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

CASE NO.: 540/2018

In the matter between:

THE ALGOA BAY YATCH CLUB **Applicant**

And

TRANSNET SOC LIMITED t/a THE NATIONAL PORTS AUTHORITY **Respondent**

JUDGMENT

BESHE J:

[1] The applicant has approached this court on an urgent basis for an order in the following terms:

1. Dispensing with the Rules of the above Honourable Court to notice and service and allowing this application to be heard as a matter of urgency in accordance with Rule 6(12) of the said Rule;

2. A *Rule Nisi* do hereby issue, calling upon the Respondent to show cause, if any, on the **27th March 2018**, at **9.30 am**, why an Order in the following terms should not be granted, namely that:

2.1 the Respondent be interdicted from issuing a Warrant of Eviction against the Applicant to evict the Applicant from the premises described as the Algoa Bay Yacht Club Port Elizabeth Harbour, pending the award of a tender referred to in paragraph 2.2 below;

2.2 the Applicant be entitled to continue to occupy the premises known as the *Algoa Bay Yacht Club*, at a rental determined by the Regulator, in terms of the National Ports Act, at a hearing to be held on the 23rd March 2018, pending the outcome of a lawful tender process conducted by the Respondent, in terms whereof a new Tenant has the right to occupy the Algoa Bay Yacht Club premises;

2.3 the Respondent bear the costs of this Application.

3. the provisions of paragraph 2.1 operate as an interim interdict pending the return day.

[2] The background to this application appears to be that: Action was instituted by the respondent against the applicant in October 2014 wherein respondent sought cancellation of the Lease Agreement between the parties, eviction of the applicant, payment of arrear rental as well as interest and costs. It appears that standoffs or disputes between the parties have a long history. According to the applicant a rental dispute was referred to the Ports Regulator in 2009 and again in 2011.

[3] The trial of the action referred to in the preceding paragraph was set down for the 22 August 2017. On that day negotiations between the two parties took place which culminated in an order in the following terms being taken by agreement between the parties on the 23 August 2017 before *Goosen J*. The order that was issued reads as follows:

"Having heard Advocate Ntsepe, Counsel for the Plaintiff and Advocate Beyleveld, Counsel for the Defendant and having read the documents file of record

IT IS ORDERED: (By Agreement)

1. That the lease agreement/s entered into between the parties is hereby cancelled.

2. That the Defendant undertakes to vacate the Plaintiff's property described as ERF 1051 ("the property") in the Port of Port Elizabeth, on the 28th February 2018, provided that if the Plaintiff procures another Tenant for the property prior thereto, the Plaintiff shall afford the Defendant two (2) calendar months' notice to vacate, provided further that the defendant may, during this period, give two (2) calendar months' notice to vacate prior to 28th February 2018.

3. That for so long as the Defendant occupies the property, the Defendant shall pay rental in the amount of R49 977.60 (Forty Nine Thousand Nine Hundred and Seventy Seven Rand and Sixty Cents) being the current monthly rental inclusive of VAT.

4. That the Defendant must pay the rental amount on or before the 1st day of each and every month, commencing 1st September 2017, provided that the Plaintiff shall provide the defendant with a TAX Invoice by the 25th of each month in advance.

5. That in the event of the defendant not making payment of the rental in paragraph 3 above timeously, the Plaintiff shall be entitled forthwith and without notice to issue a Warrant of Eviction against the Defendant.

6. That the quantum of the arrear rental and the Plaintiff's claim for arrear rental is postponed *sine die*.

7. That the Defendant undertakes to pay the Plaintiff's wasted costs on the scale as between party and party, as taxed or agreed, within fourteen (14) days from date of *allocator*."

[4] It is common cause that that order that was issued was drafted by those representing the respondent who was the plaintiff in the action.

Prior to that, a draft order had been crafted by those representing the applicant (defendant at the time). This draft order sought to cater for applicants' occupation of the property post 28 February 2018, should respondent not have secured an alternative tenant by then. According to the applicant this had been agreed upon during the settlement negotiations between the parties. That part of the draft order did not find its way to the order that was ultimately issued by the court. The parties cite different reasons for the exclusion of this aspect. According to the applicant, they were advised by those representing the respondent, in particular their attorney *Mr Vandayar* that respondent's head office wanted a "clear cut" order. But that it was agreed that notwithstanding the curtailment of the form of the draft order crafted by applicants' attorneys, the agreement entered into earlier during the negotiations would not be affected.

[5] According to the respondent that clause did not make its way into the order that was issued by the court because it was simply not accepted by the respondent, hence the crafting of a new order which was in essence the one ultimately issued by *Goosen J*.

[6] Applicant contends that the matter is urgent because it only became aware on the 16 February 2018 a Friday, that respondent

expected it to vacate the premises on the 28 February 2018 and this application was launched on Monday 19 February 2018.

[7] Applicant's claim to a *prima facie* right is that it has a right to occupy the premises, pending the lawful awarding of a tender for the lease of the property it is presently occupying, as per agreement with the representatives of the respondent.

[8] Applicant asserts that "it was expressly agreed that notwithstanding the curtailment of the draft order that the agreement referred to in Annexure ASI, (Friedman Draft Order) would not be affected". In the same breath applicant states that respondent's legal representative's position was that there was no need to incorporate the additional terms of the agreement, given that the order would relate to the termination of the lease, <u>the date for vacating the property</u> and the rental to be paid during that period. (My underlining).

[9] Applicant asserts that it is favoured by the balance of convenience given that the tender has not yet been awarded and the premises will remain vacant should the applicant vacate them on the 28 February 2018.

[10] In a supplementary affidavit **Mr Alan Straton**, who also deposed to the founding affidavits, alludes to the irreparable harm the applicant will suffer if required to vacate the property on the 28 February 2018. In that, if applicant were to comply with the call for it to vacate the property that will result in the instantaneous death of the applicant as an organisation. The deponent continues to catalogue other hardships that applicant will suffer, loss of jobs, drying up of membership fees, harm to the yachting community and so on. Applicant claims that it has no alternative remedy other than to approach the court for the relief it seeks.

[11] In opposing the application the respondent raise three points:

1. That the application lacks urgency.
2. The relief sought is not competent and
3. That the applicant has not established the requirements for an interim or final interdict.

And seeks an order for costs at an attorney and own client scale on the basis that the application is not *bona fide* and is an abuse of the court process and seeks to override an existing court order.

[12] The Regional Legal Manager of the applicant, **Mr Justin Jeremy Uren** deposed to the opposing affidavit. He confirms having engaged into without prejudice and informal discussions with applicant's legal

representatives on the trial date (August 2017). That he explained to them that he had no mandate or delegation to make a final decision regarding the settlement of the dispute between the parties, but would canvass their settlement proposal with the respondent's General Manager: Legal Services. Lo and behold, when the draft order that was prepared by **Friedman** was presented to the respondent, it was not rejected. A draft order was then crafted by the respondent's counsel. Same was accepted by the applicant and the parties took that order by agreement.

[13] **Uren** confirms that a letter was addressed to the applicant on the 16 February 2018 confirming that the terms of the order of the 23 August 2017 will be fully enforced. The 16 February 2017 was on a Friday. This application was launched on the following Monday the 20 February 2018. But as rightly pointed out by the respondent, applicant knew as far back as the 23 August 2017 that it will be required to vacate the property on the 28 February 2018.

[14] It is common cause that there are parallel proceedings involving the parties in this matter before the Ports Regulator which are concerned with the amount of rental the applicant is expected to pay from as far back as 2009. It is during the course of correspondence concerning these proceedings that on the 16 February 2018, the

respondent confirmed that the applicant is expected to vacate the premises on the 28 February 2018.

[15] The respondent takes the view that the proceedings before the Regulator have nothing to do with the occupation of the property by the applicant beyond the date of the cancellation of the lease agreement. In another skirmish between the parties, that took place in October 2017 before the Regulator, where the applicant sought to interdict the awarding of a tender in respect of the property in question, respondent's position was made clear, even at that stage, that applicant had agreed to vacate the premises by no later than 28 February 2018. In my view, if there was any doubt of the part of the applicant's as to respondent's expectations, that was the time to seek clarity or resort to litigation.

[16] I am therefore inclined to agree with the respondent that the urgency was created by the applicant. Be that as it may, in case I am wrong in this regard – the next question to answer is whether the applicant has a legally recognised right to be protected – whether the relief sought is competent. Related to this question is whether applicant has a *prima facie* right.

[17] The answer to these questions, in my view lies in the order that was issued on the 23 August 2017. It is apposite to recount what

respondent's claim was at the 2017 trial and the resultant order. It is common cause that applicant sought the following relief:

- cancellation of the lease agreement.

- eviction of the respondent fom the property.

- payment of arrear rental.

- interest on arrear rental amount.

- costs.

The order that was issued by agreement between the parties as stated earlier is the following:

"1. That the lease agreement/s entered into between the parties is hereby cancelled.

2. That the Defendant undertakes to vacate the Plaintiff's property described as ERF 1051 ("the property") in the Port of Port Elizabeth, on the 28th February 2018, provided that if the Plaintiff procures another Tenant for the property prior thereto, the Plaintiff shall afford the Defendant two (2) calendar months' notice to vacate, provided further that the defendant may, during this period, give two (2) calendar months' notice to vacate prior to 28th February 2018.

3. That for so long as the Defendant occupies the property, the Defendant shall pay rental in the amount of R49 977.60 (Forty Nine Thousand Nine Hundred and Seventy Seven Rand and Sixty Cents) being the current monthly rental inclusive of VAT.

4. That the Defendant must pay the rental amount on or before the 1st day of each and every month, commencing 1st September 2017, provided that the Plaintiff shall provide the defendant with a TAX Invoice by the 25th of each month in advance.

5. That in the event of the defendant not making payment of the rental in paragraph 3 above timeously, the Plaintiff shall be entitled forthwith and without notice to issue a Warrant of Eviction against the Defendant.

6. That the quantum of the arrear rental and the Plaintiff's claim for arrear rental is postponed *sine die*.

7. That the Defendant undertakes to pay the Plaintiff's wasted costs on the scale as between party and party, as taxed or agreed, within fourteen (14) days from date of *allocator*."

Clearly in terms of the order all but one of respondent's claims were granted in its favour. With the determination of the claim for arrears postponed *sine die*.

[18] No case was made in the founding affidavit, or allegation assailing the meaning to be imputed to order of the 23 August 2017. In his argument counsel for the applicant *Mr Beyleveld* suggested that the order cannot be interpreted to mean that applicant is required to vacate the premises on the 28 February 2018. He submitted however that the main thrust of applicant's case was that the parties had agreed that the applicant will be entitled to occupy the premises as long as a new tenant has not been secured. He acknowledged that there is a dispute between the parties whether there was an agreement between the parties that applicant will be entitled to remain in the property until a tender has been awarded. Respondent's assertion is that this was applicant's proposal and that it was rejected by the respondent whose representatives drafted an order to which the applicant agreed and was accordingly made an order of the court.

[19] It is trite that in motion proceedings, where a dispute of facts exists, the court id required to accept the respondent's allegations unless they are clearly untenable.[1] Given the terms of the 23 August 2017 which to me are clear and unambiguous, respondent's allegations in this regard are not untenable. One has to ask oneself what the significance of the 28 February 2018 is, if the parties had agreed that the date of vacation would be dependant or conditional upon an award of a lawful tender. That the respondent was not interested in an order with conditions and qualifications is clear from what according to applicant was communicated to it by respondent's representatives – namely that the respondent required a "clear cut" order.

[20] In **Eka v Parsons 2016 (3) SA 37 (CC)** the following was stated regarding the status of a settlement agreement:

"[31] The effect of a settlement order is to change the status of the rights and obligations of the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the lis between the parties, the lis became res judicata (literally, "a matter judged"). It changes the terms of the settlement agreement to an enforceable court order. The type of enforcement may be execution or contempt proceedings."

It is my considered view that the order of the 23 August 2017 did exactly that. Not having been set aside it is therefore valid and enforceable. The terms therefore are clear and unambiguous. The applicant does not

[1] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1084 (3) SA 623 (A), National Scrap Metal (Cape Town) (Pty) Ltd and Another v Murray & Roberts Ltd and Another 2012 (2) SA 300 SCA.

have a *prima facie* right deserving of being protected in the circumstances and the application stands to be dismissed.

[21] I have been urged on behalf of the respondent that in dismissing the application, I should order that applicant pays costs on an attorney and own client scale for the reason I have already outlined. The suggestion being that I should mark the court's disapproval of the conduct of the applicant. Although there might be a suspicion that the applicant is trying at all costs or by all means to remain in the premises as long as it can, I am not persuaded that there are special grounds why I should order costs on an attorney and own client scale.

[22] Accordingly the following order will issue:

The application is dismissed with costs.

NG BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

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Dates Heard	:	23 February 2018
Date Reserved	:	23 February 2018
Date Delivered	:	27 February 2018