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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 3489/2021

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

PARYS- AAN- VAAL WOONSTELLE (PTY) LTD

1st Applicant

[Reg No. 1973[...]]

ROBFAIR INVESTMENTS No. 162 CC

2nd Applicant

[Reg No. 2002[...]]

And

PLEXIPHON 115 CC

Respondent

[Reg No. 2010[...]]

HEARD ON: 14 OCTOBER 2021

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 16H00 on 20 January 2022.

[1] The first applicant is the owner of a shopping complex Grootfontein Shopping Centre in Sasolburg (“the premises”). The respondent leased one of the shops from the second applicant the previous owner of the shopping complex for use as a liquor shop for a period of three years 1 August 2019 to 30 July 2022.

[2] On 30 November 2020 the first applicant relying on clause 17 of the lease agreement cancelled the lease on the grounds that it intends to demolish and renovate the premises. Clause 17 provides thus:

“RE-BUILDING

17.1. The landlord may terminate this lease or any renewal thereof by giving the Tenant six (6) months written notice to such effect, alternatively negotiate a rent free period for any time that the building work or reconstruction takes place, if and when such instances occur in all or any of the following circumstances:

17.1.1. should the Landlord wish to demolish the building or the premises; or

17.1.2. should the Landlord wish to reconstruct and/or redevelop and/or renovate the building or the premises, provided always that such reconstruction and/or redevelopment and/or renovation be of a substantial and/or major nature.”

17.2. The landlord shall, however, have the right at any time to commence the Reconstruction and/or development and/or renovation of the building, other than the premises, and these operations may proceed while the Tenant is in occupation of the premises, provided the Tenants business is not unreasonably interfered with.

17.3. Notwithstanding the implementation of any work as contemplated in 17.2 above, the Tenant shall have no right to object to such work or to claim any rebate of rental during the period in which

the said work may be in progress nor shall the Tenant have any claim for damages of whatsoever nature by reason of the earlier termination of this lease as provided for in 17.1 above.”

[3] In terms of the cancellation notice the respondent was required to vacate the premises by 31 May 2021. Notwithstanding the cancellation the respondent remains in occupation of the premises.

[4] The applicants seek the respondent's eviction from the premises contending that all other tenants with the exception of Checkers an anchor tenant have duly accepted the cancellation and vacated their respective shops. The applicants submit that in response to the cancellation the respondent merely alleged that the cancellation is unlawful as it is motivated by the applicants' intention to establish another liquor shop at the premises, there is no proof that the renovations are extensive to warrant the cancellation and if they are, the respondent is entitled to renew or continue with the lease agreement after the renovations.

[5] The applicants state that the demolitions and renovations commenced in June 2021. Annexures “FA71” to “FA73” of the founding affidavit are photographs depicting the respondent's shop surrounded by construction equipment and rubble of the demolished shops therefore there is no merit to the respondent's contentions that there is no proof that the renovations are of a substantial nature. The lease agreement was validly cancelled the respondent and all those who occupy the premises through the respondent must be evicted from the premises.

[6] The application is opposed by the respondent. In the answering affidavit the respondent avers that the lease was terminated on unlawful and on discriminatory grounds the applicants are thus not entitled to invoke the provisions of clause 17.

[7] The respondent disputes that the renovations and re-constructions are of a substantial nature as to make the continuous occupation of the premises impossible and this is evidenced by the fact that Checkers is still trading on the premises. The respondent further states that the applicants were requested to furnish proof in this regard but they have since failed to do so. There is accordingly a clear dispute of

facts on this issue which can only be resolved by oral evidence. The applicant should have foreseen that a dispute of fact would arise and should have proceeded by way of action proceedings and not application proceedings. The application ought to be dismissed on that score.

[8] As regards the cancellation of the lease the respondent contends that the applicants have unfairly discriminated against the respondent. The other tenants whose lease agreements were cancelled on the same grounds were invited to submit re-letting proposals in respect of their re-occupation of the premises after the renovations. The applicants have refused to extend this invitation to the respondent.

[9] Furthermore, in terms of clause 17.2 the lessor may in the alternative to cancelling the lease re-negotiate with the tenant a rent free period during the time of the reconstruction. The applicants have instead chosen the most intrusive action of cancelling the respondent's lease and the only reason for this unfair treatment could be that the applicant intend to replace the respondent's business with a Checkers Liquor shop. The applicants are not *bona fide*, their actions are discriminatory and unlawful they are thus not entitled to the eviction order. The application must be dismissed.

[10] The applicant's replying affidavit raises three points *in limine* that: the respondent's answering affidavit is invalid because the certification of the commissioner of oaths does not specify the gender of the deponent, the deponent has no *locus standi* to depose to the affidavit, the affidavit was filed late and no condonation for the late filing has been sought.

Identification of a deponent of an affidavit

[11] The objection is essentially premised on non-compliance with Regulation 4 (1) which governs the administration of Oaths or Affirmation.¹ The commissioner of oaths certified the affidavit as follows:

¹ Government Notice R1258 dated 21 of July 1972 (as amended) promulgated in terms of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963.

“I certify that the Deponent has acknowledged that he/she knows and understands the contents of this affidavit, which was signed and sworn to before me at NIGEL on this 15 day of SEPTEMBER 2021, the regulations contained in Government Gazette Notice R1258 dated 21st July 1972 (as amended) and Government Notice Number R1648 dated 19th August 1977 (as amended) having been complied with.”

[12] The commissioner of oaths has omitted to delete the inapplicable gender. It is the applicant’s case that *ex facie* the affidavit it is unclear whether the deponent is a male or female. The deponent has merely been described as a manager and on the certificate by the commissioner of oaths the deponent is identified as a “*he/she*.” The applicant argues that in the light of the afore-mentioned defects the court would be unable to give effect to the presumption of regularity for the purposes of assuming that the oath was sworn to and signed in the presence of the commissioner of oaths. There is no proper affidavit the applicant is accordingly entitled to the order as prayed for in the notice of motion.

[13] In response to the applicant’s objection the deponent filed a supplementary affidavit in which he avers that it is evident from the papers he is a male.² He further states that the omission by the commissioner of oaths Ms Pretorius to delete the word “she” in the certification was a *bona fide* error her confirmatory affidavit in that regard will be submitted to court at the hearing of the matter.³ According to the respondent the error does not render the respondent’s affidavit fatally defective the point *in limine* should be dismissed.

[14] Regulation 4(1) provides that:

“Below the deponent’s signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.”

² Paragraph 5 of the supplementary affidavit.

³ Paragraph 8 & 9 of the supplementary affidavit.

[15] The provisions of regulation 4(1) are directory not peremptory in that failure to comply can be condoned at the discretion of the court where it is clear from other indications in and on the document that an oath was in fact administered by the commissioner of oaths.⁴

[16] In the exercise of my discretion whether to condone the respondent's affidavit I deem it appropriate to have regard to the peremptory requirements of rule 6(5) (d) (ii) of the Uniform Rules of the Court which provides that any person who opposes the grant of an order sought in the notice of motion must deliver an answering affidavit in response to the applicant's case.

[17] An affidavit has been described as a written statement sworn to by the deponent in the presence and before a commissioner of oaths.⁵ In this matter, the gender of the deponent is not even stated in the affidavit. The deponent merely alleged that:

"I am manager (sic) of the business known as Oasis Bottle store trading from and/or conducting business from Shop 13, Grootfontein, Centre, Sasolburg, the party whose eviction is sort (sic) in the application. As such duly authorised to depose to this affidavit."

[18] The affidavit falls short of the requirements contemplated in rule 6(5) (d) (ii) and the fact that the gender of the deponent does not appear anywhere in the affidavit supports the inference that the did not appear in person before the commissioner of oaths.

[19] I'm not persuaded that there has been substantial compliance with the requirements of Rule 4(1). I hold that the affidavit was not properly commissioned. The point *in limine* is accordingly upheld. I don't deem it necessary to deal with the remaining points in *limine*.

⁴ *Nkondo v Minister of Police and Another* 1980 (2) SA 362 (O) at 365C.

⁵ *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 336A-B.

[20] As a result of the above, I now have to consider the applicant's case with the exclusion of the respondent's opposition.

[21] On the facts germane to this matter the terms of the lease agreement are not in dispute. The lease agreement⁶ entitles the applicant to cancel the lease on a six months' written notice for the purpose of demolishing or re-constructing the premises.

[22] It is evident from the facts averred by the applicant that the renovations and re-constructions are of a substantial nature. Except for the shop of the anchor tenant (Checkers) all other shops have been demolished. (see also annexures "FA71" to "FA73"). The applicant has complied with the terms of the contract⁷ by providing the respondent with the required cancellation notice.

[23] In the premises, I'm satisfied that the applicant has made out the case it seeks in the notice of motion. The lease was validly cancelled.

Costs

[24] There is no reason why the costs should not follow the result. According to the applicant the opposition is malicious the respondent should therefore be ordered to pay the costs on a punitive scale.

[25] Except that the respondent's papers were negligibly drafted I'm not persuaded that the respondent's opposition was motivated by malice.

[26] In the premises, I hereby make the following order:

1. The respondent and all those who occupy the premises through the respondent are ordered to vacate the premises at shop 13, Grootfontein Shopping Centre, Sasolburg on or before 28 February 2022.

⁶ Clause 17.1.2.

⁷ Clause 17.1.

2. The respondent to pay the costs of this application.

NS DANISO, J

APPEARANCES:

Counsel on behalf of Applicants: Adv. GSJ van Rensburg
Instructed by: Symington & De Kok Attorneys
BLOEMFONTEIN

Counsel on behalf of Respondent: Adv. J. Ferreira
Instructed by: Bezuidenhouts Inc.
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