IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

Case No: 10729/2020

In the matter between:

AIRPORTS COMPANY SOUTH AFRICA SOC LIMITED Applicant

and

DOT TO GO TRADING (PTY) LTD First Respondent

MOGAMAD ZAHIR KHAN Second Respondent

MOHAMMED ZAYNE MAYAT Third Respondent

MAHOMED ASHRAF MAYAT Fourth Respondent

Coram: Norton AJ

Heard: 18 September 2020

Delivered: 15 October 2020

JUDGMENT

Norton AJ

[1] On 13 August 2020 the applicant brought an *ex parte* application on an urgent basis for declaratory and interdictory relief related to a tacit hypothec which it asserted over the movable property of the first respondent located at the premises which it leased from the applicant at the Cape Town International Airport.

[2] The applicant sought a rule *nisi* calling upon the respondents to show cause, on 17 September 2020, why an order should not be granted -

(a) declaring that the applicant has a tacit hypothec over all movable goods at the leased premises;

(b) authorising and directing the Sheriff to attach so much of the movable property as might be found at the leased premises in perfection of the applicant's tacit hypothec as security for the applicant's claims for arrear rental in the amount of R3 586 592.35;

(c) directing a representative of the first respondent to open the leased premises for the Sheriff; and

(d) interdicting and restraining the respondents from concealing, removing or alienating any movable property from the leased premises pending the determination of an arbitration to be instituted by the applicant in respect of outstanding rental arising from the lease agreement.

[3] The applicant also sought an order that all the above relief other than the declaratory relief serve as an interim interdict pending the return day.

[4] The case set out in the founding papers was that the applicant on 14 May 2020 terminated its lease agreement with the first respondent in circumstances in which the first respondent was in arrears with its rental payments in the amount of approximately R3.4 million, made up of rental for the period between 1 February 2018 and 11 April 2020. In circumstances in which the first respondent had allegedly been '*evasive in honouring its undertaking to pay rent*' and been given one month's notice to vacate the premises, the applicant feared that if the application came to the first respondent's attention, it would take action to remove the movable property, thus compromising the applicant's tacit hypothec.

[5] The application came before me and I granted the rule *nisi* sought by the applicant. The respondents anticipated the return day on 24 hours' notice to the applicant, and the matter (coincidentally) came before me again on 18 September 2020.

[6] The respondents opposed the confirmation of the rule *nisi* on a range of grounds, chief among which was the common law ground that in seeking the rule *nisi* on an *ex parte* basis, the applicant had not complied with its duty to exercise the utmost good faith by putting all the relevant facts before the court.

[7] The principle and standards governing this duty were recently restated by the Supreme Court of Appeal in *Recycling and Economic Development*

Initiative of South Africa v Minister of Environmental Affairs; Kusaga Taka Consulting (Pty) Ltd v Minister of Environmental Affairs 2019 (3) SA 251 (SCA) (*Redisa)*.

> 'Where an order is sought *ex parte* it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or *mala fide*' (para 45).
>
> 'The applicant must thus be scrupulously fair in presenting her own case. She must also speak for the absent party by disclosing all relevant facts she knows or reasonably expects the absent party would want placed before the court. The applicant *must disclose and deal fairly with any defences of which she is aware or which she may reasonably anticipate*. She *must disclose all relevant adverse material* that the absent respondent might have put up in opposition to the order. She must also exercise due care and make such enquiries and conduct such investigations as are reasonable in the circumstances before seeking *ex parte* relief. She may not refrain from disclosing matter asserted by the absent party because she believes it to be untrue. And even where the *ex parte* applicant has endeavoured in good faith to discharge her duty, she will be held to have fallen short if the court finds that matter she regarded as irrelevant was sufficiently material to require disclosure' (para 47). (Emphasis added)

[8] In this matter the substratum of the relief which the applicant sought *ex parte* was the existence of a tacit hypothec over the first respondent's movable property at the leased premises. It is trite law that a lessor acquires a tacit hypothec over the lessee's movable property only when the lessee is *in arrears with rental payments* in terms of a lease agreement (*Kleinsakeontwikkelingskorporasie Bpk v Santambank Bpk* 1988 (3) SA 266 (C) 270B-F).

[9] It was averred on behalf of the applicant in the founding affidavit that -

(a) on 10 August 2009 the applicant had concluded a written lease agreement with Myatt International (Pty) Ltd (Myatt) which commenced on 1 November 2009 and terminated on 30 October 2014;

(b) on 3 February 2015 the applicant and Mayat concluded an addendum to the written lease agreement in terms of which they extended the lease period by eleven months (commencing on 1 November 2014 and terminating on 2015) on the same terms and conditions;

(c) on 22 October 2015 the applicant and Myatt concluded a second addendum to the written lease agreement in terms of which they extended the lease period by a further eleven months (commencing on 1 November 2015 and terminating on 31 October 2016) on the same terms and conditions;

(d) on 8 April 2016 the applicant, Myatt and the first respondent concluded a cession agreement in terms of which Mayat ceded its rights and delegated its obligations in terms of the written lease agreement to the first respondent from 1 February 2016;

(e) from 1 November 2016 the lease agreement was tacitly relocated on a month-to-month basis in accordance with the provisions of the written lease agreement.

[10] It was on the basis of the month-to-month relocation and the rental amount due in terms of the written lease agreement (approximately R53 000 per month for the shop on the leased premises and R4 200 for two storerooms) that the applicant relied on arrear rental amounting to approximately R3.4 million. It was noted in the applicant's founding affidavit that '[t]here is a dispute between the parties regarding the amount owed by the first respondent'.

[11] The applicant annexed to its founding affidavit two pertinent documents. The first was a letter of demand sent to the first respondent on 3 February 2020 claiming the payment of arrear rental in the amount of R2.9 million, failing which the lease would be terminated and the first respondent would be evicted from the leased premises. The second was a letter dated 12 June 2020 recording arrear rental amounting to R3.4 million; noting that the first respondent disputed the applicant's right to terminate the lease agreement; and proposing the referral of that dispute to arbitration.

[12] In the opposing affidavit filed by the respondents, the first respondent claims that the written lease agreement between the applicant and Mayat (a) expired on 31 October 2014; (b) was not resuscitated by the addendum concluded on 3 February 2015; and (c) was incapable of being validly ceded to the first respondent on 1 April 2016.

[13] The first respondent avers that in any event a tacit lease agreement on new terms was concluded by the applicant and the first respondent from the time that the applicant accepted the first respondent's offer, on 1 December 2016, to pay rental in the amount of R40 000 per month in respect of the leased premises.

[14] On the basis that the first respondent has paid, and the applicant has accepted, rental of R40 000 per month from that date, the first respondent denies that it was in arrears with rental at all when this application was instituted. In support of this contention, the first respondent relies on correspondence between the applicant and the first respondent (which was not disclosed by the applicant) in which the first respondent reiterated its position regarding a new tacit lease agreement and recorded its monthly payments of rental in the amount of R40 000.

[15] In a letter dated 4 February 2020, in response to the applicant's letter of demand of 3 February 2020, the first respondent's attorney wrote as follows:

> '3. It is recorded that pursuant to the expiry of the lease concluded between our clients, our client actively endeavoured to

conclude a new written lease agreement with your client regarding the premises.

4. At the time same could not be concluded due to *inter alia*, certain internal issues your client had such as, open tender processes, and changing in staff members, etc.

5. Notwithstanding the above our client made an offer which was communicated to your client on the terms at which it would like to lease the premises.

6. Again due to the aforementioned internal issues with your client, no formal written lease was concluded. However in good faith our client perform[ed] in terms of the tendered amount, which your client accepted, and continued to accept for a number of years.

7. It thus comes as a complete shock to read your letter and that your client purports to give our client notice.'

[16] In a further letter dated 14 May 2020 the first respondent's attorney referred once again to the new lease and stated as follows:

'Our client is not in default of the new lease, nor has our client been given an opportunity to remedy any such alleged breach of the new lease. The purported termination of our client's lease is thus disputed, bad in law and will be opposed.'

[17] In a letter addressed to the applicant shortly before the applicant launched this application, the first respondent's attorney on 21 July 2020 conveyed the first respondent's wish to conclude a new written lease to replace the old written lease and the tacit new lease, and noted that (a) the first respondent was willing to commit to a five year lease with an automatic option for an additional five years; and (b) if a further lease was concluded, the first respondent would remodel and upgrade the store, which would be 'an obvious benefit' to the applicant.

[18] Two material facts appear from this correspondence, which were not put before this court by the applicant in its *ex parte* application.

[19] The first is that the first respondent disputed liability for any rental due under the original written lease agreement and asserted that it was up to date with the rental amounts due under the new tacit lease agreement. This was a material fact to be taken into consideration in determining whether urgent *ex parte* relief should be granted on the basis of an alleged tacit hypothec. If the lessee was not in arrears with rental under the lease agreement which it claimed was applicable, there was no tacit hypothec upon which the relief sought by the applicant could be granted.

[20] The second material fact is the first respondent's recordal that it wished to conclude a written lease and continue leasing the premises for another five to ten years, and intended to remodel and upgrade its store on the premises. This is an important indication that the first respondent, despite having been given notice to vacate the leased premises, was not about to

leave precipitously or do anything which would jeopardise its prospects of securing a further lease.

[21] On the return day it was contended on behalf of the applicant that the founding affidavit did include the averments that '[t]here is a dispute between the parties regarding the amount owed by the first respondent' and 'the applicant has addressed a letter to the first respondent, seeking that the parties agree to refer the matter to arbitration'. These averments, however, did not indicate to the court that the first respondent disputed *any liability at all* for arrear rental.

[22] The applicant's counsel also relied on the letter attached to the founding affidavit in which the applicant's attorney noted that the first respondent disputed the applicant's right to terminate the lease agreement. Reference to this letter does not avail the applicant.

[23] First, as the Supreme Court of Appeal pointed out in *Redisa*, a judge determining an urgent *ex parte* application cannot be expected to trawl through annexures to discern the true facts. Cachalia JA referred to the observations by Waller J in *Arab Business Consortium International Finance and Investment Co v Banque Franco-Tunisienne* [1996] 1 Lloyd's Rep 485 (QB) that points in favour of the absent party should be clearly drawn to the judge's attention, and '[t]here should be no thought in the mind of those preparing affidavits that provided that somewhere in the exhibits or in the affidavit a point of materiality can be discerned, that is good enough' (para 49), before stating:

> 'The *ex parte* litigant should not be guided by any notion of doing the bare minimum. She should not make disclosure in a way calculated to deflect the Judge's attention from the force and substance of the absent respondent's known or likely stance on the matters in issue. Generally this will require disclosure in the body of the affidavit. The Judge who hears an *ex parte* application, particularly if urgent and voluminous, is rarely able to study the papers at length and cannot be expected to trawl through annexures in order to find material favouring the absent party.' (para 49).

[24] Second, the letter relied on by the applicant does not disclose that the first respondent's position was that it was not in arrears with rental at all.

[25] The court's exercise of its discretion to set aside an *ex parte* order because of non-disclosure is subject to the test laid down in *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 350B:

> 'Unless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtain *ex parte* on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant.'

[26] The factors relevant to the exercise of the court's discretion were identified in *Phillips and others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) para 29 as being (a) the extent of the non-disclosure; (b) whether the judge hearing the *ex parte* application might have been influenced by proper disclosure; (c) the reasons for non-disclosure; and (d)

the consequences of setting the provisional order aside. The materiality of the non-closure is plainly pertinent (*Redisa*, para 54).

[27] In this matter the applicant's failure to disclose that the first respondent disputed any liability for arrear rental was a material non-disclosure, as the applicant's claim to a tacit hypothec – the substratum of all the relief sought by the applicant - depended on the first respondent being in arrears in respect of rental. The disclosure of the first respondent's position would undoubtedly have influenced the outcome of the *ex parte* application.

[28] The fact that the first respondent was still intent, when the *ex parte* application was instituted, on concluding a further five to ten year lease, and remodelling and upgrading the premises, was a material fact to be taken into account in determining both the question of urgency and the question whether the first respondent was likely to remove the movable property from the leased premises if given notice of the application. The applicant's failure to disclose that information was also material.

[29] The applicant offered no compelling reasons why the relevant information was not disclosed in its founding papers.

[30] I am accordingly of the view that the rule *nisi* falls to be discharged on the ground that the applicant failed to comply with its duty of full disclosure.

[31] I point out that in view of the dispute of fact on the papers on the material issue of whether or not the first respondent was in arrears with rental, which in accordance with the *Plascon-Evans* rule (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1983 (3) SA 623 (A) 634E-

635C) must be resolved in favour of the respondents, the applicant could in any event not have succeeded in establishing a tacit hypothec as a basis for having the rule *nisi* made final.

[32] The respondents seek an order that the applicant pay the costs of the application on the scale as between attorney and own client. This is an exceptionally punitive scale which indicates 'extreme opprobrium' (*Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others* 1990 (2) SA 574 (T) 589D) and will not be ordered without compelling reasons (*Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) 22B).

[33] The question whether a costs order on a punitive scale is justified depends on 'what would be just and equitable in the circumstances of a particular case' (*Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) para 222).

[34] In *Public Protector* a majority of the Constitutional Court observed that over the years courts have awarded costs on the attorney and client scale (a less punitive scale than the attorney and own client scale) to mark their disapproval of 'fraudulent, dishonest or *mala fides* (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court' (para 223), and concluded that a punitive costs order is justified where the conduct concerned is 'extraordinary and worthy of a court's rebuke' (para 226).

[35] In *Schlesinger* the party found to have failed in her duty of disclosure in an *ex parte* application was ordered, in the absence of any finding of fraudulent conduct, to pay costs on the attorney and client scale for her

'reckless disregard of a litigant's duty to a Court in making a full and frank disclosure of all known facts which might influence the Court in reaching a just conclusion' (354D).

[36] I have not found that the applicant was fraudulent, dishonest or *mala fide* in failing to disclose material facts in its founding affidavit. Its non-disclosure was however material and negligent and I am accordingly satisfied that a costs order on the attorney and client scale is justified.

[37] An order is made in the following terms:

(a) The rule *nisi* granted on 13 August 2020 is discharged.

(b) The applicant shall pay the costs of the application on the attorney and client scale.

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Michelle Norton
Acting Justice of the High Court
Western Cape Division

APPEARANCES

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