

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

In the matter between:

Case No: 1288/2012

TRANSNET LIMITED

First Applicant

LE TAP CC

Second Applicant

And

OCEANS 11 SEAFOODS TAKE OUT CC

Respondent

Coram: **Chetty, J**

Heard: **2 August 2012**

Delivered: **10 August 2012**

Summary: ***Ejectment** – Claim based on ownership – Onus – Landlord and tenant – Owner alleging respondent in unlawful possession – Lease agreement prohibiting sub-lease – Owner unaware of existence of sub-lease – Owner entitled to possession*

JUDGMENT

Chetty, J

[1] The first applicant, a state owned corporation, is the owner of erf 5638 (the property), situate within the confines of the Port Elizabeth harbor. More than a decade ago it leased the only building erected thereon to the second applicant in terms of an agreement of lease which was renewed on subsequent occasions and endures to the present. Currently housed therein is a seafood take out

business which, it is common cause, operates under the name and style of *Oceans 11*. In order to place this application in proper perspective it is necessary to traverse the factual matrix which has engendered the dispute between the parties and what follows is either common cause or not in dispute. During the latter portion of 2011 the second applicant commenced construction of additional premises on the same erf virtually abutting *Oceans 11*. It now houses a seafood take out styled "*This is eat*" and the two businesses operate in direct competition with each other. The enmity generated thereby has ushered the second applicant and the respondent through the portals of this court on several occasions, the present application yet another chapter in the ongoing saga.

[2] The construction of "*This is eat*" struck a discordant note in the familial relationship which had hitherto endured between the members of the second applicant and the respondent. During November 2011 the second applicant instituted urgent motion proceedings (the initial proceedings) against the respondent in which it sought its eviction from the property. Although the first applicant was cited as the second respondent, no relief was sought against it absent opposition. The respondent unsuccessfully opposed the application and was ordered to vacate the premises. The learned judge, Revelas J, found that the respondent had no entitlement in law to occupy the premises given the express terms of the lease agreement concluded between the first and second applicants prohibiting subletting. The learned judge however, for equitable considerations, refused to order ejectment forthwith but granted the respondent a

reprieve until the end of January 2012 to vacate the premises.

[3] Aggrieved at the eviction order, the respondent sought leave to appeal on the basis that as a matter of law, the right to eject a sub tenant occupying in breach of a prohibition clause, vested in the lessor and not a lessee and that, in any event, the first applicant had consented or acquiesced in the sub-lease and would accordingly, in any contemplated proceedings for eviction by it against the respondent, be estopped from relying upon the prohibition clause in the agreement of lease. Leave to appeal was granted and the appeal is pending before the Full Court. In the interim *Oceans 11* and *This is eat* continue to operate, albeit with heightened enmity.

[4] On 20 February 2012 the Nelson Mandela Metropolitan Municipality issued a notice to the first applicant to vacate the property by reason of what it contended was a deviation from the approved building plans¹, which it identified as, **“No link between the two buildings”**. The notice carried the rider that the transgression should be rectified in conformity with the approved plans but occupation could nonetheless continue on receipt of a “occupancy certificate” from the municipality. The first applicant’s attempts to comply with the notice aforesaid by commencing the construction of the stipulated link was thwarted by the respondent seeking an interdict against it based, ostensibly, on the fact that the second applicant’s conduct, was in breach of paragraph 2² of the order

1 These plans were submitted to the first applicant by the second applicant as far back as April 2008 and depicted the proposed new construction linked to the existing building..

2 Continued occupation until the end of January 2012.

issued by Revelas J. By agreement between the parties however the matter was postponed *sine die* and second applicant undertook to cease construction of the link. A subsequent attempt to recommence construction elicited a threatened contempt of court application and once more construction ceased. On 16 April 2012, the Nelson Mandela Metropolitan Municipality issued a further notice to the first applicant lamenting its failure to adhere to the previous notice and ordered it to vacate the property by 8 a.m. on 23 April 2012. This notice precipitated this application, filed on 24 April 2012.

[5] The relief sought by the first and second applicants is separate and distinct. The first applicant's claim for the ejectment of the respondent from the property is based on the *rei vindicatio*. The principal allegation relied upon in the founding affidavit, deposed to by its attorney, is that, as the owner of the property, it is entitled, as a matter of law, to be restored to possession of the property. The relief sought by the second applicant, predicated upon the provision of Rule 49, is for the enforcement of the eviction order granted by Revelas J, notwithstanding the pending appeal.

[6] It is not in issue that the first applicant is the owner of the property. Consequently the onus rests upon the respondent to establish the basis upon which it claims an entitlement to remain in occupation of *Oceans 11*. To discharge the onus it has advanced a two pronged defence – firstly, *lis alibi pendens* and secondly, the existence of a tacit lease between it and the first

applicant.

The defence based on *lis alibi pendens*

[7] The requisites for the successful invocation of a plea of *lis alibi pendens* are that the two actions must have been between the same parties or their successors in title, concerning the same subject matter and founded upon the same cause of complaint. As to the parties, although the first applicant was cited as the second respondent in the initial proceedings, it was clearly not a party to those proceedings. In order to surmount the obstacle posed by the first requisite Mr Beyleveld submitted that the first applicant's election not to file opposing papers in the initial proceedings coupled to the fact that in those proceedings the second applicant had alleged that the application was brought with "the blessing" of the first applicant ineluctably compelled the conclusion that it was, albeit by conduct, a party to the initial proceedings. The submission is untenable. The fact of the matter is that no relief was sought against the first applicant. Furthermore, whatever ideas the second applicant might have entertained arising from the first applicant's omission to file opposing papers is peculiar to it alone and in no way impacts negatively upon the first applicant. The mere citation of the first applicant as a respondent is wholly insufficient to trigger the operation of the defence raised. On this ground alone the plea of *lis alibi pendens* cannot be sustained. It was moreover submitted on behalf of the respondent that the subject matter in these proceedings is the very question to be determined in the appeal noted

against the judgment of Revelas J. The argument completely overlooks the disparate relief sought by the first applicant in this application and that sought and granted to the second applicant in the initial proceedings.

[8] The relief which the first applicant seeks, based on the *rei vindicatio*, is one for restoration of the property and not, as counsel for the respondent contends, one for eviction. The mere fact that eviction is incidental to the order sought cannot affect the essential character of the relief sought – the subject matter in this application is distinct from that in the pending appeal. The defence based on *lis alibi pendens* can accordingly not avail the respondent.

Tacit lease

[9] In order to discharge the onus resting upon it to prove a right to possession of the property, the deponent to the opposing affidavit alleges that -

“10.1 Despite the Respondent’s lease agreement being with the Second Applicant, the First Applicant has since 2002 been fully aware that the Respondent occupies the premises, which occupation was with the blessing of the First Applicant. Up until 2008, the Respondent paid its rental in respect of the premises directly to the First Applicant, after which the Second Applicant began to invoice the Respondent directly for rental and other charges. This could only have been by arrangement between the First and Second Applicants. In addition, my family had direct

dealings with Mr Pitout, the First Applicant's area manager in Port Elizabeth, regarding renovations to the premises when a fire broke out in the restaurant. Moreover, many employees of the First Applicant are regular patrons of the Respondent's restaurant as its main office building is very close to same.

10.2 The Respondent has always complied with the terms of the sublease.

10.3 In light of the First Applicant's aforesaid knowledge, the First Applicant consented or acquiesced to the Respondent remaining in occupation in terms of the sub-lease and is estopped from relying on the prohibition clause against sub-letting in the lease agreement, more particularly as the Respondent has acted to its detriment by accepting the acquiescence of the First Applicant and occupied and traded from the premises. The First Applicant at the time through its representatives, represented to the Respondent that it was entitled to occupy the premises pursuant to a valid sublease. Alternatively, the First Applicant waived, in favour of the Respondent, any non-compliance with the clause relating of subletting."

[10] In the replying affidavit, deposed to by the first applicant's area manager, Mr *Evert Phillipus Pitout (Pitout)*, the latter disputes the allegation not only that he had knowledge of the sub-lease concluded between the second applicant and the respondent but emphatically denied that the first applicant either consented to or acquiesced in the respondent remaining in occupation of *Oceans 11*. This

denial precipitated the filing of supplementary heads by respondent's counsel advancing the argument that the matter be referred for the hearing of oral evidence. In argument before me, Mr *van Rooyen* submitted that upon a proper analysis of the affidavits, there is no dispute of fact warranting a referral of the matter for the adduction of oral testimony. I agree. Although there are differences in the factual accounts deposed to, these relate to peripheral issues. The material facts are not in dispute and the matter is capable of resolution on the papers.

[11] In the answering affidavit, *Mohamed Jameel Hassim (Hassim)*, in an attempt to invest the first applicant with knowledge of the respondent's occupation of the property, relies predominantly upon the fact that it paid the rental directly to it. This is a non *sequitur*. It is wholly sufficient to infer that thereby, the first applicant, a huge parastatal, had knowledge of the respondent's occupation. Furthermore the change in the rental payment regime does not justify the inference contended for. The first applicant's new payment method was communicated to its lessee, the second applicant and the reasons fully explained in the letter addressed to the second applicant's managing member, *Patel*, as far back as 2007. It is inconceivable that the letter would have been sent to *Patel* if the first applicant was aware, not only that the respondent occupied the premises, but, moreover, paid the rental to it. *Pitout's* evidence is that he labored under the impression that *Hassim* and his family were running the business on behalf of the second applicant. He furthermore decried all

knowledge of the existence of a sub-lease and referred to discussions he held with *Hassim's* mother wherein she denied the existence of a sublease.

[12] Although *Hassim* deposed to a further supplementary affidavit, ostensibly in response to *Pitout's* replying affidavit, the latter's evidence went unchallenged. *Pitout's* account of the meeting between himself and *Hassim's* mother was specifically adverted to in paragraph 20 wherein he stated as follows –

"20. At about this time or shortly afterwards, Naeema called on me at my office and told me that Mr Patel intended evicting them from the premises. I was somewhat surprised at this information and immediately asked her whether there was a sub-lease in place, to which she responded that there was not. On another occasion subsequent to that, the date of which I cannot now recall, I again asked Naeema whether there was a sub-lease in place and she denied it."

Hassim's evidence concerning the tacit lease is, upon a proper appraisal of his affidavits, clearly contrived. It is clear that the second applicant and the respondent, with full knowledge of the prohibition against subletting, colluded in concluding a sub-lease without the knowledge of the first applicant who remained blissfully unaware of the true state of affairs until the meeting with *Patel* and his attorney. Consequently the defence based upon estoppel cannot avail the respondent.

[13] It follows from the foregoing that the defences raised are without merit and the first applicant is entitled to the orders sought. This finding renders nugatory the relief sought by the second applicant. In the result the following orders will issue –

- 1. The respondent is ordered to forthwith restore possession of the business premises, operated by it on Erf 5638, Port Elizabeth, to the first applicant.**
- 2. The respondent is ordered to pay the costs of this application.**

D. CHETTY
JUDGE OF THE HIGH COURT

On behalf the Applicants: *Adv R.P van Rooyen S.C instructed by Friedman Scheckter, 75 – 2nd Ave, Newton Park, Port Elizabeth; Tel: 041-395 8412; Ref: G Friedman*

On behalf of the Respondent: *Adv A. Beyleveld S.C / Adv Bands instructed by Fredericks Incorporated, 109 Westview Drive, Mill Park, Port Elizabeth; Tel: 041-363 8506; Ref: T Fredericks*