

NOT REPORTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 40746/2010

DATE: 10/11/2010

In the matter between:

SP & C CATERING INVESTMENTS (PTY) LTD

Applicant

and

MANUEL JORGE MAIA DA CRUZ

First Respondent

CASCAIS RESTAURANT CC

Second Respondent

ENEZA COFFEE SHOP CC

Third Respondent

SERAB TRADERS CC

Fourth Respondent

COZ WORLD DEALERS 3 CC

Fifth Respondent

ADEGA DE MONGE RIVONIA

Sixth Respondent

J U D G M E N T

LAMONT, J:

[1] The applicant brought an urgent application seeking the ejectment of the two respondents from certain premises. The applicant had previously brought an application for the ejectment of the respondents from the same premises.

[2] In the earlier application the applicant's claim against the respondents became crystallised in the declaration which was delivered subsequent to that application having been referred to trial. In that matter the applicant claimed; that on 4 November 2009 had concluded two written leases one with the first respondent under and in terms whereof the first respondent leased Shop B3 at a stated rental and one with second respondent leasing shop B2 at a stated rental. It claimed that each respondent had breached the lease it had with such respondent and that following the procedure prescribed in the lease it had duly cancelled the lease. The first and second respondents filed identical pleas. Under and in terms of those pleas the first and second respondents while admitting they had signed the written agreements of lease, pleaded that each had entered into an oral agreement of partnership under and in terms whereof one Pereira and each respondent would become partners in each particular restaurant. Under and in terms of the partnership agreement Pereira would provide certain capital; each respondent would contribute certain skill; Pereira would ensure a two month rent-free period, would ensure a lower rental thereafter until Pereira had recovered his capital investment and only once the capital investment had been recovered would the rental be adjusted to a market-related rental. The respondents sought rectifications of the contracts concluded.

[3] It is immediately apparent that the first and second respondents each set up a right of occupation of the premises each occupied pursuant to a different contract than that alleged by the applicant. It was presumably this dispute of fact which led to the matter being referred to trial. In the matter

referred to trial the pleadings have closed and a trial date has been applied for.

[4] On 6 October 2010 the applicant delivered similar letters to each respondent. For present purposes the letters may be regarded as identical. In those letters the applicant set out that notwithstanding the delivery of letters of cancellation dated 1 October 2010 cancelling the contracts it had concluded on 4 November 2009 it withdrew those letters of cancellation. The reason stated for the withdrawal was that the applicant had incorrectly calculated the total amount of rental due. The applicant then set out what its position was as far as each lease was concerned that namely each respondent occupied the particular shop pursuant to the written leases which had been breached in consequence whereof the applicant had cancelled the leases and the particular respondent was no longer entitled to occupation. The letter thereafter set out that in terms of the version set out by the respondent in each case, each respondent would be required to have paid certain rental. The amount of the rental is then calculated on the basis of that version, deductions constituting payments are made. The nett balance derived appears in paragraph 10. The following is then stated:

- “11. *The total amount to be paid is accordingly R309 462,99 ...*
12. *Although our client is entitled to an eviction of both Cascais Restaurant and Veneza Coffee Shop on the basis set out in paragraph 5 above should any of the tenants pay the relevant amounts referred to in paragraph 10 hereof timeously in terms of the demand, our client will not take steps to have such entity ejected from the premises on the basis of such cancellation (i.e. the cancellation referred to in paragraph 5.3). We record however that our client retains the right to cancel the leases on*

grounds of any subsequent breach by either Cascais Restaurant or Veneza Coffee Shop.

13. *The issue as to what amounts are due by Cascais Restaurant and by Veneza Coffee Shop and the entitlement of our client to have brought proceedings against inter alia such entities will be disposed of in the proceedings already brought and our client does not waive any rights in regard thereto. However, should the amounts demanded be paid timeously our client will not seek to eject Cascais Restaurant and Veneza Coffee Shop on the basis of the entitlement which has already accrued to it as referred to in paragraph 5.3 above.*
14. *In the event that:*
 - 14.1 *Cascais Restaurant does not pay the amount referred to in paragraph 10.1 above by the date specified; our client will cancel any lease that may exist between it and Cascais Restaurant.*
 - 14.2 *Veneza Coffee Shop does not pay the amount referred to in paragraph 10.2 above by the date specified our client will cancel any lease that may exist between it and Veneza Coffee Shop.*
15. *Following upon any such cancellation referred to in paragraph 14 our client proposes taking immediate steps on the basis thereof for the ejectment of whichever party cancellation has been effected against."*

[5] The letter required each respondent to pay the amount due by 11 October 2010. No payment was forthcoming and the applicant cancelled each lease on 11 October 2010 in the following terms:

- "1. *The letter of demand hand-delivered to you on 6th day October 2010 ...*
2. *You were warned in such demand that should you not discharge such amount on or before the specified date, our client would cancel any lease that may exist between the parties. ... such demand was predicated upon the version advanced on your behalf by Da Cruz, your alter ego and sole member.*

3. *Despite the aforesaid demand you have failed to discharge the said indebtedness, ..., and in the circumstances ... client hereby communicates to you a cancellation of any lease that may exist ...*

[6] The present application is based upon that cancellation.

[7] There is no dispute between the parties that assuming the lease alleged by the applicant between itself and the respondents being valid that it was duly cancelled and that the respondents would not be entitled to occupation. I have assumed for present purposes that the withdrawal of the letter of cancellation as set out in paragraph 4 of the letter dated 6 October 2010 does not affect the right of the applicant to eject the respondent. The right of the respondents to occupation is dependent upon the right claimed by the first and second respondents to occupation as set in the plea.

[8] In this application the applicant seeks to eject the first and second respondents from the premises on the basis of the cancellation of leases set up by the respondents which it the applicant disavows. The question to be answered is whether the applicant while disavowing the existence of a contract is entitled to rely upon it, demand payment in its terms, deliver an interpellatio
 , thereafter cancel it and then seek relief based on the cancellation. (I have assumed that all the parties to the lease are cited and that if the partnership was the tenant it is before court).

[9] The applicant made the submission that the position was similar to that of a party to litigation who pleads in the alternative. It frequently happens that a party to litigation pleads allegations in the alternative which conflict with each other with a view to setting up its claims which may be based on conflicting facts or on conflicting scenarios. It is open to a party to plead the contract is A alternatively it is B. It is also open to a party to plead that in consequence of the existence of fact A a variety relief is available. See for example Jardin v Agrela 1952 (1) SA 256 at 259 at following; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 at 470 (AD).

[10] In pleading this way a party to litigation raises different legal issues which are to be decided on the basis of the facts which are ultimately found to be proven at the end of the trial. The present situation is distinguishable. In the present situation no facts are proven in that the applicant disavows the facts upon which it relies (as being the respondent's facts) and is unable to establish its own facts as those facts are disputed and form the subject-matter of the trial which is to be heard in due course. Accordingly the court is not called upon to decide facts and therefore determine which legal contention based on which factual matrix provides the appropriate relief for the applicant.

[11] It is this feature of the case which is the flaw-in the applicant's argument.

[12] In the present matter not only is a Court not called upon to decide the factual issue but the applicant while disavowing the terms of a contract seeks

to invoke its terms. The applicant in the 6 October 2010 letter purports to conditionally abandon the cancellation it made of the contracts it claims existed. Nonetheless it claims rights under the application referred to trial

[13] The resultant position creates an absurdity:

1. The applicant has cancelled the contract it claims existed.
2. It conditionally abandons the cancellation yet it persists in its action which is based upon the cancellation.
3. It disavows the existence of the contract the respondent sets up.
4. It seeks to enforce the terms of that contract thereby claiming rights it disavows.
5. It cancels the contract it disavows.

[14] There are further issues which arise namely: What were the terms of the contract pursuant to which the interpellatio was issued? Was it a term that breaches required notice of a reasonable period? Was it a term that breaches to be dealt with in terms of particular clauses with particular time-limits and methods of cancellation? There is simply no answer to these questions and apparent absurdities which arise if the applicant is entitled to rely on a contract it claims does not exist.

[15] This being so the applicant was not entitled to demand payment in terms of the lease which it does not accept existed and was not entitled to

cancel it. In addition there is the technical difficulty that the applicant has failed to establish how the cancellation would be effected by proving an appropriate term.

[16] It follows then that the application falls to be dismissed with costs. The order which I make is:

“Application dismissed with costs.”

**C G LAMONT
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG**