

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case No.: D8281/2022

In the matter between:

K2022290842 (SOUTH AFRICA) (PTY) LTD t/a APPETITE APPLICANT

and

**GOVERNMENT EMPLOYEES PENSION FUND represented
by THE PUBLIC INVESTMENT CORPORATION
SOC LTD ("GEPF") FIRST RESPONDENT**

**OCEANS UMHLANGA RETAIL COMPANY
(PTY) LTD SECOND RESPONDENT**

ORDER

The application is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

JUDGMENT

HARRISON AJ

[1] In this matter, the applicant seeks an order directing the first and second respondents to sign the consents necessary for the applicant to apply for a liquor licence in respect of Portions 11, 13 and 14 of the development known as 'Oceans' in Umhlanga Rocks.

[2] The applicant contends that there was a written lease agreement, annexure "B" to the application papers, which it contends was concluded on 28 April 2022.

[3] In terms of that lease agreement, the applicant, trading as Appetite, was going to open a restaurant for *"Selling Pizzas and Burgers and wine, craft beer and gin and for no other purpose whatsoever"*.¹

[4] Subsequent to 28 April 2022, the applicant, on various occasions, addressed correspondence to the respondents seeking to secure the respondents' signatures on the consent forms necessary to submit for a liquor licence with the relevant licensing authority.

[5] Subsequent thereto was a litany of correspondence from the applicant calling for the consent to which there was no response. This was identified by Mr Khan, for the applicant, as being the first cause for complaint.

[6] Subsequent thereto, there was a meeting on site regarding the construction of a wall and in correspondence, the respondents' attorneys advised that it had been disclosed at the meeting that the applicant intended to use the premises as a night club. This correspondence was immediately rejected by the applicant's attorneys and the respondents were again called upon to furnish the consents.

[7] Shortly thereafter, and on 2 April 2022, the respondents' attorneys addressed a letter, annexure "I" to the founding papers, wherein it was brought to the applicant's attention that there had been what is referred to as *"a material*

¹ Clause 8 of the schedule to the lease.

change to the proposed standard lease” by the insertion in clause 35.1 (the breach clause) of the word “*not*”.

[8] The clause as it appears in the lease reads as follows—

‘... then, in any of such events, the Landlord shall not be entitled, but not obliged, notwithstanding any previous waiver or anything to the contrary herein contained and without prejudice to its claim for arrear rental or any other sums payable hereunder or for any damages which it may suffer by reason of such breach and/or cancellation, including but not limited to costs of reinstatement of the Premises at the Landlord’s election in terms of 16.4, and commissions in respect of reletting of the Premises, or any other remedy which it may have against the Tenant arising out of this Agreement or in law to either:-

(a) forthwith cancel the Agreement ...’

[9] The respondents’ attorney’s contention in annexure “I” is that the lease agreement had been deliberately amended by the insertion of the word “*not*” which was a material change, which had not been brought to the respondents’ attention, and voided the lease *ab initio*.

[10] This contention was met by the applicant’s attorneys with a concession that the lease agreement as signed does indeed contain the word “*not*”, but a tender for an amendment.²

[11] The respondents thereafter never furnished any consents for the liquor licence and, subsequently, in August 2022, raised an additional issue relating to the failure by the applicant to furnish deposits which was immediately met by the applicant’s reply that their obligation to furnish such deposits was excused because of the respondents’ dilatory behaviour in preventing the applicant from acquiring the requisite liquor licences.

² See: Indexed papers, page 139, para 1 of applicant’s attorney’s letter dated 14 July 2022.

[12] The history as set out above is clear from the founding affidavit and the applicant goes further to specifically put up and introduce as an annexure, a report and affidavit by Cecil Greenfield (“Greenfield”), who identifies himself as a “*forensic examiner of question documents*”.

[13] Greenfield's affidavit relates to the examination of the original lease agreement and, relevant to this application, he states that, in his view—

‘... it would have been physically impossible to add the words “not” after the page of the document had been typed without affecting the justified layout of the margins ...’

[14] With this history, the applicant has instituted these proceedings for an order directing the respondents to sign the necessary consent.

[15] The history, the correspondence and the affidavit and report of Greenfield are all contained in the founding affidavit.

[16] The answering affidavit immediately and unsurprisingly raises that the lease is either void *ab initio* or voidable/rescindable at the instance of the respondents.

[17] Mr *King* (appearing with Miss *Gouws*), for the respondents, during the course of argument, indicated that the respondents pins their colours to the mast of *justus error* and the failure by the applicant to bring the insertion of the word “not” to the attention of the respondents when delivering the signed lease.

[18] Mr *Khan* submitted and commenced his address with the proposition that there was a signed lease agreement and referred me to the papers, contending that there is no dispute that there was signed agreement. As I understand it, there is no dispute that the agreement was signed, it is the validity of that consent which is challenged by the respondents.

[19] Mr *Khan* then submitted that there was a litany of displays and took me to what he referred to as four such instances of delay, namely—

- (a) the initial refusal to sign the consent;
- (b) the refusal to consent after the meeting with the architect regarding the wall;
- (c) the dispute relating to the insertion of the word “not”; and
- (d) the issue of the deposit.

[20] It was in the course of raising the third issue, namely, the issue of the insertion of the word “not” in clause 35 that I raised with Mr *Khan* the problem that motion proceedings were not designed to deal with expert evidence such as that tendered by Mr Greenfield or, indeed, that tendered by the respondents’ expert, Mr Oosthuizen.

[21] Mr *Khan* conceded that if the court was of the view that there was a dispute of fact, then the matter ought to be referred to the hearing of oral evidence and he enjoined me to make such an order.

[22] The problem with the approach by Mr *Khan* was something which I specifically raised with him in argument, namely, an application for the referral to oral evidence is required to be made at the outset of the matter.³

[23] In *Mogami*, it is only in exceptional circumstances that the court should deviate from the rule that the parties are required at the outset of the matter to make the election. There are no exceptional circumstances in the present matter.

[24] I thereafter raised with Mr *Khan* that Uniform rule 6(5)(g) afforded various options which included, but were not exclusively confined, to referring the matter to oral evidence, but also referring the matter to trial, or dismissing the application.

³ See: *Law Society, Northern Provinces v Mogami and Others* 2010 (1) SA 186 (SCA) para 23.

[25] Mr *Khan* thereafter made an impassioned plea to invoke the principles of *ubuntu* and referred me to the matters of *Barkhuizen v Napier*,⁴ *Botha and Another v Rich NO and Others*,⁵ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*⁶ and *Beadica 231 CC and Others v Trustees, Oregon Trust and Others*.⁷

[26] It bears repeating that Harms DP in *National Director of Public Prosecutions v Zuma*⁸ specifically stated—

‘Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities.’

[27] It is not for this court to determine the probabilities of the matter relating to what was and was not sent, or to make decisions as between the applicant’s expert, Greenfield, and the respondents’ expert, Oosthuizen, on what was sent and received as regards the lease agreement.

[28] Mr *King* submitted that by virtue of the applicant having elected to proceed with the matter and the attorney having signed a certificate of readiness, the matter should be decided on the *Plascon-Evans* rule and Mr *King* further enjoined that I should have regard to the improbabilities of the applicant’s version relating to the dates of signature as the version in the replying affidavit contradicts the documents put up in the founding papers.

[29] The submission by the respondents is that the entire agreement is void alternatively voidable at its instance and, accordingly, the principles of interpreting in accordance with *ubuntu* do not even begin to arise. What needs to be dealt with first is the issue of dispute of fact.

⁴ *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323; 2007 (7) BCLR 691 (CC).

⁵ *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC).

⁶ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

⁷ *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* 2020 (5) SA 247 (CC).

⁸ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26.

[30] The problem with the submission by Mr *Khan* and the reference to *ubuntu* presupposes the existence of a contract and that the contract must be interpreted in light of the principles of *ubuntu*.

[31] It has long been held in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*⁹ that it is undesirable that where there is a genuine dispute of facts, the matter may—

- (a) be referred for the hearing of oral evidence;
- (b) referred to trial; or
- (c) dismissed with costs.

[32] The issue of the dismissal with costs arises in circumstances where the dispute is reasonably anticipated and, in present circumstances, annexure “I” to the founding papers demonstrates that the dispute was not only reasonably anticipated, but acknowledged in the founding affidavit.

[33] Mr *King* submitted further that I should decide the matter on the basis of the *Plascon-Evans* rule and delve into the merits of the application. In this regard the respondents’ version is to be accepted. There is no lease as it is void or voidable at the respondents’ instance. Mr *King* correctly submitted that I must accept that the respondents would not be bound by a lease and that is a further basis to dismiss the application. I do not have to decide whether the lease is void or voidable as I dismiss the application on the basis that there was a reasonably anticipated dispute of fact which was foreseen by the parties and, accordingly, motion proceedings were not appropriate.

⁹ *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).

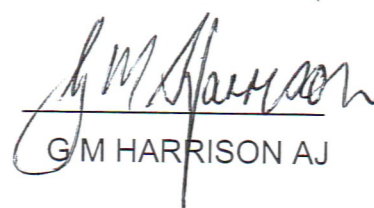
[34] In making such a finding and dismissing the application, I do so in order that nothing that I say in this judgment will be binding on a subsequent court hearing a trial in the matter, in order that the evidence therein may be tendered without there being any issue of prejudging the question of void or voidable.

[35] I am in agreement with the further submission by Mr *King* that the dispute relating to the matter requires expert evidence on the analysis of what he referred to as “*meta data*”, that is a dispute of fact which was identified and anticipated and, accordingly, the dispute of fact was very much alive even prior to the institution of these proceedings.

[36] Whilst I can sympathise with an applicant who feels frustrated by the other party’s conduct in refusing to sign a consent form, those sympathies do not translate into a right to use motion proceedings where quite clearly an action ought to have been instituted.

[37] The argument that a party should be entitled to proceed by way of application and then when faced with a dispute of fact, refer the matter to oral evidence or trial, is not to be used to gain an advantage over litigants who properly institute actions. I am not convinced by the applicant’s arguments that I should invoke any issues of *ubuntu* or take cognisance of the dilatory behaviour of the respondents, to have the matter referred to oral evidence, in preference to any other matter which is before the civil court.

[38] In the circumstances, I dismiss the application with costs, such costs to include the costs of two counsel where so employed.



G M HARRISON AJ

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