**REPORTABLE**

**IN THE HIGH COURT OF SOUTH AFRICA**
**EASTERN CAPE – PORT ELIZABETH**

Case No: 3563/11
Date Heard: 29/11/11
Date Delivered: 2/12/2011

In the matter between

**LETAP CC** Applicant

and

**OCEANS 11 SEAFOODS TAKE OUT CC** First Respondent

**TRANSNET LIMITED** Second Respondent

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**JUDGMENT**

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**REVELAS J**

[1] The applicant approached this court in urgent proceedings seeking the eviction of the first respondent from premises which the applicant has been leasing since 2001, from its owner, the second respondent by 30 November 2011. Notwithstanding a clause in the lease agreement concluded between the applicant and the second respondent prohibiting sub-letting, the applicant nonetheless sub-let the premises to the first respondent. The second respondent did not oppose the application, whereas the first respondent not only opposed the application, but launched a counter application seeking to prohibit the applicant from proceeding with the building operations on the property on which it had commenced in October this year.

[2] Substantial disputes of facts emerged in the affidavits filed in this

matter, but I will nonetheless attempt to set out accurately, insofar as possible, the background facts which are common cause, or not in dispute which gave rise to these two applications.

[3] The deponent to the founding affidavit, Imraan Patel ("Patel") is the managing member of the applicant, a close corporation. The applicant is a lessee of a portion of property (erf 5638) comprising 702 square metres, within the Port Elizabeth Harbour. On this land there is a building described in the second respondent's lease agreement with the applicant as "(a) Mess and Ablution _ _ _ (b) Control Cabin Building". The latter is known as "Oceans 11", a very popular seafood restaurant ("the premises"). The current lease, entered into on 1 April 2011 between the applicant, and the second respondent, is a renewal of two prior leases, each for a duration period of three years. The current lease comes to an end on 31 March 2014.

[4] During about 2002, Patel came to what Patel terms "an arrangement" with Mohamed Rashid Hassim ("Hassim"), his wife's uncle, to the effect that the latter and his family could occupy the premises for his own use, paying the rental and deposits and consumption charges in respect thereof. According to Hassim, who is also the deponent to the answering affidavit, the first respondent has been conducting its business on the premises since 2005 from the premises.

[5] Before that, and since 2002, two other entities, which were the predecessors of the first respondent (C-Food Packaging and Catch 22), occupied the premises. Both businesses belonged to Hassim's son, Mohamed Jameel Hassim ("Jameel"). Jameel is also the sole member of the first respondent, who currently occupies the premises.

[6] Quite plainly, this "arrangement" as Patel has termed it, was nothing more than an agreement (albeit unlawful) to sublet. Hassim denies any knowledge of a prohibition against sub-letting. However on

his own version, he was given a copy of the lease in 2002 when he raised the concerns he had with the cancellation clause (clause 1), and when Patel gave him the assurance that the lease would not be cancelled and that Hassims could do business on the premises for as long as the lease with the second respondent endured. One has to assume he had read the entire contract.

[7] The probabilities indicate that all parties involved knew that the sub-letting agreement was prohibited by the main lease between the applicant and the first respondent. In WE Cooper's *The South African Law of Land and Tenant 6th Edition*, at 230, the consequences of a breach of a prohibition clause against sub-letting in a lease agreement are discussed. In such circumstances according to the author, the lessor would be entitled to eject a sublessee and terminate the agreement with the lessee. Clearly, the first respondent has no entitlement in law to occupy the premises. The lessor (second respondent) has however elected to remain silent and has not taken or threatened with any action against the first respondent. Hassim explained that Mr Pitout of the second respondent, had adopted the approach that this was a family matter in which the second respondent did not want to become embroiled. Since no affidavit has been put up to the contrary the veracity of the aforesaid statement can be accepted. That then puts paid to the applicant's argument that if the first respondent remains on the premises any longer, after the end of November this year, the second respondent would cancel the lease and both the applicant and the first respondent would face financial ruin. I will now consider the applicant's other contentions pertaining to the urgency of the relief sought.

[8] The applicant's current lease with the second respondent is much on the same terms and conditions of the previous leases. The material term in the lease which is of relevance in the determination of this matter, is clause 31.1, which prohibits sub-letting without the second respondent's consent. Hassim was fully aware that the premises were owned by the

second respondent who leased it to the applicant. According to him, the first respondent's occupation of the premises has been with the knowledge and blessing of the second respondent. At the expiry of every lease, when a new one was entered into by the applicant and the second respondent, Hassim would be notified of the new deposit and rental payable to the second respondent, and Hassim's daughter made the necessary payments directly to the second respondent. It can hardly be argued that the second respondent was unaware of the sub-letting arrangement on these facts. The Hassims also had dealings with Mr Pitout, the second respondent's area manager in Port Elizabeth, regarding renovations to the premises when a fire broke out in the restaurant. Many employees of the second respondent are also regular patrons of the restaurant as its main office building is very close to the restaurant.

[9] During 2008, the applicant began to invoice the first respondent directly for rental and other charges. During this same year Patel also had building plans pertaining to renovation and alterations of the premises approved by the local municipality, but did not advise the Hassims thereof.

[10] Some time before 2008 then, Patel must have decided to develop and renovate the property. It appears from his later conduct and the plans that Patel or the applicant also wanted to run a food outlet from the premises with Patel's brother. The second respondent gave its consent to the refurbishment of the premises in October 2011. An architect and project manager, Eldridge Sauls ("Sauls") was appointed as the project manager for development of the premises.

[11] On 24 October 2011, the applicant's attorneys advised the first respondent that the applicant needed the premises in order "to further its business interests". Relying on the express prohibition of sub-letting without the second respondent's consent in the lease agreement, it was

maintained that the first respondent's occupation of the property was in breach of the applicant's lease agreement with the second respondent. The purpose of this letter was to notify Hassim that the agreement with the first respondent "to occupy" the premises, had been terminated and the first respondent is given until the end of November (2011) to vacate the premises. Hassim who had by then realized that Patel wanted to begin a new business venture of his own on the premises, did not want to co-operate and vacate the premises. Acrimony resulted between the two families. Hassim alleged that dustbins were emptied by members of Patel's family at the premises just to harass the Hassims.

[12] In support of the applicant's contention that the eviction of the first respondent had become a pressing and urgent matter, it attached an affidavit by Sauls to its papers, stating that the completion of the renovation project is 9 December 2011 (within ten days of hearing this application) which is the shutdown date for the building industry. He stated that the project was running on an "extremely tight timetable" and that sub-contractors have been booked in advance to commence with plumbing and the installation of electricity. Patel advised Hassim that he wished to start the renovations on 10 October 2011. Sauls stated in his affidavit that occupation by 1 December 2011 was critical. A large consignment of fish had also been ordered to be sold from the new food outlet, which Patel wanted to run from the premises.

[13] The impression Hassim gained initially, was that Patel only wanted to upgrade the premises. Hassim said he did not realize that the first respondent would be incorporated or become part of Patel's new business venture. Patel had previously given him a rudimentary sketchplan of the future upgraded building. Significantly, Patel did not give Hassim the detailed building plan which had already been approved by the municipality in 2008, which looked entirely different from the skecthplan, and was clearly a deceptive omission on Patel's part.

[14] The fire referred to earlier, broke out on the premises in April 2011, around the time when the applicant renewed the lease with the second respondent. The first respondent had taken out insurance and the insurance company paid out R250 000.00. The building had to be refurbished and this took about six to eight weeks to complete. Patel never let on that he planned his own extensive renovations. The first respondent was even required by the applicant to pay the applicant the deposit and rentals, owing in respect of the new lease with the second respondent.

[15] Patel knew as early as 2008 that the proposed development he had in mind, which would further the applicant's business interests, had been approved and his deliberate silence on this important aspect until October 2011 compounds his deception. The applicant's reliance on the breach of the lease contract it had concluded with the second respondent, is disingenuous. Further, to wait until the eleventh hour to bring this urgent application suggests that the urgency to eject the first respondent, seems to be part of the applicant's business strategy with regard to the new restaurant rather than events out of the applicant's or Patel's control.

[16] The reason for Patel's failure to inform Hassim of his business plans much sooner than he did, can only be because it was economically advantageous to the applicant. It did not seem to matter to Patel that his late disclosure of the position was highly prejudicial to the first respondent who now had to endure closure of its business before the lucrative holiday season.

[17] The fact that a litigant with a claim sounding in money might suffer serious financial consequences by having to wait his turn for the hearing of his claim, does not entitle him to preferential treatment on the roll. (See: *IL & B Marcow Caterers v Greatermans South Africa* 1981(4) SA 108 [WLD at 113G-H]). Even if an application is regarded as urgent in

terms of Rule 6(12) of the Uniform Rules of Court on its merits, a court may still refuse to dispense with the ordinary prescripts of Rule 6 regarding time limits, where the matter has become urgent due to circumstances which is of an applicant's own making. (*Schweizer Reneke Vleis mpy (Edms) Bpk v Die Minister van Landbou en Andere* 1972(1) SA 235 (T)).

[18] In my view, the applicant's self-created urgency should not determine this matter. The applicant's decision to engage the service of sub-contracts or to perform building work in the timeslot of ten days after arguing this urgent application and its order of large quantities of fish on the basis that it would successfully obtain an eviction order against the first respondent on an urgent basis, was an ill-considered one.

[19] In the light of the aforegoing I naturally considered striking the application from the roll. That would have had the result that the applicant would have to bring the application in the normal course. The first respondent would then still, even at that later stage, be unable to show any entitlement to remain on the premises, and will probably be ordered to vacate the premises in any event. A preferable route to follow, would be to order the first respondent to vacate the premises in question at a later date than dictated by the applicant, and to prohibit the members of the applicant from interfering with the first respondent access to the premises or to continue with its building operations until the applicant has properly vacated the premises.

[20] In the early case of *Graaff-Reinet Municipality v Mkwane,* 1950(3) SA 883 EDLD, the court considered an appeal from the magistrate's court against a decision of a magistrate in a matter where the appellant municipality sought an order for ejectment of the respondent from a housing scheme on the ground of non-payment of rent. The respondent had become unfit for work and was engaged in an endeavour to obtain a

pension.

[21] The magistrate granted the ejection sought, but stayed the execution of the warrant "*until the defendant can be provided with other cheaper accommodation*". On appeal the court held that "*however good and right*" the action of the appellant was in establishing the housing scheme which caused the respondent to lose his cheaper accommodation, the magistrate did not exercise his wide discretion so unreasonably as to warrant interference. The court held as follows at 896 H-I:

*"In deciding this question we must look at the equities both for and against the lessor as well as the lessee, but should remember that this is a Regulation for the protection of the lessee. In De Wet and De Wet v Juter (1944 C.P.D. 255 at page 257) it was stated:*

> "that one must look at the position occupied by the lessee under the lease, and the position in which he will be placed in if he were to be ejected from the leased property etc".

[22] The aforesaid reasoning can be applied to the facts of the present matter. It stands to reason that a court has an inherent discretion to postpone the effect of an interdict, if it brings undue hardship for one of the parties. Given the position of the first respondent, if it were to be ejected on such short notice, after running a profitable business for so many years from the premises, it would be appropriate to exercise my discretion to afford the first respondent more time to vacate the premises. The building operations at the premises would presumably not commence properly before the middle of January next year. Accordingly, it would be fair and practical in the circumstances to give the first respondent until the end of January 2012 to vacate the premises.

<u>Costs</u>

[23] Even though the applicant was partially successful in obtaining the relief it sought, it should not be entitled to its costs since the matter was also not urgent. The first respondent argued that a punitive costs order ought to be made against the applicant. Although the manner in which the applicant has conducted itself calls some for censure, it should also not be overlooked that the first respondent was also only nominally, or partially successful in resisting the application and pursuing its counter-application. An ordinary costs order against the applicant would be sufficient.

[24] Accordingly, I make the following order:

a) The first respondent is to vacate the premises measuring 702 square metres on ERF 5638 Port Elizabeth Central, within the Port Elizabeth harbour, also known as "Oceans 11" by no later than 17h00 on 31 January 2012;

b) Until such time as the first respondent has vacated the premises, the first respondent is to enjoy undisturbed possession and unfettered access to and from the aforesaid premises.

c) The applicant is to pay the costs of this application on a scale as between party and party.

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E REVELAS
Judge of the High Court

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