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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED

CASE NO: 2771/2018

15/2/2019

REDEFINE RETAIL (PTY) LTD

Applicant

(Registration no: 2012/079189/07)

And

CUPPAZA PAZAZ (PTY) LTD

1st Respondent

(Registration no: 2014/169146/07)

JEANNETE ENGELBRECHT

2nd Respondent

(Identity number [...])

JUDGMENT

SKIBI AJ

Introduction

[1] This is an application where the applicant seeks a final relief against the respondent for:

[1.1] Payment of the amount of **R94,468.21** towards arrear rental and

ancillary charges;

- [1.2] The immediate ejectment of the 1st Respondent and all persons claiming occupation under it from the premises;
 - [1.3] An order making Annexure " E" an order of court (Acknowledgement of debt)
 - [1.4] Interest at prime plus 2% per annum a tempore morae on prayers1 & 3;
 - [1.5] Any further claims between the parties postponed sine die;
 - [1.7] Costs on an attorney client scale
- [2] At the hearing counsel for the applicant informed the court that the applicant is no longer seeking an order for ejectment in respect of prayer 2. It also moved for an amendment of prayer 3 to read that an order sought is to make Annexure "E" an order of court. The application for amendment was granted.
- [3] The application is opposed by the respondent.

Factual background

- [4] On or about 13 December 2016 at or near Klerksdorp the first respondent concluded a written Lease Agreement with the applicant for lease of the property situated at shops number 116 and 116a, Matlosana Mall in the North West Province. The first respondent was duly represented by the 2nd respondent. According to the terms of the agreement the contract was to commence on 1 October 2016 and terminate on 30 September 2019. The parties agreed that the respondent was to pay monthly rental to the applicant in terms of the contract. Prior to the conclusion of the Lease Agreement between the parties, the first respondent occupied the leased property and fell into arrears and it is alleged that the applicant tried to assist the first respondent and an acknowledgement of debt was signed for an amount of R331,295.00 on 28 February 2017.
- [5] In November 2017 the applicant instituted an action against the respondent at Klerksdorp Magistrate court for payment of the amount of **R61,095.20** and ejectment which action was defended by the respondent. Whilst the action

was pending at Klerksdorp Magistrate's Court the applicant launched an application in this court seeking the same prayers with a revised amount of **R94,468.21**, ejectment as well as other prayers set out above.

- [6] It is alleged that the first respondent fell into arrears of payment of the amount contained in the acknowledgment of debt and as well the rent which amounts remain unpaid and the first respondent is in breach. The applicant alleges that the first respondent is indebted to the applicant for arrear rental and related expenses in the sum of **R94,468 .21**.

Issues

- [7] The main issue for determination is whether the order sought can be resolved on papers where there is dispute of fact. The applicant's argument is that there is no dispute of fact. The respondent, on the other hand, argues that there is a dispute of fact which cannot be resolved on papers.
- [8] The respondents raised three points in *limine* being:
- (i) *lis pendens* ;
 - (ii) a challenge of the jurisdiction of this court to hear the matter; and
 - (iii) the authority of the applicant.
- [9] The other issue for determination is whether the applicant has made out a case for the order/s sought. However, due to the ruling made in respect of the issue mentioned on paragraph 7 it will not be necessary to deal with this issue.

Law

- [10] Rule 6(5)(g) of the Uniform Rules of court deals with the situation where an application cannot properly be decided on affidavit. The rule provides that if the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by the respondent together with the facts alleged by the applicant that are admitted by the respondent, justify an order.¹ I will pause here for a moment and first deal with the points in *limine* raised by the respondent.

¹ Erasmus: Superior Court Practice Volume 2 01-69

Lis pendens

- [11] The applicant contends that this issue has no merit and it should be dismissed. The applicant's submission is that there is no pending litigation at Klerksdorp as the said application was withdrawn on 10 April 2018, furthermore, the respondent was notified of such withdrawal before they filed their answering affidavit.²
- [12] The respondent on the other hand, contends that at the time the application was launched in this court on 18 January 2018 an action was pending at Klerksdorp Magistrate's Court and it was within their right to raise the defence of pending litigation. Counsel for the respondent concedes that the issue is not a defence any more.
- [13] I am of the considered view that the concession is correctly made. Accordingly, and the court finds that there is no merit in this point at the present moment and this defence stands to be dismissed.

Jurisdiction

- [14] The respondent raised an issue that this matter deserves the audience of the lower court in that all the parties stay in Klerksdorp and the property in question is in Klerksdorp. The applicant's submission is that it was within its right to bring the matter to this court. Counsel for the applicant contends that this application was filed in January 2018 and it is only matters which were instituted after the 29 of March 2018 which may not be adjudicated upon in this court in terms of the Government Gazette³.
- [15] The respondent's contention is that summons was issued at Klerksdorp Magistrates' court from the onset but when the applicant was faced with the special plea and to avoid the dismissal of this application, it withdrew the action in Klerksdorp and tendered costs. The applicant argued that the court is seized with the matter now because it is here already and to take it back to the

² Record, Bundle 2 **page** 145

³ No 408, Dated 29 March 2018 (determination of the Area of Jurisdiction of the Gauteng and North West Division of the High Court of South Africa in terms of section 6 (3) (a) of the Superior Courts Act 10 of 2013)

lower court would incur further costs.

[16] The second issue regarding jurisdiction is that the value of the amount claimed by the applicant falls within the jurisdiction of the magistrate's court and the matter ought to have been dealt with in the Magistrates' court in Klerksdorp. The respondent in his contention relies on the full court decision of this court, the case of *Nedbank Limited v Thobejane and similar matters*⁴ in which this court held that the court may *mero motu* transfer the matter to another other court if it is in the interest of justice to do so.⁵ In the instant case there is no valid reason as why this matter was launched in this court when it deserved the audience of the Magistrate's court. The argument by the applicant that the matter is before this court and it should be adjudicated upon is not good enough.

[17] In the *Thobejane matter*, the full court held that if a party is of the view that a matter falls within the jurisdiction of the Magistrate's Court and that it should be heard in this Court, an application must be launched setting out reasonable grounds why the matter should be heard in this Court. Counsel for the applicant's counter argument is that the full court issued a directive which refers to matters which are instituted as from 2 February 2019 and that this matter was already pending in this court when the judgment was delivered.

[18] At the time of argument I am informed that this matter has been taken on appeal to the Supreme Court of Appeal but it is still pending. I agree that the matter was already launched in this court and that the order says the matters instituted after 2 February 2019. The court finds that at the time this application was launched it had a concurrent jurisdiction to hear the matter.

Authority

[19] This point has not been persisted with during the oral arguments. It can be inferred that the respondent is no longer persisting with it. However, the court needs to make a determination on the matter. This point has been addressed by counsel for the applicant and from the papers filed, I am of the view that the

⁴ 2019 (1) SA 594 (GP) at para [91] & [92]

⁵ Thobejane full court case at para [92]

deponent of the founding affidavit had the necessary authority⁶ to depose to the affidavit. The court is of the view that this point raised regarding the authority of Ms Erasmus who deposed to the applicant's founding affidavit has no merit. The challenge of the authority of the deponent of the founding affidavit is dismissed.

The respondent's factual dispute of fact

[20] The respondents contend that:

- (i) a factual dispute of fact exists regarding the indebtedness towards the applicant;
- (ii) the legality of the acknowledgment of debt is placed in dispute;
- (iii) the certificate of balance is totally late, flawed and in contradiction of the applicant's own claim;
- (iv) the applicant from time to time collected rental in cash, the amount of which is in dispute;
- (v) that a dispute arose as a result of a faulty electricity statement, thereby disputing the amount owed. This was inclusive of second electricity point.

Arrears

[21] The respondent in its affidavit dispute being in arrears and alleges that the first respondent was never in arrears with monthly rental⁷. They also state that arrears began as a result of a high electricity bill which was not the respondent's fault⁸. The first respondent also alleges that it was up to date with rental payment amounts.⁹ However, in sharp contrast with the allegation stated above, the first respondent alleges that, if it was not for the applicant who spoliated the first respondent,... *"there would not have been any outstanding amounts"*¹⁰. The second respondent confirms in the email dated

⁶ Record page 4 of Cornelius Erasmus was given necessary authority by the Board of Directors in terms of the resolution at page 12 of the record

⁷ Page 108 para 13.2

⁸ **Page** 109 para 13.12

⁹ Page 110 para 13.13

¹⁰ Page 111 para 14

20 June 2017, that she could only make partial payment and she requested an extension to make full payment. The said email has been attached and forms part of the record¹¹.

- [22] There is an email correspondence dated 17 October 2017 between the second respondent and Mr Olwage, a representative of the applicant. The importance of this email is the unconditional confirmation that the first respondent is in arrears with rent and that the purchase price would include the current rental.

The second respondent refers to the amount of R300 000.00 outstanding in the acknowledgment of debt and mentions that the arrangement would be reviewed in February 2018.

The email reads¹²: *""Die koop prys wat sy tanswil betaal sluit die huidige agterstalllge huur in. Ek kan net nie die R300.000 ook in berekening bring... in the dokumentasie en korrespondensie het hulle daarna verwys dat die bedrag en reeling hersien sal word in Feb 2018..."*

- [23] It is based on these contradictions of the version of the respondents the applicant argues that the dispute raised is not genuine but is a fictitious dispute of fact. At one stage the respondent admits having been in arrears with rental payment. Another there is an allegation of the arrangement to be revised in February 2018.
- [24] The electricity account is also in dispute. In terms of the Lease Agreement, there is a provision which states that the second respondent will be held liable for all municipal charges including and without the limitation of the electricity.¹³ It is confirmed by the respondents that after receiving a higher electricity account than was expected, they were informed that there was a circuit breaker (meter) and it was not connected.¹⁴ The respondents confirm in their papers that the applicant informed them that they would remain liable for the

¹¹ Annexure F to replying affidavit

¹² Annexure F at page 15 7 of the record

¹³ Annexure C, Lease Agreement, clause 11.2.8.1.2.2. at page 24 of the record

¹⁴ Page 109 at para 13.5, 13.8 of the Opposing affidavit

circuit breaker to which the respondent accepted that it was, however, they requested more time to make payment¹⁵.

- [25] The respondents state the arrears started as a result of the higher electricity account during August 2017.¹⁶ On 17 October 2017 the second respondent confirms that the purchase price includes the current outstanding arrear rental. The second respondent does not dispute the arrears in the correspondence, she confirms that the first respondent is in arrears.¹⁷ It is the applicant's argument that the first respondent remains liable for the electricity, the terms of the lease agreement are binding.
- [26] The applicant argues that the version of the respondent has bare denials and nowhere in the opposing affidavit, or email correspondence was it contested that rental was collected, was not all accounted for. The applicant provided slips for all the cash collected. It is on this basis that the applicant argues that the version of the respondent regarding unexpected visits and allegation of taking all the cash is simply unsubstantiated. The court accepts the argument by the applicant on this point.

Acknowledgment of debt

- [27] The version of the respondent on this point is so improbably that it cannot be reasonable possibly be true. The respondents in the opposing affidavit which led up to the signing of the Acknowledgement of Debt is alleged to have been signed under duress. It is alleged that in June 2017 the applicant's representative, Mr Olwage was unhappy with the respondents conduct as the result of that being that Mr Olwage would make unexpected visits, without prior notice or arrangements and would take all the funds in the first respondent's cash register.
- [28] During July 2017 the respondent received a substantially higher electricity account.¹⁸ During September 2017 the second respondent informed the applicant that she obtained a purchaser for the first respondent and enquired as to the process to be followed. She alleged that two days after her inquiry Mr Olwage made unfounded personal remarks towards her children and family.

¹⁵ Opposing affidavit at page 109 para 13.9 and 13.10

¹⁶ Opposing affidavit page 109 para 13.11 and 13.12

¹⁷ Page 157 email correspondence

On 20 October 2017 the respondents received a notice of termination of the lease agreement and a letter of demand.¹⁹ It is alleged that as a result of the events set out above from June to September, the acknowledgement of debt was signed under duress. This is so improbably that it cannot be true defence that threats which allegedly occurred in October 2017 could have induced the signing of the acknowledgment of debt which took place on 20 February 2017.

- [29] Counsel for the applicant contends that the Acknowledgment of Debt's, validity was never in dispute, notwithstanding the argument in the opposing affidavit and in court that it was signed under duress.

Certificate of balance

- [30] The respondents argue that the certificate of balance is totally late, flawed (due to being signed and it is not properly dated) and in contradiction of the applicant's own statement.

The applicant concedes that the certificate of balance is not dated. It contends that it is clear that it was done after the issue of the application and simultaneously with the replying affidavit. The applicant further contends that the certificate of balance was signed in May 2018 but submit that that they do not rely on the certificate of balance to prove the arrear amount, but it is merely attached to indicate that at the time of the preparation of the replying affidavit, the arrears were escalating even further. The court is of the view that the respondent argument on this point has merit. The certificate of balance is flawed. Paragraph 2 thereof, states that the interest will start running from the date of signature but there is no date recorded on it.

- [31] The amount claimed as reflected in prayer 1 was calculated on the date of founding affidavit and finds corroboration with the Tenant/Debtor List²⁰ which forms part of the record. This list clearly shows the breakdown of the amount and shows how the amount claimed was arrived at. The dispute still remains as to how much was owed and is due to the applicant on the date of termination of the lease agreement (on 20 October 2017).

¹⁸ Page 108 Opposing affidavit para 13.3 and 13.4

¹⁹ Record **page** 110 para 13.17

²⁰ Page 88 of the record

- [32] The applicant argues that in terms of the Acknowledgment of Debt, an amount of R331 295,00 is outstanding together with the amount as per the certificate of balance in the sum of R94 469.21 as well as a portion of the rent for the month of May when the replying affidavit was filed.

The applicant's claim R94 468.21

- [33] On the face of it , there might merit on the argument by the applicant that the first respondent is liable to pay turnover and electricity charges in terms of the lease agreement. It is clear that in October 2017 the Respondents confirmed its indebtedness in the email.²¹ It is further clear that from the Tenant/Debtor Transactions list as of November 2017 the Respondent was in arrears in the amount of **R61 095.20**²².
- [34] The respondent's contention is that on 20 October 2017, on the date of termination of the lease agreement the amount owed and due was **R37 304.98**, while the security deposit (**R47, 138.00**) was available to the applicant on a mere request from the bank. I will quote the relevant paragraph in the respondents' answering affidavit: - *"There was an agreement reached between the Applicant and Respondent on 20 October 2017 confirming that the lease agreement would be terminated and the Respondents vacate the premises by no later than 30 November 2017, which was confirmed by myself in writing by way of an e-mail dated 23 October 2017. A copy of the e-mail is attached hereto as annexure "C". However, the Olwage and Rudi Joubert threatened myself and the employees of the 1st Respondent when we wished to remove the equipment and vacate the premises. This prevented the premises from being vacated when the alleged outstanding rental was approximately R37 304.98 as stipulated in "transaction report dated 26 October 2017 attached as annexure "D". At inception of the lease agreement, the guarantees issued amount of R47 138.00 and attached proof of the ABSA guarantee as annexure "E". This is without interest accumulated. Therefore, there would have been no outstanding amount leaving a credit payable to the 1st Respondent.*

²¹ Page 157

²² Annexure G page 88

The contents of this paragraph are therefore denied²³." (underlined own emphases).

- [35] The amount of indebtedness of the applicant and the respondent as at October 2017 are not the same. When one looks at Annexure" **G**" indeed in October the amount owed was the amount as stated by the respondent. However, in November 2017 the amount had escalated to **R61 095.20**. There is still a dispute as to the amount owed as at October 2017 being the date of termination of the lease. The applicant says the amount due was **R61 095.20** and on the respondent on the other hand, says the amount which was due and payable to the applicant was **R37 304.98**. The respondent further states that there was a security guarantee issued in the sum of **R47 138.00** which was available to the applicant on a mere request to the bank.

Dispute of fact and the law

- [36] A fact is said to be in dispute when it is alleged by one party and denied by the other, and by both with some show of reason. A mere allegation, without evidence, or against the evidence cannot create a dispute within the meaning of the law.
- [37] In motion proceedings the affidavits constitute both pleadings and evidence and the issues and averments in support of the parties' case must appear clearly therefrom. It is trite that the applicant in application proceedings must make out his or her case in the founding affidavit. A litigant should not be allowed to try and make out a case in the replying affidavit.
- [38] A real and genuine dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed.
- [39] A judge hearing the application will be faced with the following choices which must be decided upon in a judicious manner:
- (i) dismiss the application if the applicant foresaw or ought reasonably to have foreseen, before initiation of proceedings that a dispute of fact

²³ Paragraph 15 of the 2n d Respondent's Answering Affidavit at page 111 of the record

would arise;

- (ii) refer the oral dispute to oral evidence if it can be disposed of speedily and without any other issues in the matter;
- (iii) refer the entire matter for trial and order that the notice of motion stand as a simple summons, the founding affidavit stand as the declaration and the answering affidavit stand as the plea and make any other order relating to the conduct of the proceedings as a trial.

[40] As far back as 1949 in the matter of **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd**²⁴ the courts have held that the crucial question is whether there is a real dispute of fact. Disputes of fact arise when-

- (i) the respondent denies allegations made in the applicant's affidavit and further produces positive evidence to the contrary in the answering affidavit;
- (ii) the respondent admits the allegations in the applicant's founding affidavit but alleges additional facts and evidence which the applicant disputes;
- (iii) the respondent alleges that he has no knowledge of the averments in the applicant's affidavit and puts him to the proof thereof;
- (iv) the respondent alleges that he can lead no evidence to dispute the truth of the applicant's averments and puts the applicant to the proof thereof by oral evidence and subject to cross-examination.

[41] In the matter on hand the respondent raised as a point in *limine* in her affidavit that the applicants made an application to this court whilst there is a material dispute of fact as to the amount of indebtedness seems to be in dispute and this court is unable to resolve the issue on paper. The applicant knew, prior to the institution of the High Court application, that the respondents are going to dispute the claim and indebtedness, yet it proceeded to bring the application to this Court. When the matter was moved to this court from the lower court it

²⁴ 1949 (3) SA 1155 (T)

changed its colour, came by way of motion proceedings whereas in the Magistrate Court it was brought by way of an action despite the all the risks in motion the matter by application where the applicant foresaw dispute of fact.

[42] After a thorough reading of the papers' and hearing the submissions of the respective parties, I am of the considered view that there is indeed a material dispute of fact which the applicant should have foreseen especially in light of the papers which had been exchanged between his attorneys and the respondent's attorneys of record before the litigation was commenced. Accordingly, the applicant should not have proceeded on application proceedings but proceeded to trial.

[43] In the premises, I order that the application be dismissed with costs.

SKIBI AJ

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Heard on : 5 February 2019

Judgment delivered : 15 February 2019

APPEARANCES

For the Applicant : Adv.J Vorster
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