



Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.s: 11141 and 15887/2018

Before: The Hon. Mr Justice Binns-Ward
Hearing: 1 November 2018
Judgment: 8 November 2018

In the matters between:

DAVID SIMON GREEN N.O.
LEON NORBERT SASSE N.O.
GERALD DIAMOND N.O.
JACOBUS FREDERIK VAN DER MERWE N.O.
VUYANI HAKO N.O.
PATRICK ASHWORTH GARRATT N.O.
LINTON FRANÇOIS BURGER N.O.
(in their capacity as trustees of the
Two Oceans Aquarium Trust)

First Applicant
Second Applicant
Third Applicant
Fourth Applicant
Fifth Applicant
Sixth Applicant
Seventh Applicant

and

AQUARIDES ENTERTAINMENT CC
T/A VISTA MARINA

Respondent

JUDGMENT

BINNS-WARD J:

[1] Two applications by the applicants, who are the trustees for the time being of the Two Oceans Aquarium Trust, for relief against the respondent close corporation came up for hearing before me together. The first (in case no. 11141/2018) was the

postponed return day of a provisional order for the perfection of a general notarial bond registered in favour of the trust over the moveable property of the respondent. The other (in case no. 15887/2018) was an application for the ejectment of the respondent from the premises at the Victoria & Alfred Waterfront in Cape Town, in respect of which the parties had, on 13 September 2016, signed a deed of lease.

[2] The respondent's liability to the trust in terms of the lease was the factor that was common to both applications. For reasons that it is unnecessary to describe, the respondent had experienced some financial adversity at the outset of the period of lease. The applicants had been willing to accommodate these difficulties by entering into an agreement with the respondent whereby the latter's rental obligations in terms of the lease were rescheduled. The terms of the accommodation agreement were integrated in a deed of acknowledgment of debt executed by the respondent. The general notarial bond was registered primarily in order to provide the trust with security for the performance of the respondent's obligations in terms of the acknowledgment of debt.

[3] The application for the perfection of the security furnished by the notarial bond was precipitated by the respondent's failure to perform in terms of the acknowledgment of debt and the application for ejectment has been brought because the respondent is in material breach of the lease, primarily by reason of its default in the payment of rental. It is undisputed that the respondent has not paid any rental in respect of the let premises since February 2018. It did tender payment of the rental due in September, but the payment was dishonoured.

[4] The relief sought by the trust in respect of the perfection its security under the notarial bond is limited to seeking possession of the movable property in question. The trust does not seek leave at this stage to realise the property that it seeks to take into possession. The limited nature of the relief sought by the trust in this respect is significant because there is a pending application by Bidvest Foodservice (Pty) Ltd t/a Bidvest Foodservice Multi-Temp Western Cape ('Bidvest') for the winding up of the respondent on the grounds that the close corporation is unable to pay its debt. The parties in the winding up proceedings, which were launched on 10 January 2018, managed to persuade a judge to grant an order postponing those proceedings *sine die* pending the redemption by the respondent of its indebtedness to the applicant in that matter by payment in instalments.

[5] The movables subject to attachment under the notarial bond have already been attached in terms of the provisional order obtained by the trust in *ex parte* proceedings in June this year. The attached property, which is in use in the operation of the respondent's restaurant business at the leased premises, has been left there pending the outcome of the proceedings on the return date.

[6] The trustees recognise that should a winding up order ever be made in the pending proceedings instituted by Bidvest, the winding up will be deemed to have commenced prior to any order that it has obtained in these proceedings,¹ and that any relief confirming the perfection of its security that it might obtain in these proceedings would consequently be rendered redundant.² It is for that reason that, advisedly, the trust does not seek leave at this stage to realise the respondent's moveable property that it has taken into possession.

[7] The respondent has opposed both applications. It has raised numerous grounds of opposition, some of which are common to both applications. For the reasons set forth below, which I have tried to keep brief, I have not been persuaded that there is merit in any of them.

[8] Amongst its defences to the ejectment application, the respondent raised a plea of *lis alibi pendens*. The other pending proceedings upon which the dilatory plea was founded were those in the perfection of security application. As the respondent's counsel wisely recognised, the fact that in the end both matters came up for hearing and determination together effectively stripped the defence of substance, whatever merit there might otherwise theoretically have been in it. Had it been necessary to determine the question, however, I would have rejected the defence. The two applications are indeed between the same parties, but the relief sought in each application is materially different from the other and it was predicated on completely different contracts. That there happens to be some overlap of relevant fact in the two

¹ By virtue of the effect of s 348 of the Companies Act 61 of 1973, which provides that '[a] winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up'.

² By virtue of s 359(1)(b) of the Companies Act 61 of 1973, which provides: 'When the Court has made an order for the winding-up of a company ...

(a) ...

(b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void'.

matters is entirely incidental. The determination of either one of them would in no way effectively dispose of the other.

[9] The bases of the respondent's opposition to the perfection of security application were the following:

1. That the application was not urgent.
2. That the deponent to the founding affidavit had not been authorised to make it or perform a number of other acts.
3. That the content of the notarial bond that was registered does not accord with that which the respondent had authorised to be registered.
4. That the acknowledgment of debt arrangement gave rise to a credit agreement subject to the National Credit Act 34 of 2005, and that the trust had not proven that it was registered as a credit provider in terms of the that Act, and accordingly in no position to enforce the agreement.
5. That the amount owing by the respondent to the trust was in dispute.
6. That the application has been motivated by bad faith.

I shall deal with these grounds of opposition in turn.

[10] Proceedings to perfect security are in their very nature almost invariably urgent. The proceedings in this case were initiated, in the usual way, with an *ex parte* application for a rule *nisi* operating provisionally as an effective order. It is axiomatic why applications of this nature are entertained as a matter of course by the court on that basis. Prior notice to the debtor that the creditor was about to perfect its security would put the security sought to be obtained at risk. If there were prior notice, the property liable to attachment could be disposed of or hidden before any order that the creditor might obtain could be executed. In the circumstances the respondent was ill advised to have taken the point of an absence of urgency.

[11] As to the second of the aforementioned defences, a deponent to an affidavit does not require authority from anyone to give evidence. As a witness in proceedings to which he is not a party, he acts for himself when he gives evidence. The current proceedings were launched by the trustees acting through their attorneys of record. If the respondent sought to challenge the attorneys' authority to have launched the application, they were required to do so timeously under the auspices of rule 7 of the

Uniform Rules of Court; see *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA), at para. 19. As they did not do so, the lack of authority objection requires no further consideration.

[12] As to the defence mentioned in paragraph [9].3 above, the text of the registered bond does indeed differ in certain respects from the draft that was initialled by the respondent's representative. In my view the differences are superficial and inconsequential. It is noteworthy in this regard that the respondent did not raise rectification of the bond agreement, either affirmatively, or as a defence on this account, nor did it set forth any cogent basis upon which it might have been entitled to have the registration of the bond set aside on account of the discrepancies. This, no doubt, was because it recognised that the variations did not derogate in any effective way from the import of the wording in the draft to which it did agree. Their character was of the type contemplated by the provision in the special power of attorney executed by the respondent's representative granting the notary the power to '*amend the said [initialled copy of the] bond to correct clerical errors and errors of description and to comply with the requirements of the Registrar of Deeds and of the Notary for the purposes of the notarial execution and registration of the bond.*' There is accordingly no substance in the point taken by the respondent.

[13] The defence raised with reliance on the National Credit Act is also devoid of merit. The acknowledgement of debt is not an agreement to which the Act applies. This, by virtue of the fact that it is '*a large agreement*' as defined in s 9(4)(b) of the Act, and therefore excluded from the statute's application by s 4(1)(b) of the Act applied; alternatively, and in any event, it is an agreement excluded from regulation in terms of the Act by virtue of s 4(1)(a).³ The obligation on credit providers in terms of

³ Insofar as relevant, sub-secs 4(1)(a) and (b) of the National Credit Act provide:

'... *this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except—*

(a) *a credit agreement in terms of which the consumer is—*
 (i) *a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7 (1);*
 (ii) *the state; or*
 (iii) *an organ of state;*
 (b) *a large agreement, as described in section 9 (4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the threshold value determined by the Minister in terms of section 7 (1)'.
 (Underlining supplied.)*

s 40 of the National Credit Act to register as credit advisers is dependant on their status at the relevant time as creditors in terms of ‘*outstanding credit agreements, other than incidental credit agreements*’ within the meaning of that phrase in s 40(1).⁴ It is clear, if regard is had to the provision within the context of the statute read as a whole, that the ‘*outstanding credit agreements*’ identified in s 40(1) must be credit agreements of the type subject to regulation in terms of the Act, and not those that have been excluded from its application by s 4. In this regard I would endorse the observation in Scholtz *et al*, *Guide to the National Credit Act* (LexisNexis) at 5-8 that

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It stands to reason that only credit agreements to which the Act applies should be taken into account when determining whether a person is required to register as a credit provider. If this were not the case, even the South African Reserve Bank, whose credit agreements are all excluded from the application of the Act, would have had to register as a credit provider and report to the National Credit Regulator on all its credit agreements.

[14] As to the respondent’s reliance on the existence of a dispute about the computation of the precise sum in which it is indebted to the trust, that is of no moment in my view. It is not a prerequisite to the applicants’ exercise of a right to perfect the trust’s security that the quantum of the claim to be secured be finitely determined, or undisputed. The position might have been otherwise had the applicant also sought leave at this stage to realise the respondent’s property and to apply the proceeds in settlement of its claim, but as pointed out earlier, that is not the case. The respondent has not only formally acknowledged its substantial indebtedness to the applicant in terms of the aforementioned acknowledgment of debt, its indebtedness is also vouched by the payment in respect of rental that it sought to make in September, which, as mentioned, was dishonoured. As will appear presently, when I deal with the application for ejectment, I am satisfied that the respondent was in breach of the agreement of lease when the applicants applied to perfect the trust’s security. That afforded the applicants the right to make the application. The fact that the respondent had entered into a debt scheduling agreement with Bidvest in order to stave off the

⁴ Section 40(1) provides:

‘A person must apply to be registered as a credit provider if the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42 (1)’.
(Underlining supplied.)

winding up application brought by the latter was a further event entitling the trust to perfect its security in terms of the notarial bond agreement.

[15] There is nothing in the evidence to suggest that the applicants have acted in bad faith in instituting the proceedings for the perfection of the trust's security. On the contrary, their action in doing so is entirely consistent with what might be expected of creditors in their circumstances. In any event, a court that is called upon to enforce a contract is not concerned with the contracting party's reasons for seeking enforcement. It is concerned only with whether the terms of the agreement, and a proper basis for their enforcement, have been established.

[16] The respondent's counsel, relying on the approach adopted by Didcott J in *Barclays National Bank Ltd and another v Natal Fire Extinguishers Manufacturing Co (Pty) Ltd and others* 1982 (4) SA 650 (D), nevertheless suggested that there was scope for the court to exercise a discretion adversely to the applicant's claim to perfect its security in terms of the notarial bond. The weight of authority, however, is against the existence of any discretionary power of the sort contended for. That much is evident in the following passage in the Supreme Court of Appeal's judgment (per Harms JA) in *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and Others* 2003 (2) SA 253 (SCA) at para. 10:

The rule can only be discharged on grounds that go to the root of the creditor's entitlement to possession. ... I also do not understand the reference to the court's discretion. Although aware of dicta by Didcott J to the effect that there is a discretion, I cannot see how a court, in the exercise of its discretion, can refuse an order to an applicant who has a right to possession of a pledged article to take possession. The principles relating to the limited discretion to refuse specific performance apply only where the creditor has another remedy, such as a claim for damages, at its disposal. A claim for damages cannot replace a claim for real security. In the absence of a conflict with the Bill of Rights or a rule to the contrary, a court may not under the guise of the exercise of a discretion have regard to what is fair and equitable in that particular court's view and so dispossess someone of a substantive right.

(Footnotes omitted.)

[17] The respondent's counsel argued that Bidvest should have been joined as a party in the perfection application. I do not agree. Bidvest has no direct legal interest in the relief sought by the applicants in terms of their notarial bond. It seems likely in any event that Bidvest has knowledge of the proceedings as it appears from the

evidence that discussions have taken place between their attorneys in the winding-up application and the applicants' attorneys in the current proceedings.

[18] I do consider, however, that it would be prudent, having regard to the fact that the effect of the perfection of the applicant's security would be rendered redundant if Bidvest obtains a winding-up order, that the order in the perfection application should provide that any of the attached movables that the applicants might take into possession in terms of any order that is made perfecting their security be held by the sheriff on their behalf pending the making of any order authorising their realisation. It appears from the applicants' heads of argument that such an order would be acceptable to them.

[19] Turning now to discuss the respondent's defences to the application for its ejectment from the leased premises.

[20] The ejectment application was brought in September 2018, some months after the perfection of security application. As mentioned, the existence of the undetermined perfection application led the respondent to plead *lis alibi pendens* in the ejectment application. I have already disposed of that objection.⁵

[21] The respondent also contended that the lease-related dispute should be referred to arbitration in terms of the arbitration agreement incorporated in clause 16 of the deed of the lease. That contention overlooked the effect of clause 16.7, which expressly excluded proceedings for the eviction of the lessee from the premises from the ambit of the arbitration clause. The respondent's counsel sought to argue, however, that the exclusion provision did not operate where there were underlying disputes about matters such as the interpretation and import of the lease, being questions that were expressly made susceptible to arbitration in terms of some of the other sub-clauses in clause 16. Necessarily implicit in counsel's argument was the contention that these questions should first be determined by arbitration before any court proceedings for an ejectment order might properly ensue. This would connote that any dispute about the applicants' entitlement to evict the respondent from the premises would first have to be determined favourably to the applicants in arbitration proceedings before they were entitled to approach a court in separately instituted proceedings for an order of ejectment; an obviously time-consuming process.

⁵ In paragraph [8].

[22] Accepting the argument would be to attribute a singularly unbusinesslike meaning to the clause. It is well established that where the wording of a contract allows two or more meanings to be contended for, courts should eschew an interpretation that gives an unbusinesslike or impractical effect, for it is inherently unlikely that that would have been what the contracting parties intended. ‘Sophisticated semantic analysis’ should not be permitted to negate an evident practical object that was clearly sought to be achieved by the provision which is being construed; see *Lloyds of London Underwriting Syndicates* 969, 48, 1183 and 2183 v *Skilya Property Investments (Pty) Ltd* [2004] 1 All SA 386 (SCA) at para. 14. The evident practical object intended by the exclusion in issue here was that the arbitration clause should have no residual binding effect on the applicant if it had terminated the lease and was consequently seeking the lessee’s ejectment. Quite apart from the obvious cumbersomeness of a duality of arbitration and court proceedings in such a situation, direct court proceedings in such circumstances would allow the lessor the benefit of the expeditious remedy of summary judgment, a remedy that would not be available in arbitration proceedings. Any lessor seeking the ejectment of its erstwhile lessee would have an obvious interest in the matter being determined as expeditiously as possible. The exclusion provision in issue was directed at serving that interest.

[23] The dilatory defence based on the arbitration clause must therefore fail.

[24] The lease provided that the respondent would be in material breach of the agreement in a number of circumstances including failure to pay the rent on time or compromising or attempting to compromise with, or deferring or attempting to defer payment of debts owing by it to its creditors generally. The evidence established that the respondent had failed to pay any rental for the premises since January 2018, and that it had persisted in its default notwithstanding having been given the prescribed period of notice by the lessor to purge its default. In the circumstances, the applicants were entitled to, and did, terminate the lease.

[25] The respondent has not asserted any valid basis upon which it might be entitled to remain in possession of the premises after the termination of the lease. It argued that in postponing the return date of the perfection application, the applicants had impliedly agreed that the respondent could remain in occupation of the premises. As the applicants’ counsel pointed out in his heads of argument, the relief sought in that application was distinct and, however determined, would have no bearing on the

respondent's entitlement to remain in possession of the premises. The respondent's argument was opportunistic and baseless.

[26] The respondent also raised a number of arguments, the detail of which it is not necessary to burden this judgment with, calling the choateness or validity of the agreement of lease into question. Suffice it to say, as the applicant's counsel pointed out, these arguments were self-defeating; for if there were no lease, then *a fortiori*, the respondent had no basis to retain possession of the premises. The respondent also claimed that the applicants had been responsible, for various reasons, for a delay in the respondent's ability to take effective possession of the premises at the inception of the lease. It is unnecessary for the purpose of deciding the ejectment application to make any determination of the validity of these allegations. Suffice it to say, none of them afforded the respondent the right to take and remain in possession of the premises in default of its obligation to pay rent under the lease. There was certainly nothing in the respondent's answer in the eviction proceedings that would have made out a case entitling the respondent to the benefit of any set-off against the rental.

[27] It follows that the applicants are entitled to an order for the respondent's ejectment.

[28] In the result the following orders will issue:

In case no. 11141/2018:

1. The rule in terms of paragraph 1.1 of the order made by this Court on 26 June 2018 is hereby made final.
2. The sheriff is directed to retain any movable property removed from the premises at the instance of the applicants in terms of this order in storage, for the account of the applicants, pending the first occurring of the any of the following:
 - a) further directions by the Court as to the disposal of the property;
 - b) the dismissal or withdrawal of the application for the winding-up of the respondent instituted by Bidvest Foodservice (Pty) Ltd ('Bidvest') on 10 January 2018; or

- c) the submission to him of a written agreement between the Two Oceans Aquarium Trust and Bidvest to otherwise regulate the storage of the attached property pending its further disposal as directed by the court.
- 3. The respondent shall be liable to pay the applicants' costs of suit on the scale as between attorney and client.

In case no. 15887/2018:

- 1. The respondent and all other persons or entities occupying the Vista Marina premises at the Two Oceans Aquarium in the Victoria & Alfred Waterfront consisting of -
 - 1.1 the restaurant premises both internal and external;
 - 1.2 the tuckshop in the Afrisam's Children's Play Centre;
 - 1.3 the Gelateria; and
 - 1.4 the coffee shop.
 (hereinafter collectively referred to as 'the premises') under it, be ordered to vacate the premises within 10 days of the grant of this order.
- 2. The sheriff (or his/her deputy) is hereby authorised to evict the respondent and/or all other persons or entities occupying the premises under it should the respondent or such persons or entities fail to comply with paragraph 1 of the order.
- 3. The South African Police Service is authorised to assist the sheriff in executing paragraph 1 of this order if requested to do so by the sheriff or his/her deputy;
- 4. The respondent shall be liable for the applicants' costs of suit on the scale as between attorney and own client.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES**Applicants' counsel:****Deneys van Reenen****Applicants' attorneys:****Hayes Incorporated****Cape Town****Respondent's counsel:****Brendan Atkins****Respondent's attorneys:****Tanya Nöckler Attorneys****Cape Town**