

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

CASE NUMBER: 23305/2010

DATE: 12 NOVEMBER 2010

In the matter between:

KLOOF INVESTMENT 2004 CC Applicant

and

GARY ISAACS Respondent

JUDGMENT

MIA, AJ

This is an application for ejectment of the respondent from the premises described as Shops 11C and 11D, Palm Hof Centre, Kloof Street, Gardens, Cape Town and a further order directing the respondent to pay the costs of this application on an attorney and own client scale. There were a number of issues that the parties had disputes with regard to. However, when the matter came before me, the parties indicated that there was no opposition to the issue with regard to condonation for the late filing of the opposing papers* With regard to the further aspects, the parties indicated that there were no further outstanding issues. The request was that this Court only consider the application of clause 4.6 of the agreement between the parties and its application to this matter.

Briefly, the background to this matter is that the respondent and the applicant entered into a lease agreement for premises for the period 1 January 2008 until

31 December 2012. It appears that during the course of 2010 there was an averment that the respondent had not been paying rentals herein and a demand was sent to the respondent. Following on the respondent's failure to make payment in terms of demand, a summons was issued out of the Cape Town Magistrate's Court.

At the time of commencing hearing this matter, I was informed that in order to succeed in this matter, the applicant would withdraw the matters pending in the Magistrate's Court. There was nothing placed before me indicating that such matters were in fact withdrawn. Having regard to the papers, there are a number of disputes that have been raised between the parties which disputes ought to have been addressed by way of action. On the papers, neither of the parties have indicated that they request that this matter be addressed by oral evidence.

Ordinarily, having regard to the founding and opposing affidavits, in the event that there are disputes, either the respondent may call for the deponents to be cross-examined in terms of Rule 6(5)(g) of the Uniform Rules of Court. This was not in fact done so in this matter. The Court is thus faced with

the position that there are disputes in this matter. The respondent relies on *compensatio*, indicating that there are a number of claims that it has against the applicant in this matter, specifically for the lack of storage space for refuse, the lack of access to parking bays and the leaking roof.

The respondent places an amount of R1 000,00 value to each parking bay and the respondent then also calculates its loss of 25 metres square use of the

premises as a result of the lack of a storage facility for refuse, and avers that in view of that lack of 25 metres square, there is an amount of overpayment for rentals due and due to this that there was an overpayment for rental for the previous years, which places them in credit with the applicant herein.

In instances where there appears to be disputes, I refer to the case of Room Hire Company Property Limited v Jeppe Street Mansions Property Limited 1949(3) 1155 at 1163 where the Court refers to various disputes of fact which may arise. In the present case, the dispute of fact that is applicable in this matter, is where the respondent disputes the averments made by the applicant in the matter. The Court in the Room Hire Case refers to Rule 9 (5) (applicable Rule at the time) of the Uniform Rules of Court and indicated that the respondent may have the option of calling for the deponents to be crossexamined, and that such cross-examination would be sufficient to safeguard the respondent.

In the Room Hire Case at 1164 the Court said the following: "... the Court should ordinarily decline to decide the dispute, purely on the probabilities as disclosed in the affidavit and should, at its discretion, select the most suitable method of employing *viva voce* evidence for the determination of the dispute." In this instance, as I have indicated, the parties have not availed themselves of that instance. The Court says at 1165 that "in other circumstances, the Court's discretion may well be exercised in the direction of either dismissing the application or of sending the parties to trial with such direction as to costs and of filing pleadings as it deems fit. Whatever particular course should be taken, depends on the circumstances of each case, and that it is undesirable to lay down any rule of exercise of the Court's discretion."

Now having regard to the rule applied in Plascon Evans Paints v Van Riebeeck Paints 1984(3) SA 623, I have had regard to the versions that have been placed before the Court. The applicant knew full well at the stage when it launched this application that the respondent had raised a defence on material aspects in the Magistrate's Court. The respondent had indicated that he was not indebted to the applicant and why he had not breached the agreement of lease. The applicant thus accordingly knew that a real or a genuine or *bona fide* dispute of fact would have been raised in this court and despite this knowledge, the applicant proceeded to bring this claim by way of application.

The issue of the respondent's alleged indebtedness on the breach, are material and should be ventilated in an action in due course. The issue of *compensatio* which is raised by the respondent herein and which the applicant indicates that the Court should not have reference to with regard to clause 4.6 of the agreement signed between the parties, which is found at page 24 of the pleadings herein, is not capable of determination without having regard to the aspects that are raised with regard to the parking bays, the reduction of space for refuse disposal and with regard to the leaking roof.

Thus having regard to the above, I find that there are *bona fide* disputes of material facts which are not farfetched and that makes this application incapable of succeeding on the papers. The applicant ought to have proceeded by way of action and I accordingly DISMISS THE

APPLICATION WITH COSTS.

MIA, AJ

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

Case No.: **23305/2010**

In the matter between:

KLOOF INVESTMENT 2004 CC

Applicant

and

GARY ISSACS

Respondent

MIA AJ:

I have heard counsel for the applicant and the respondent herein. I have also had the benefit of perusing the record herein.

I am not persuaded that there are reasonable prospects that another court may come to a different conclusion.

The applicant's application for leave to appeal is dismissed with costs.

MIA, AJ