early stage, when it would have been very easy for him to do so, provide first applicant with all the relevant detail and information about the alleged sub-lease.

[34] In my view this was an ideal opportunity for respondent to provide applicant with all the details in substantiation of his defence so as to avoid a situation where an unnecessary dispute of fact could arise at a later stage should there be litigation. In my view the respondent did not provide the information that first applicant requested as he knew that there was indeed no valid sub-lease and as will appear from what later appears herein, that respondent had fabricated and adjusted his version as the matter developed, in an attempt to create the existence of a sub-lease. The consequence of respondent's conduct is that by fabricating and adjusting his version, that he also created a dispute of fact.

[35] In the circumstances the respondent cannot now allege that there is a dispute of facts and then rely on Plascon Evans in circumstances where he is responsible for creating the dispute of facts.

The problems with the respondent's version

[36] In his answering affidavit respondent alleges that he effected certain improvements at unit 4. According to him he installed three phase power points and other improvements at unit 4. This allegation is however belied in an affidavit deposed to by William Burger De Waal ("De Waal") of Rawsonville Elektries BK in which he

states that he received all instructions for the upgrade of the power points in unit 4 from first applicant and that all payments in this respect had been received from first applicant. Respondent's version that the invoice was accidently made out to first applicant's business is not tenable. If it is so that he gave instructions as owner of the ice cream business, then in that event, the invoice would have been made out in his name and one would have expected that he would insist that the invoice be made out to him. What is further significant is that De Waal, who is a completely independent party to these proceedings, states that, he was approached by respondent's attorney to sign an affidavit in which he was required to corroborate respondent's version by having to state under oath that: "… *Ek bevestig hiermee dat ek opdrag van Albertus Barend Kotze ontvang het om die werk te verrig soos per Aanhangsel WB1 hierby ingesluit.*
Vermelde faktuur is deur my uitgereik op 15 Junie 2015 nadat Mnr. Kotze die betrokke perseel as 'n besigheidsperseel omskep het.
Ek bevestig dat Mnr Albertus Barend Kotze ook verantwoordelik is vir betaling van die rekening en dat hy tans 'n bedrag van R 1000.00 per maand aan my betaal ten opsigte van die rekening. Hierdie rekening is byna ten volle vereffen"

[37] It is not in dispute that S W Steyn ("Steyn") of the respondent's attorneys had requested De Waal to have the affidavit signed in a letter dated 7 December 2015. In that same letter Steyn states that after De Waal had signed the affidavit ; *"… kan Mnr De Waal die rekening aan Mnr Kotze oorhandig sodat dit aan my kantore besorg kan word."*

[38] On 7 December 2015 De Waal sent an email to Steyn Prokureurs in which he emphatically states: "*Ek dra geen kennis van Mnr. Kotze se opdragte nie. Alle instruksies is ontvang van Mev. Hamman. Toerusting wat installeer is behoort ook aan Mev. Hamman."*

[39] As appears from the aforementioned, De Waal had refused to sign the affidavit that was presented to him by Steyn Prokureurs. It is clear that he refused to sign the affidavit as its contents was false and or untruthful and he specifically informed respondents attorneys that he had received all instructions to do the installations and improvements from the first applicant and that she had paid him for the services rendered. It is noteworthy that respondent and or his attorneys only made the overtures to De Waal after the applicant had already launched the application against the respondent.

[40] The attempt by respondent and or his attorneys to persuade De Waal to sign an affidavit, the content of which was clearly not true, is disturbing and more so indicative of a desperate attempt on the part of respondent to fabricate and or build up a version that he was the owner of the ice cream division and / or to give credence to his version that he was the sub-lessee of unit 4. What is further significant is that the respondent makes no mention of the overtures that he made to De Waal in any of the papers filed by him of this affidavit nor does he attach the correspondence and / or affidavit to his opposing papers.

[41] A further problem that respondent is confronted with is his allegation that: "*20. Ek het vir SF Refrigeration opdrag gegee om lugversorging in perseel 4 te installeer sowel as 'n luggordyn. Ek heg hierby aan as 'ABK5', synde die faktuur aan my voorsien deur SF Refrigeration BK ten opsigte van die luggordyn sowel as die deposito strokies vir betalings wat ek aan SF Refrigeration gemaak het."* This allegation is similarly contradicted by the independent evidence of Steven Engelbrecht of SF Refrigeration who states in an affidavit that all instructions to install air conditioners in unit 4 were received from first applicant and that all payments in respect thereof was also made by her. Respondent's version in this respect is dealt a further blow by the second applicant who in an affidavit in the replying papers states that applicant had approached him for permission to make improvements to unit 4 and that he had given her permission to do such improvements.

[42] There is no basis for a finding that either De Waal and /or Engelbrecht colluded with the first applicant. The evidence rather points to a poor and desperate attempt on the part of the respondent to build up a version which did not exist and for which there was no basis in fact or law.

[43] Even though Ms Marais submitted that there was no proof in the form of a contract of employment or proof of the payment of employee taxes to show that respondent was in fact in the employ of the first applicant, she could not give a reasonable explanation why, if the respondent was not employed with first applicant, reference is made to him in first applicant's daily duty roster/register that she kept for

her business. The suggestion that he is referred to in the daily duty roster/register, because first applicant wanted to keep a record of who was in the premises at every given time does not make sense and is rejected. If the respondent was indeed self-employed and conducted the ice cream business independently, then there would be no reason whatsoever why his name would appear in the applicant's daily duty roster/register that was kept for her employees. It may be so that the daily duty roster/register was not kept in the most satisfactory way but I am nonetheless satisfied that it is definitely a factor which supports first applicant's averments that respondent was in fact employed by her. I pause to mention that respondent was further unable to give a reasonable explanation as to why he would have to account to first applicant for his whereabouts if he conducted his own business. In this regard I refer in particular to the entry made in the daily duty roster/register relating to him doing "*Worcester aankope*" and or why the daily duty roster would stipulate what times he was on duty. In my view nothing turns on the fact that there was no written contract of employment between the parties and / or that there was no proof of payment of employee tax.

[44] A further aspect reflecting negatively on the respondent's version is the fact that he denied knowledge of any similarity between the 1998 contract concluded between himself and second applicant and the subsequent lease agreement concluded between first and second applicant. In his first answering affidavit, in dealing with the issue of his knowledge of the contents of the lease agreement, respondent specifically states that: *"In 2003 het die huurkontrak met van der Merwe verstryk en applikant het*

'n nuwe kontrak met soortgelyke terme met van der Merwe aangegaan in haar eie naam." (my emphasis)

[45] On a simple reading of this statement by respondent I understand this to mean that according to the respondent the lease agreement entered between first and second applicant; subsequent to the termination of his (i.e.. respondent's) lease with second applicant, contained similar terms to the lease agreement he had concluded with the second applicant. I must accept that respondent would not make such a statement unless he had, had sight of the agreement entered into between first and second applicant, and or if he was aware of the terms of the agreement. In conflict with his knowledge of the terms of the agreement between the first and second applicants', respondent surprisingly later states in his second answering affidavit that:

> "*32 … ek bevestig dat die terme van die kontrak tussen die eerste en tweede applikante, anders as die huursaak en die termyn daarvan, nie binne my kennis was toe ek die onderverhuur kontrak met die eerste applikant aangegaan het nie, en dat dit eers tot my kennis gekom het na ek die eerste applikant se funderende stukke gelees het."*

[46] If the latter averment is correct then it is strange that applicant did not at the outset mention what is contained in para 32 of his second answering affidavit. It is further important to point out that respondent does not dispute the allegation that second applicant's prior written consent was required for the sub-lease in respect of unit

4. In regard to the fact that second applicant's written consent was required for the sub-lease, respondent states in his first answering affidavit that:

> "*Ten alle relevante tye was die verhuurder; van der Merwe, deeglik bewus van die feit dat ek in perseel 4 my besigheid bedryf het, dat hy dus minstens stilswyend toestemming gegee het tot die onderverhuuring deur applikant van perseel 4 is aan my duidelik.*"

[47] I agree with Mr. Bothma that it is clear that respondent had, insofar as the first answering affidavit was concerned, at the least, nailed his colours to the mast by alleging a tacit approval on the part of the second applicant for the conclusion of the sub-lease.

[48] After the second applicant was joined to the proceedings, the respondent however, adjusted his version. In his second answering affidavit respondent alleges that he was never aware that prior permission on the part of the second applicant was required for the conclusion of the sub-lease. In this regard, respondent states:

> "*24.1 Die tweede applikant was bewus daarvan, sedert ten minste Januarie 2015, dat ek die perseel by eerste applikant huur en dat ek die roomysbesigheid vir my eie rekening bedryf, soos hierbo uiteengesit, maar het nooit aangedui dat sy toestemming benodig is om die onderverhuurkontrak aan te gaan nie.*
>
> *24.2 Die eerste en tweede applikante het dus deur hul gedrag, nalatig of opsetlik, die indruk geskep dat die eerste applikant nie die tweede applikant se toestemming nodig gehad het om die onderverhuurkontrak met my aan te gaan*

nie of in die alternatief, het hul die indruk geskep dat die tweede applikant sy toestemming vir die eerste applikant gegee het om onderverhuurkontrak aan te gaan."

[49] The inconsistencies and the conflict in respondent's above two versions are obvious. On the one hand (in the first answering affidavits), respondent concedes that second applicant's consent is required for the conclusion of the sub-lease, but alleges that this consent was tacitly granted and states that this consent/permission was "duidelik" to him. In the second answering affidavit respondent alleges that the second applicant represented to him that no such consent was ever required.

[50] I am on the whole satisfied that the inconsistent and conflicting versions of the respondent are indicative of a litigant who, as aptly submitted by Mr Bothma, "seeks to amend his factual allegations to relieve the pinch of the shoe."

[51] On the evidence before me I am satisfied that the respondent tailored and adjusted his factual version as and when he needed to do so, to suit his case. I accordingly have no hesitation in rejecting the respondent's factual version of the existence of a sub-lease between him and first applicant as untenable and unworthy of belief.

[52] My findings in this regard are fortified by the affidavits of De Waal and Engelbrecht and the second applicant who materially confirm and corroborate the first applicant's version. In addition, although respondent addresses the facts contained in

the affidavit by second applicant, filed with the replying papers, he ignores the allegations made by De Waal and Engelbrecht as hereinbefore referred to.

[53] Considering the numerous discrepancies, inconsistencies, and/or contradictions in respondents factual version; his version that there was a sub-lease between himself and first applicant accordingly falls to be dismissed on this basis alone.

The estoppel argument

[54] According to Ms De Waal, the respondent's main contention is that a fixed term agreement sub-lease agreement was concluded between the respondent and first applicant in respect of unit 4 and that the first and second applicants either intentionally or negligently represented to the respondent that the sub-lease agreement was valid and enforceable for that fixed period and that the respondent had accordingly acted thereon to this detriment, believing the truth of their representation by establishing the ice cream business at the premises (i.e. at unit 4) with a view to operate it in "the medium term".

[55] In **South African Broadcasting Corporation v Coop** 2006 (2) SA 217 (SCA) para 64 at 233 I – 234 A the SCA held that:

> "*The essentials of estoppel can briefly be stated as follows: The person relying on estoppel will have to show that he or she was misled by the person whom it is sought to hold liable as principal to believe that the person who acted on the latter's behalf had authority to conclude the act, that the belief was reasonable and that the representee acted on that belief to his or her prejudice*."

[56] It is accepted law that the doctrine of estoppel is based on considerations of fairness and justice, and its application is aimed at preventing prejudice and injustice. See LAWSA Vol 18, 3rd ed, para 79. According to *Amler's Precedents and Pleadings* (7th ed) Harms 195-197 the essentials for the doctrine of estoppel are the following:

(a) Representation by words or conduct of a certain factual position.

(b) The party acted on the correctness of the facts as represented.

(c) The party so acted, or failed to act; to her or his detriment.

(d) The representation was made negligently.

(e) The party who made the representation could bind the defendant by means of a representation

See also *The Law of Estoppel in South Africa,* Rabie and Sonnekus 3rd ed, 48-13 **Company Unique Finance (Pty) Ltd v Johannesburg Northern Metropolitan Local Council** 2011 (1) SA 440 (GSJ) at 458 – 459 A and **Glofinco v Absa Bank Ltd t/a United Bank** 2002 (6) SA 470 (SCA) at para 12. According to Rabie and Sonnekus *(supra)* para 36, estoppel must be pleaded. The onus of establishing estoppel rests on the party who raises it i.e the estoppel assertor. See **Union Government v Vianini Ferro - Concrete Pipes (Pty) Ltd** 1941 AD 43 at 49, Strachan v Blackbeard and Son1910 AD 282 at 288 – 289. All the elements and facts necessary to constitute estoppel must be set out in the pleadings with precision; certainty; accuracy; and particularity. The principle that estoppel should be raised in pleadings or application papers was reaffirmed in Company Unique Financial (Pty) Ltd v Johannesburg Northern Metropolitan Council (supra) where the court held at 459 A-B that; *"… a claimant who*

relies on an estoppel will have to show that he or she was misled by the principal in believing that the party, who purportedly acted on the principals behalf had authority to conclude the act, that the belief was reasonable and that the claimant acted on that belief to his or her prejudice. Assurances by the agent of the existence or extent of his own authority are of no consequence."

[57] I have already hereinbefore highlighted that the respondent has given inconsistent and conflicting versions of whether or not he was aware that the second applicant's written consent was required. I have also found that the factual averments made by the respondent are untrue and untenable.

[58] Considering the legal principles outlined above I am of the view that the estoppel argument raised on behalf of the respondent must fail for inter alia the following reasons:

58.1 Respondent has failed and neglected to expressly plead estoppel.

58.2 Respondent makes no reference whatsoever to the principle of estoppel and the closest he comes to asserting anything relating to estoppel is when he states in his further answering affidavit that;

"21.5 Die eerste en tweede applikante het dus deur hul gedrag nalatig of opsetlik, die indruk geskep, dat die eerste applikant nie die tweede applikant se toestemming nodig gehad het om die ondervehuringkontrak

met my aan te gaan nie of in die alternatief, het hul die indruk geskep dat die tweede applikant sy toestemming vir die eerste applikant gegee het en onderverhuuringkontrak aan te gaan.

21.6 Die verteenwoordiging wat hulle geskep het was, met betrekking tot die eerste applikant se woorde en gedrag uitdruklik en ondubbelsinning tot en met die onaangename ommeswaai in haar gesindheid teenoor my vanaf Julie 2015. Die tweede applikant se gedrag ten opsigte van my eienaarskap van die besigheid en die ondervehuur van perseel 4 was ook ondubbelsinning tot en met sy betrokkenheid by hierdie aansoek.

21.7 As gevolg van die eerste en die tweede applikante se gedrag, en die indruk wat hulle geskep het dat ek regmatig die perseel by die eerste applikant huur het ek die besigheid ingerig en bedryf op die basis dat ek 'n vaste termyn huurkontrak het wat geldig is tot ten minste Februarie 2020, en dat ek tot dan 'n kontraktuele reg to die huur van perseel 4 het"

58.3 It is significant that respondent makes these averments against the background of his earlier statement that; *"… en ek was op geen tyd bewus dat daar so 'n term in die hoofooreenkoms was nie"*, with reference to the fact that the lease agreement between first and second applicant prohibits sub-letting without the written consent of the second applicant.

58.4 This is of course at odds with the averments made by him in his first answering affidavits where he states at 71 para 87 that; *"… hy dus minstens stilswyend toestemming gegee het tot die onderverhuuring deur applikant van perseel 4 aan my is duidelik."*

58.5 Respondent alleges that second applicant represented to him that his (i.e. second applicant's) prior consent was not required for the conclusion of the sub-lease, alternatively that second applicant had created the impression that such consent had been given. I agree with Mr Bothma that it is not clear on what alleged representation the respondent relies and accordingly it is unclear to the applicant's what case they have to meet in this respect.

58.6 Respondent further, on the one hand alleges that consent was granted albeit tacitly, but later avers that he never knew that consent was required.

58.7 The respondent has further provided no evidence to show on what basis or manner, fault is to be attributed to the second applicant and makes bare allegations in this respect without substantiation. See para 58.2 above.

58.8 What is further fatal to the respondents estoppel argument is that on respondent's own version the alleged representation, i.e. that the

> impression had been created that consent was not required and or that consent was granted, could not have caused the respondent to enter into the sub-lease. It is clear that, certainly in respect of the second applicant, the respondent's version appears to be that the representation by second applicant consisted of acquiescence in the execution of the sub-lease agreement, which acquiescence could therefore only have occurred after the execution of the sub-lease. I am accordingly satisfied that on the respondent's own version, the alleged acquiescence could not have induced respondent to enter into the sub-lease agreement. In the circumstances there is no merit in the estoppel argument and it must therefore be dismissed.

[59] Counsel for the respondent has advised that should I grant the relief prayed for by applicant that respondent will be in a position to vacate no 4, 14 Van Riebeeck Street, Rawsonville by the end of April 2016.

[60] In the result I make the following order.

1. An order for the eviction of the respondent from the premises known as number 4, 14 Van Riebeeck Street, Rawsonville is hereby granted.

2. The respondent is ordered to vacate the said premises by no later than 16h00 on 30 April 2016.

3. If the respondent has not vacated the said premises by 16h00 on 30 April 2016 the Sheriff is hereby authorised and required to carry out the eviction order on 3 May 2016 by removing the respondent from the said premises.

4. The respondent is ordered to pay the costs of the application.

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RILEY, AJ