

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)**

24/3/2010

Case number: 17251/10

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO. ☒ YES

(2) OF INTEREST TO OTHER JUDGES: YES ☒

(3) REVISED. ☒

24.03.2010

DATE

SIGNATURE

In the matter between:

DAINFERN SHOPPING CENTRE (PTY) LTD

PLAINTIFF

and

BERRY HILL TRADING 154 CC t/a BOBBY'S HIRE SHOP

DEFENDANT

JUDGMENT

RAULINGA J,

[1] This is an application for summary judgment in which the plaintiff prays for;

- Payment in the amount of R100455-19;
- Interest for the sum of R100455-19 at the rate of prime plus 2% *a tempore morae*;
- Confirmation of the cancellation of the lease agreement;
- Eviction of the Defendant and any other occupant from the leased premises, and
- Costs of suit.

Plaintiff had prior to this application sued the Defendant for arrear rentals and other costs pertaining to commercial premises comprising

part of the Plaintiff's property portfolios arising from a written agreement of lease.

The Plaintiff contends that the Defendant has not set out a *bona fide* defence as required in law and that the points raised by the Defendant *in limine* should be dismissed.

[2] The Defendant is however of the view that all the four points raised in *limine* are valid and should be upheld. Further that on merits the Defendant has a *bona fide* defence and as a result leave to defend should be granted.

[3] After reading the papers and having heard Counsel I decided to dispense with all other points in *limine* and decided to deal with only one of them. It is my respectful view that all these other points do not hold water. The Defendant avers that the particulars of claim fail to comply with the provisions of Rule 18 (6) of the Rules of Court in that the Plaintiff failed to annex a complete copy of the lease agreement upon which the cause of action relies. Although the schedule is annexed certain pages of the terms and conditions numbered pages "A6" to "A9" and referring to Clause 14.01 to Clauses 26.01 are missing.

As a result the averment in paragraph 5.10 allegedly in reference to Clause 22 of the general conditions for the payment of electricity, water and gas by the Defendant cannot be determined by reference to the lease agreement. Furthermore, the Plaintiff avers in paragraph 9 that it is entitled to eject the defendant from the leased premises and cancel the lease in the event that the defendant fails to pay an amount on the due date, allegedly in reference to clause 26 of the lease agreement, the alleged breach clause but this too is missing.

- [4] Rule 18 (6) reads as follows: "A party who in his pleadings relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleadings shall be annexed to the pleadings."

Rule 18 (6) requires the Plaintiff to annex where it relies on a written contract, a true copy thereof or the part relied upon in the pleading. The Plaintiff failed to do so and therefore the particulars of claim are excipiable and/or vague and embarrassing in terms of Rule 23 (1) and the Defendant would be entitled to take an exception alternatively to make an application that the particulars of claim are irregular in terms of the provisions of Rule 30 of the Rules of Court. On this basis alone the Defendant would be granted leave to defendant.

- [5] However on merit an important agreement has been made by the Defendant that there exists a tacit term of the lease agreement that the Plaintiff would provide and deliver a functioning shopping centre. An averment is made that the shopping centre has only thirty percent tenancy. In proof of this the Defendant annexed "TH2". This has had a large effect on the Defendant's business which is dependant on the shoppers who pass through. The shopping centre has fallen into a state of disrepam which is a breach of clause 13.01 (1)-See in this regard "TH3"wherein the Dainfern Housing Estate residents have been forewarned to exercise caution when proceeding to the Fern Shopping Centre. A statement has been made that the Fern Shopping Centre no longer has security and that the area is extremely high risk.

In **Wilkins NO v Voges 1994 (3) SA 130 (AD) at 144 (C-D)** the court held that, "a tacit term in a written contract, be it actual or imputed, can be the corollary of the express terms, as it were, between the lines or it can be the product of the express terms read in

conjunction with evidence of admissible surrounding circumstances. Either way, a tacit term, once found to exist, is simply read or blended into the contract: as such it is 'contained' in a written deed. (my emphasis) not being an adjunct to but integrated part of the contract, a tacit term does not in my opinion fall foul of either the clause in question".

- [6] In **Sishen Hotel (EDMS) BPK v Suid- Afrikaanse Yster en Staal Industriële Korporasie BPK 1987 (2) 932** the court held that " the respondent had committed breach of contract in respect of its common law obligation of giving the *commodus usus* of the leased premises to the appellant, and that the respondent was on that ground liable to pay damages to the appellant (in an amount agreed to between the parties.) **See also Sweets from Heaven (PTY) Ltd and Another v Ster Kinekor Films (PTY) Ltd and Another 1999(1) SA 796 (WLD)**

- [7] From the above reasoning, it is clear that the point in *limine* raised by the Defendant and as discussed above should be upheld. Further, on merits it can be concluded that the defendant has a *bona fide* defence.

It therefore follows that the Defendant be granted leave to defend.

- [8] **In the premises I would make the following order:**

- [1] **The Plaintiff's Application for summary judgment is dismissed with costs.**
- [2] **The Defendant is granted leave to defend the action.**



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T J RAULINGA
JUDGE OF THE HIGH COURT
NORTH GAUTENG HIGH COURT