

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

**Not reportable
CASE NO: 1328/2017**

In the matter between:

**CLEMLEN INVESTMENTS NO. 10 (PTY) LTD
REGISTRATION NO. 1997/017109/07**

APPLICANT

and

**RECYCLE YOURSELF (PTY) LTD
REGISTRATION NO. 2013/190254/07**

RESPONDENT

JUDGMENT

GQAMANA, AJ

[1] This is an application brought by the applicant against the respondent seeking an order that the respondent be directed to comply with its contractual obligations arising from a lease agreement concluded between the parties on 3 May 2016. The applicant is the registered owner of an immovable property situated at 137 Grahamstown Road, Deal Party, Port Elizabeth, consisting of a warehouse and an office. Certain portions of the applicant's premises are rented out to a number of tenants for business purposes including the respondent.

[2] Central to this application is the lease agreement¹ concluded between the parties.

[3] In terms of the aforesaid lease agreement, the respondent has leased premises for recycling of cardboard and paper products. Further, the lease is for the period of three years and two months commencing from 1 May 2016 until 30 June 2019.

[4] The lease agreement contains the following special conditions:

"ADDITIONAL CONDITIONS

- The front yard area of the warehouse may be utilised for staff and visitor parking and loading and off-loading of trucks only;
- All stock in trade to be worked with and stored internally. The external yard area is to remain clean and tidy at all times.
- No Purchase of cardboard or paper products shall be allowed from people (smouse) off the street at the premises at all times."

[5] The applicant contends that the conduct of the respondent is in direct breach of clause 29 of the relevant lease agreement in that, the respondent has on several occasions stored, *inter alia*, large metal bins, shipping containers, bales of recyclable material and baling machines in the yard area in front of the premises. To substantiate and support its case it has attached photographs depicting recyclable material and large metal bins in the front yard of the leased premises.

¹ Annexure "A", Index pp 16 – 32.

[6] This application was brought on an urgent basis for hearing on 25 April 2017. However, on the said date the matter was postponed to 9 May 2017 with costs reserved. Again, on 9 May 2017, the application was postponed to 25 May 2017. The application was issued and served on 13 April 2017. In the Notice of Motion the respondent was called upon to file the answering affidavit on or before 21 April 2017. It was, however, served and filed on 24 April 2017.

[7] Although the application was brought on an urgent basis, there was no certificate of urgency filed.

[8] Further, Rule 6 (12) (b) of the Uniform Rules requires an applicant in an urgent application to set forth explicitly the circumstances which render the matter urgent. Therefore an applicant must in its founding affidavit set out the circumstances on which it relies to render the matter urgent and the reasons why it claims that it cannot be afforded substantial relief at a hearing in due course.²

[9] Counsel for the applicant correctly in my view conceded that there was no certificate of urgency filed accompanying the application and that the founding affidavit falls foul of Rule 6 (12). However, he advanced argument that the issue of urgency has since been overtaken by events. As I understand him, on 25 April 2017 parties reached an agreement postponing the matter so as to allow the applicant to file replying papers and for the parties to explore the possibility

² Cebeshe v Premier Eastern Cape 1998 (4) SA 935 (Tk) at 948 F

of resolving the matter between themselves. Further he argued that the matter is now ripe for hearing and the date of the hearing was then given to them by the Registrar. In my view the issue of urgency remains valid only insofar as the costs that were reserved on 25 April 2017 and I will deal with that in paragraph 16 below.

[10] The respondent is disputing that its conduct is in contravention of clause 29 of the relevant lease agreement. Its version is that it never stored recyclable material externally in breach of the lease agreement. Further, it contends that having regard to the nature of its business, the recyclable material is transported in bins or shipping containers which are off-loaded from trucks and loaded onto trucks and that has to occur outside as provided for in the lease agreement. The bottom line of its defence is that, the presence of the shipping containers as evident in the photographs attached in the founding papers is reasonably incidental to the agreed loading and off-loading process. A further argument advanced by the respondent was that the yard area where the large metal bins and shipping containers were placed is not in the front part of the leased premises but at the back. According to the respondent, the placement of bins and shipping containers at the rear end of the warehouse does not offend clause 29 of the relevant lease agreement.

[11] It is trite law that, in an interdict application, for an applicant to succeed all the well-known requirements for the final interdict relief must be met.³ On

³ Setlogelo v Setlogelo 1914 AD 221 at 227

anyone's reading of clause 29, the front yard area of the warehouse is reserved only for visitors and staff parking and loading and for loading and off-loading of trucks. In addition, all stock in trade has to be worked with and stored internally and the external yard area has to remain clean and tidy at all times. As indicated above, the respondent disputes that its conduct offends the provisions of clause 29, but the evidence produced by the applicant in the form of photographs which were taken over a period of time and on different days supports the applicant's case. It is evident from these annexures that shipping containers, recyclable materials and bales are stored on the outside of the warehouse. These are huge shipping containers and there is no evidence that they were there for purposes of loading and off-loading when these photographs were taken. Huge number of shipping containers with recyclable bags next to them are clearly visible from the photographs.⁴ Therefore, the respondent's contention that it has not conducted its business in contravention of clause 29 of the lease agreement is paralysed, having regard to all the evidence produced by the applicant.

[12] The applicant has further made allegations which are not seriously disputed by the respondent that as a result of its conduct it has suffered financial losses because it could not secure further leases and that the conduct of the respondent is hazardous.

⁴ Annexure "B4", Index p 42

[13] In resisting the application it was also argued on behalf of the respondent that the interdict relief is not the only appropriate remedy available to the applicant. The respondent's argument was that the applicant could cancel the lease agreement as provided for in clause 21.1 of the lease if it contends that the respondent has committed a breach of any terms of the lease. The crux of this argument is that cancellation of the lease is an alternative suitable remedy available to the applicant. In my view this argument cannot succeed because the applicant is entitled to enforce the respondent not to act contrary to the terms of the lease agreement. This view is fortified by the judgment of the Supreme Court of Appeal in V & A Waterfront Properties v Helicopter and Marine Services⁵ where it was stated that:

"... the respondents submitted that an interdict was not the only appropriate remedy. It was said that the first appellant could sue for damages or cancel the lease. This argument cannot prevail. The first appellant is entitled to enforce its bargain: to obtain the lessee's promised rental while preventing the latter from conducting itself in a manner that involves breaking the law. The only ordinary remedy which provides it with the necessary protection is an interdict. Cancellation will be quite the opposite of that to which the first appellant is entitled."

[14] In my view even if provision for cancellation is available in the lease agreement but if the respondent is conducting itself in breach of the lease agreement, that does not bar the applicant from binding the respondent to the terms of the agreement without resorting to the cancellation. The applicant has elected not to cancel the lease but approach this court for an interdict remedy and to prevent the respondent from conducting itself in a manner that involves breaking the terms of the lease agreement.

⁵ 2006 (1) SA 252 (SCA) at para 23

[15] Having regard to all the facts and evidence before me, I am satisfied that the applicant has established and met all the requirements for an interdict. It therefore follows that the application must succeed.

[16] On the issue of the reserved costs on 25 April 2017, although primarily the postponement was caused by the applicant because it had rushed to court on truncated time periods and when it was faced with an answering affidavit, it sought time to file replying papers. But having found that the respondent has indeed acted and conducted its business in breach of clause 29 of the lease agreement, fairness in my view dictates that each party must pay its own costs occasioned by this postponement.

[17] In the result the following order is issued:

1. The respondent is hereby directed to remove any and all large metal bins, shipping containers, bales of recyclable material and baling machines from the front yard area of the warehouse situated at 137 Grahamstown Road, Deal Party, Port Elizabeth, within five (5) days of service of this order.
2. The respondent must refrain from placing large metal bins, shipping containers, bales of recyclable material and baling machines in the front yard area of the warehouse of the leased premises.

3. The respondent is directed only to use the front area of the warehouse of the premises for staff and visitor parking and for the loading and off-loading of trucks.
4. The respondent must ensure that the front yard of the warehouse on the premises is kept clean and tidy at all times.
5. The respondent is ordered to pay the costs of this application as between attorney and client scale.
6. Insofar as the reserved costs of 25 April 2017, each party must pay its own costs.

NW Gqamana

Acting Judge of the High Court

Appearances:

Adv AC Barnett

Counsel for applicant

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North

PORT ELIZABETH

Adv L Kroon

Counsel for the respondent

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PORT ELIZABETH

Date heard: 25 May 2017

Date delivered: 13 June 2017