IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

Case No: 3618/2016

In the matter between:

TRANSNET LIMITED Applicant

[Registration No. 1990/00090/06]

and

ED-U-COLLEGE (PORT ELIZABETH) 1st Respondent

[Registration No. 1995/011813/08]

MAZARS (A FIRM OF CHARTERED ACCOUNTANTS (SA)) 2nd Respondent

JUDGMENT

MBENENGE J:

[1] The applicant, in its capacity as owner of certain properties subject to this application, and the first respondent, a registered school in terms of the South African Schools Act 84 of 1996 and an association not for gain in terms of section 21 of the Companies Act 61 of 1973, concluded two lease agreements; the one lease agreement related to a building colloquially referred to as Payne's Building, which the first respondent leased from the applicant approximately 20 years ago renewable from time to time, but terminating on 31 December 2011, whilst the other related to a property

colloquially known as the Harbour Building concluded during 2008 which terminated during April 2013.

[2] It is not in dispute that, notwithstanding the termination of the lease agreements, the first respondent renewed its occupation of the Payne and Harbour Buildings. The first respondent did not pay rental promptly and this resulted in the applicant resorting to court proceedings on diverse occasions for recovery of arrear rental and/or for the eviction of the first respondent from the subject properties. The applicant and the first respondent have been embroiled in litigation since approximately the year 2011.

[3] On 14 July 2011 the applicant launched an action against the first respondent (the respondent)[1] before this Court under case no.1729/2011 seeking payment of R1 115 090.88 as and for arrear rentals in respect of Payne's Building. The parties however reached agreement in settlement of that action during or about October 2011, when the respondent acknowledged being indebted to the applicant in the sum of R1 118 383.00 *"which [represented] the total arrear rental up to and including August 2011"* and undertook to pay the outstanding amount timeously on the tenth day of each month commencing on 1 September 2011 and on the tenth of each succeeding month thereafter. According to the agreement, failure to effect timeous payment as undertaken after 7 days' notice would result in the full balance outstanding becoming due and payable immediately.

[4] The parties further agreed that the respondent would remain in occupation of Payne's Building until 31 December 2011, subject to a further undertaking that the respondent would "*pay the rental and operating costs due for the period September 2011 to December 2011 in the sum of R49 129.20 per month plus electricity commencing with effect from 1 September 2011 and thereafter payable on the 10th day of each succeeding mont*h."

[5] The settlement agreement in relation to case no. 1729/2011 was made an order of court on 7 July 2012.

[1] The second respondent has been cited out of caution and has not opposed the applicant, hence the first respondent is, for the sake of convenience, referred to as "*the respondent*"

[6] The respondent once again defaulted in its payment of rental and, demanding notwithstanding, failed to remedy its breach. Consequent upon this state of affairs, on 22 November 2012, the applicant caused a writ of execution to be issued. The execution resulted in a *nulla bona* return of service, on the strength of which the applicant brought an application under case no. 135/2013 before this court for the liquidation of the respondent. Side by side with that, the applicant also sought to evict the respondent from Payne's Building.

[7] The respondent did not give heed to the notice to vacate Payne's Building. The applicant thereupon brought an application for the eviction of the respondent under case no. 212/2013 on 25 January 2013. The parties once again entered into negotiations with a view to settling the disputes that beset them. It is not in dispute that, at this point, the parties had evinced a determination to resolve even a dispute relative to the Harbour Building which had also, on its own, attracted pending litigation due to unpaid rentals. The papers shed no further light regarding the nature of these pending proceedings. At the relevant negotiations the parties were represented by their respective attorneys.[2]

[8] The negotiations culminated in a further settlement, made an order of court on 28 March 2013, being reached in relation to case no. 135/2013 (the liquidation application) and case no. 212/2013 (the eviction application). The preamble to the settlement agreement (hereinafter referred to as the 2013 agreement) makes it plain that "*the parties [had] settled both disputes,..which agreement [in those cases] … they [wished] to be made an order of court.*"

[9] The relevant part of the 2013 agreement, quoted copiously, reads:

> "3. The parties' respective auditors will endeavour to determine the amount owed by the Respondent to the Applicant, if anything, in respect of the lease of Payne's Building and the Harbour Building within fifteen working days of the Respondent's auditors being provided with all the necessary documentation requested by them.
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> 4. In the event of a party's respective auditors being unable to reach agreement within ten working days as to the amount owing, if anything, the parties agree

[2] At that point the applicant was represented by its erstwhile attorneys Burmeister, De Lange, Soni Incorporated, and the first respondent, attorneys Spilkins Incorporated

that the Chairman of the Port Elizabeth District Region of the South African Institute of Chartered Accountants shall within five days appoint an dependent auditor to determine the said amount, whose decision will be final and binding on the parties.

5. In respect of the eviction application the Respondent hereby undertakes to vacate Payne's Building and the Harbour Building by not later than 31 July 2013.

6. The Respondent tenders to pay the Applicant's taxed party and party costs of the eviction application.

7. The Respondent will be liable to pay monthly rental in respect of the Payne's Building and R33 000 in respect of the Harbour Building until such time as it vacates both buildings."

[10] That did not bring to an end embroilment by the parties in litigation,[3] but the background outlined above suffices for present purposes.

[11] Pursuant to clauses 3 and 4 of the 2013 agreement, and upon it emerging that the parties were not *ad idem* regarding the amount the respondent owed the applicant, the second respondent, an independent firm of chartered accountants (Mazars), was appointed by the Chairman of the Port Elizabeth District Region of the South African institute of Chartered Accountants to arbitrate the matter and determine the indebtedness of the respondent.

[12] The applicant is of the view that the arbitration process has merely to determine the indebtedness of the respondent in respect of Payne's Building from 1 September 2011, as, in terms of the initial agreement concluded during October 2011, the indebtedness of the respondent to the applicant for debts in respect of Payne's Building before 1 September 2011 was agreed upon as being in the amount of R1 183 383.00. In respect of the Harbour Building, goes the applicant's case, the arbitration process has to determine the indebtedness over the period the respondent occupied this building up to and including the date of vacation thereof.

3 For example, even though agreement had been reached that the respondent would vacate both buildings by 31 July 2013, that did not come about. Yet another application for the eviction of the respondent was resorted to. At some other point, the respondent brought another application under case number 62/2014 to interdict the applicant from evicting the respondent pending the launch of proceedings to determine the applicant's alleged constitutional obligation to continue to provide the respondent with accommodation.

[13] The respondent, on the other hand, sees things differently; the arbitration process has to consider the indebtedness of the respondent towards the applicant afresh, as the 2013 agreement intended to start the applicant and the respondent off on a clean slate, even in respect of Payne's Building for the pre- 1 September 2011 period.

[14] The arbitration process has now ground to a halt, as the arbitrator has no jurisdiction to determine a proper interpretation of the March 2011 agreement and the 2013 agreement.

[15] This court has been called upon to resolve the dispute and, to that end, the applicant seeks an order:

> "1. declaring that the Respondent is indebted to the Applicant in the amount of R1 181 383.00 as at 1 September 2011;
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> 2. interest at 11% on the amount of R1 181 383.00 as from 1 September 2011 to the date the Respondent vacated the Payne's Building;
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> 3. that Mazars a firm of Chartered Accountants (SA) is ordered to determine the indebtedness of the Respondent in respect of outstanding rental payments for the buildings of Payne's Building from 1 September 2011 until the date this building was vacated and to further determine the indebtedness in terms of the Respondent's rental payments in respect of the Harbour building from the commencement of the rental agreement until the date the Respondent vacated the harbour building;
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> 4. consequent upon the determination of the rental amount per paragraph 3 above, the First Respondent is ordered to effect payment of the amount so determined within a period of 30 days of such determination;
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> 5. that the Respondent pays the cost of this application;
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> 6. [for] further and/or alternative relief."

[16] What has fallen to be determined is principally whether the respondent's acknowledgement of indebtedness to the applicant in the sum of R1 181 383.00 "*which represents the total arrear rental up to and including August 2011*," made an order of court on 7 February 2012, was in effect compromised by the 2013 agreement.

[17] It is trite law that the onus is on the party alleging that a compromise has been effected,[4] and because compromise is a form of novation and involves the waiver of

4 *The Torch Moderne Binnehuis Vervaardiging Venn (Edms) Bpk v Husserl* 1946 CPD 548

the existing rights (or claimed rights) it must be as clearly and unambiguouslyproved as any other waiver or novation.[5]

[18] In its papers the respondent contends, in essence, that the final and only enforceable order which regulates the dispute of arrear rental remains that of 28 March 2013. The respondent then proceeds to state that *"[i]t is clear from the March 2013 Agreement that there has at all material times been a dispute regarding the alleged arrear rental which was owed*" as is apparent at paragraph 3 in so far as it refers to an endeavour by the auditors to determine the amount owed by the respondent to the applicant, "*if any,*" and paragraph 9 of the same agreement, which reads:

> "If any amount is found to be due by the respondent to the applicant …it will be settled in full by 31 December 2013."

[19] The respondent then concludes by saying *"[n]othing recorded in the March 2013 Settlement Agreement suggests that there was a predetermined amount which was due and payable at that point.*"

[20] The 2013 agreement related primarily to case numbers 135/ 2013 and 212/2013, and regulated, in the main, the withdrawal of these litigious matters. Much as there is reference in the clauses in question to an endeavour having to be made to determine "*any amount*" that might be owed even in respect of the Harbour Building, no specific reference is made to the order embodying acknowledgement of indebtedness by the respondent to the applicant in the sum of R1 118 383.00 in respect of Payne's Building for the period prior to 1 September 2011.

[21] The order of 7 February 2012 preserving the extent of acknowledgment of indebtedness by the respondent to the applicant for the pre- 1 September 2011 period was neither appealed nor rescinded by the respondent.

[22] Instead, the respondent's erstwhile attorneys, on 3 April 2013, wrote a letter wherein *inter alia* they acknowledged that the calculation by the arbitrator should be

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5 HR Christe, *The law of Contract in South Africa* (5th Ed) p 456

done in respect of Payne's Building from 1 September 2011. On the authority of *Hlobo v Multilateral Motor Vehicle Accident Fund*[6], it is not available to the respondent to contend that its erstwhile attorneys did not have the power to bind it the way the attorneys did.

[23] The words "*if any*" relied on by the respondent should, in my view, not be interpreted as compromising the applicant's entitlement to being paid R1 118 383.00 for the pre- September 2011 period. An intention to the contrary should have been conveyed in clear and unambiguous terms. "*If any*" should be interpreted, in this instance, as referring to such of the respondent's indebtedness to the applicant for the period computed from 1 September 2011 onwards (in relation to Payne's Building) as may be determined by the auditors. It is hard to believe why the applicant would, after binding the respondent in the manner done in 2011, in the course of time, turn around and waive or compromise its vested right in circumstances where the indebtedness of its debtor was of an ongoing nature. That stance defies logic. "*If any'* has, in my view, not freed the respondent from the obligation imposed by the 2011 agreement. A clearer indication of intention to free the respondent from the obligation is required than the mere use of "*if an*y." The parties merely contemplated the possibility that there might be no indebtedness in relation to the period, after August 2011.

[24] I am therefore of the view that the onus resting on the respondent to clearly and unambiguously prove compromise has not been discharged.

[25] It now remains to consider the appropriate relief to which the applicant is entitled. Prayer 1 is not competent because the order of 7 February 2012 has already determined that the respondent is indebted to the applicant in the sum of R1 118 383.00 "*which represents the total arrear rental up to and including August 2011*." Consequent upon that, prayer 2 relating to interest must also fall by the wayside. Mr *Rautenbach*, who appeared for the applicant, conceded as much, and was content to press for an order in terms of prayer 3. Prayer 4 is a matter to be dealt with approximately once the arbitrator has made his determination.

[6] 2001 (2) SA 59 (SCA)

[26] The applicant has attained substantial victory in these proceedings. There is thus no reason why costs should not follow the result.

[27 I therefore grant the following order:

1. **The second respondent is directed to determine the indebtedness of the first respondent in respect of outstanding rental payments for Payne's Building, from 1 September 2011 until the date this building was vacated, and to further determine the indebtedness of the first respondent towards the applicant in respect of the Harbour Building from the commencement of the relevant rental agreement until the date the first respondent vacated the Harbour Building.**

2. **The first respondent is directed to pay the costs of this application**.

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JUDGE OF THE HIGH COURT

Counsel for the Applicant	:	*J G Rautenbach SC*
Instructed by	:	Siya Cokile Inc. Attorneys 16 Clyde Street Central PORT ELIZABETH

Counsel for the 1st Respondent	:	*B C Dyke SC (with him, A C Barnett)*
Instructed by	:	Listen Brewis & CO 35 Albany Road Central PORT ELIZABETH
Date heard	:	9 February 2017
Judgement delivered	:	21 February 2017