



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA

CASE NUMBER: 41143/18

DELETE WHICHEVER IS NOT APPLICABLE

1. REPORTABLE:

YES/NO *Yes*

2. OF INTEREST TO OTHER JUDGES:

YES/NO *Yes*

3. REVISED

9/5/2018

DATE

[Signature]

SIGNATURE

In the matter between:

ENYUKA PROP HOLDINGS (PTY) LTD

Applicant

and

DELPORT VAN DEN BERG INC
GEDEELTE 1 VAN ERF 3887 BARBERTON (PTY) LTD

First Respondent
Second
Respondent

JUDGMENT

AE ANDREWS, AJ

[1.] This is an application for an order that first respondent, a firm of attorneys, be compelled to release the amount of R2 500 000 to the applicant, together with all interest accruing thereon. The funds are currently being held in a Section 78(2A) trust account by the first respondent.

[2.] The background to this matter is as follows. On or about 26th August 2015 the applicant entered into a written sale agreement ("the agreement") with the second respondent. It purchased a rental enterprise known as Jock of the Bushveld Shopping Centre situated at portion 1 Erf 3887 Barberton, for R62 250 000 including VAT. The enterprise consisted of the immovable property situated on this erf, together with all fixed assets, moveable assets and the second respondent's rights in terms of the then extant lease agreements. The first respondent was appointed conveyancer for this transaction.

The Pick n Pay Project

[3.] The parties recorded in clause 23.3 of the agreement that the second respondent had an existing liability to undertake certain renovation works ("the works") for Pick n Pay in terms of their lease agreement, and that Pick n Pay had agreed to pay an increased monthly rental on completion of the works referred to in clause 23.3.1.1. of the agreement. It was recorded that the second respondent anticipated that these works would be completed prior to the date of transfer to the applicant.

[4.] However the agreement provided for the possibility that this might not take place, setting out a contractual structure in clause 23.3.1.3 to cater for the event that the completion of the works to the satisfaction of Pick n Pay and consequent increase in the monthly rentals had not taken place prior to transfer. In terms of this structure the second respondent undertook in clause 23.3.2.1 that in these circumstances it would

pay to the applicant the difference between the anticipated increase in rental and the current rental payable by Pick n Pay. In this regard the applicant was required to provide the second respondent with appropriate VAT invoices.

[5.] The parties also agreed that R5 000 000 (the "retention amount") would be deposited by the applicant into the first respondent's trust account and held there on its behalf. The funds would only be released to the second respondent if the following events took place:

[5.1] 50% of the retention amount would be released on the issue of a certificate by both the applicant and second respondent's quantity surveyors, confirming that not less than 50% of the works had been completed, and

[5.2] The remaining 50% of the retention amount plus interest would be paid to the second respondent on the issue of a certificate jointly by the same parties confirming that not less than 100% of the works had been completed; a certificate of compliance in respect of the electrical installation in the Pick n Pay premises had been issued; an occupational certificate had been issued by the local authority in respect of the Pick n Pay premises; and that Pick n Pay had confirmed in writing that the works and all snags had been dealt with to their satisfaction.

[6.] The agreement also provided for the retention amount to be payable to the applicant under certain circumstances. Clause 23.3.3 reads:

"In the event that the completion of the works contemplated in clause 23.3.1.1. above, to the satisfaction of Pick n Pay, and consequent increase in the monthly Pick n Pay rentals have not taken place within 12 months from date of transfer the retention amount (or portion thereof if a payment has been made in terms of clause 23.3.2.3) plus interest shall be paid to the purchaser and the purchase price shall automatically be reduced by an amount equal to the retention amount or portion thereof. After the purchase price has been reduced by an amount as provided for in this clause 23.3.3 the seller shall have no further liability of whatsoever nature in respect of the Pick n Pay works."

[7.] Transfer of the property took place on or about 14th November 2016, however the works had not been completed by this date. During or about April 2017 R2 500 000 was released by the first respondent to the second respondent.

Summary of issues

[8.] Applicant seeks the release of the funds pursuant to the alleged non-occurrence of an event contemplated in the sale agreement between it and the second respondent. It avers in its founding affidavit that by 14th November 2017 the works had still not been completed and Pick n Pay was not paying the increased rental. Hence, in terms of the agreement the first respondent was obliged to return to it the remaining R2 500 000 to it together with interest accrued. However despite demand the first respondent has failed to release the funds to the applicant.

[9.] The second respondent argues that the only time the first respondent will be obliged to release the funds to the applicant is if the Court holds that the purchase price has been reduced in terms of clause 23.3.3.

[10.] In its answering affidavit the second respondent states that the renovation works had been completed during June 2017 as confirmed by the occupation certificate, as well as the second respondent's failure to provide VAT invoices for the difference between the increased and actual rentals as was its obligation in terms of clause 23.3.2.1.

[11.] In its replying affidavit the applicant changes its version on the issue of payment of the increased rental. It states that Pick n Pay has been paying this amount since June 2017, thus commencing some six months before the final date for the completion of the works as contemplated in clause 23.3.3, however not because it was satisfied with the works, but because the applicant and Pick n Pay had entered into an

agreement. Part of the agreement included an undertaking that the applicant would attend to the relevant snags, and incomplete and defective works.

[12.] The second respondent contends that there is a dispute of fact regarding the question of whether the works had been completed timeously, which dispute is not capable of being decided on the papers. The gist of the dispute according to second respondent is that it maintains that the works were completed to Pick n Pay's satisfaction by June 2017, whilst applicant maintains that they were still not completed by 14th November 2017.

Interpretation of the agreement

[13.] The application hinges on the interpretation of the sale agreement between the applicant and the second respondent.

[14.] Clause 23.3.2.4 sets out the conditions for return of the balance of the retention amount to the seller. Clause 23.3.3 sets out the conditions for payment of the retention amount to the purchaser. These clauses are different. The condition that approval by Pick n Pay should be in writing is required in the former, but not the latter clause. Pick n Pay therefore did not have to give its approval in writing under clause 23.3.3 for fate of the retention amount to be determined in terms of this clause.

[15.] In order for the applicant to succeed in its claim for a reduction in the purchase price it must establish that prior to 14 November 2017 -

[15.1] The renovation works (the works) had not been completed to the satisfaction of Pick n Pay; and

[15.2] The consequent increase of the month rentals had not taken effect.

The second requirement for a reduction in the purchase price is fulfilled, (in the event that prior to 14 November 2017 Pick n Pay was paying the increased rentals), if such increased payments were not as a consequence of Pick n Pay being satisfied that the works had been completed.

Was Pick n Pay satisfied with the works?

[16.] Clearly, as Pick n Pay did not have to give its written approval of the completion of works in terms of clause 23.3.3 - its approval could also legitimately have been inferred from relevant facts.

[17.] The founding affidavit refers to correspondence between the applicant's attorneys and the first respondent dated 3rd April 2018 complaining that Pick n Pay had failed to confirm in writing that all works and snags have been dealt with to their satisfaction as required in terms of clause 23.3.2.4.4 of the contract. It states that "moreover, *de facto*, the works and all snags have not been completed or dealt with in a satisfactory manner." Secondly this letter of demand states emphatically that "it is a matter of record that the increased monthly rentals anticipated from Pick n Pay have not been effected." It advises the first respondent that it is duty bound to release the retention amount to the applicant, plus interest thereon. To date the first respondent has failed to do so.

[18.] Paragraphs 1.5 and 1.6 of its replying affidavit contradict this letter in two material respects. Applicant states that Pick n Pay ceased to render VAT invoices to the second respondent in June 2017 as it had "started paying an increased rental." The next paragraph refers to Pick n Pay paying *the* increased rental. The VAT invoices were for the increased rental reflected in the agreement, and according thereto would only cease to be rendered if the increase was being paid by Pick n Pay.

[19.] Applicant also annexes to its replying affidavit a snag list presented in June 2017 by Pick n Pay to the second respondent which shows that all snags have been addressed, save for a query regarding a tear in a soft duct. There are therefore major factual discrepancies between the applicants founding and replying affidavits.

[20.] Applicant states in its replying affidavit that Pick n Pay has been paying the increased monthly rentals from June 2017, but not because the construction works were complete. It refers to it having entered into an agreement with Pick n Pay, without giving the date of the agreement, and states that it had undertaken to attend to relevant snags and incomplete and defective works, which are not specified. It states that the increased payments were as a result of the applicant "commercially negotiating with Pick n Pay for the payment of the increased rental notwithstanding that Pick n Pay was not happy with the construction works". Pick n Pay started paying the increased rental in June 2017.

[21.] No explanation is given by the applicant for this change in its version presented under oath in its founding affidavit. It appears to have been prompted by the second respondent's affidavit which states that no VAT invoices requesting increased rentals had been tendered as of June 2017.

[22.] Apart from not explaining the factual contradictions, the applicant also provides no documentary evidence of it having attended to the repairs, and when it did so. It baldly states that as late as March 2018 it was still attending to certain incomplete and defective works. The only documentary evidence tendered is a quote dated 13th March 2018 from Magic Plumbers.

[23.] Notwithstanding the snag list which represent the snags, bar one query regarding a tear in a soft duct, as having been resolved in June 2017 to the satisfaction of Pick n Pay, the applicant also attaches to its replying affidavit two further letters dated 2nd August 2017 and 16th November 2017 from Mr Webb of Pick n Pay to the second

respondent indicating that *inter alia* the roof is leaking, there are problems with the air conditioning as well as disintegrating floor surfaces.

[24.] The Oxford English Dictionary definition of snagging is "the process of checking a new building for minor faults that need to be rectified." The applicant, though by now the lessor of the premises to Pick n Pay does not shed any light on how it had come about that two months after the snag list had recorded the snags as resolved, there were significant problems being raised by Pick n Pay. The terms of the renovation works agreed upon initially between Pick n Pay and the second respondent in the main agreement are not spelt out at all, and as a result hence is it not possible to ascertain from the application whether the subject matter of these two letters falls under these works or not.

[25.] There is a further discrepancy in the applicant's case. Applicant's explanation in reply is irreconcilable with these two letters, as they indicate that Pick n Pay was still looking to the second respondent to attend to the works right up to 17th November 2017, notwithstanding the alleged agreement where applicant would attend thereto against payment of the increased rentals by Pick n Pay.

[26.] The second respondent denies the applicant's averments that Pick n Pay was not satisfied with the works before the end of the 12 month period, and refers to several facts and circumstances, from which it contends the inference can be drawn that the works had indeed been completed to Pick n Pay's satisfaction.

[27.] Firstly the answering affidavit refers to a certificate of occupation that had been issued on 6th June 2017 by the local authority, that indicates that the building had been erected and finished according to approved building plans and the relevant legislation.

[28.] Secondly it refers to the fact that the applicant had failed to provide VAT invoices for the difference between the increased and actual rentals as was the applicant's

obligation in terms of clause 23.3.2.1. It stated that upon a proper interpretation of 23.3.1.3 and 23.3.1.2 the monthly rentals could only be increased upon Pick n Pay's indication to the applicant that the works had been completed to its satisfaction and until such indication had been given the applicant had a contractual obligation to provide the second respondent with VAT invoices for the difference between the increased monthly rentals and the actual rentals payable by Pick n Pay.

[29.] The second respondent argues that on a proper interpretation of clause 23.3.3 the purchase price would only be reduced if the monthly Pick n Pay rentals had not been increased by 14th November 2017, and that payment of the increased rentals, (which were only disclosed to it in the replying affidavit) had indicated that the works had been completed to the satisfaction of Pick n Pay.

[30.] In argument the second respondent contends that if the applicant is to be believed it had decided to effect the works itself before the end of the 12 month period and in so doing has precluded the second respondent from doing so. It contends that a compelling argument can be made that the applicants alleged completion of the works constituted fictional fulfilment of the condition that the purchase price would not be reduced unless the works be completed by 14 November 2017.

[31.] Finally it contends that the existence of the snag list as annexed to the replying affidavit implies that the works had been completed in June 2017.

Discussion

[32.] It is trite that in application proceedings the applicant must set out the facts necessary to establish a *prima facie* case in as complete a way as the circumstances demand in its founding affidavit. The stating of a bald allegation of fact is done at the applicant's own risk since it will usually not be permitted to set out a more complete

case in reply. (see Harms, *D Civil Procedure in the Superior Courts*¹). Introducing new material in replying affidavits is likewise problematic. As stated in *Riddle v Riddle*²

“Undoubtedly, it is a general rule of our practice that all allegations necessary to establish the applicant’s cause of action must appear in the petition and/or the supporting affidavits and that the petitioner cannot cure a deficient case or fortify one, inadequately set forth, by introducing new matter in his replying affidavits, and that if he attempts to do so the offending paragraphs in the latter affidavits will be struck out.”

[33.] The facts on which applicant relies in this matter are that Pick n Pay did not indicate that it was satisfied with the works prior to November 2017. It has been paying the increased rentals but not as a consequence of being so satisfied. The latter averment is however contained in the applicant’s replying affidavit not its founding affidavit, and contradicts what is averred in the founding affidavit. The applicant does not take the court into its confidence by providing an explanation for the discrepancy in its affidavits regarding its failure to mention at the outset that Pick n Pay was paying the increased rentals.

[34.] Given the terms of the founding agreement Pick n Pay’s payment of the increased rentals is indicative of it having approved the works. The applicant was aware of these payments when it drafted the founding affidavit and had a duty to disclose this fact therein. The failure to explain why it failed to do so do so leads to the conclusion that the applicant was culpably remiss in preparing this application.

[35.] As the applicant fails to set out the essential averments of fact for its cause of action in its founding affidavit the respondents as a result have been deprived of an opportunity to respond thereto. The applicant’s averments of fact are scanty, and documentary evidence in support thereof, which must have been at its disposal is not tendered. The absence of any detail in the evidence of the alleged agreement between

¹ Lexis Nexis, February 2019 at B6.25

² [1956] 3 All SA 9 (C) at page 17

Pick n Pay and the applicant, and how applicant complied therewith results in respondents not being able to determine the case they have to meet.

[36.] Finally, on the facts presented the applicant's version is implausible. In its heads of argument second respondent raises a number of pertinent questions that suggest the improbability of applicant's explanation for the increased rental. These include querying why Pick n Pay would opt to pay the increased rental if they could have insisted on the seller paying it, and why would they entrust the completion of the works and snags to the applicant at a stage when the seller still has five months to complete the works. I consider it implausible that after entering into an agreement effectively shifting the obligation to attend to the works to applicant, Pick n Pay would still continue to hold second respondent accountable for repairs to its premises.

Conclusion

[37.] The applicant seeks to prove that Pick n Pay was not satisfied with the works prior to November 2014 by relying on the fact that Pick n Pay has not stated as much in writing, and on the existence of two letters annexed to its replying affidavit. Pick n Pay did not need to indicate its satisfaction in writing for the purposes of clause 23.3.3. The documents referred to in clause 23.3.2.4 have no bearing on the question of the reduction of the purchase price.

[38.] The second respondent disputes that Pick n Pay was not satisfied with the works prior to November 2014 based on three facts: it had paying the increased rental, had completed a snag list where all issues were resolved (save for one query), and the fact that an occupation certificate had been issued which indicated that the building was fit for purpose and had been completed according to plan. These events pre-date the two letters that applicant relies on.

[39.] The applicant has failed to establish the factual basis for the relief it seeks in its founding affidavit. The facts tendered by it in the replying affidavit contradict the founding affidavit, and for the most part consist of bare allegations, unsupported by evidence, that are improbable.

[40.] The version that Pick n Pay accepted the snag list and occupation certificate and began paying the increased rentals as a consequence of being satisfied with the works has the ring of truth about it although I make no findings in this regard.

[41.] The requirements for the reduction of the purchase price in terms of clause 23.3.3 have not been proved by the applicant to have been met. The application must therefore fail.

[42.] The first respondent, although instructed by the applicant, holds the funds in trust pending the outcome of the two different scenarios, envisaged in clauses 23.3.2.4 and 23.3.3 of the agreement. Applicant is bound by this agreement and may not lawfully instruct the first respondent to act in a manner which frustrates the proper carrying out of its terms, and the resolution of the issues reflected in these clauses. As the requirements of the reduction of the purchase price have not been proved by the applicant to have been met it follows that the court will not order the first respondent to pay the funds demanded (R2 500 000 plus interest accrued thereon) to the applicant.

[43.] I make the following order:

[43.1] Condonation is granted for the late filing of the replying affidavit;

[43.2] The application is dismissed;

[43.3] The applicant is ordered to pay the second respondent's cos



AE ANDREWS, AJ

ACTING JUDGE OF THE HIGH COURT,
PRETORIA

APPEARANCES

DATE OF HEARING	:	5 th February 2019
DATE OF JUDGMENT	:	May 2019
APPLICANT'S COUNSEL	:	Adv J M Hoffmann
APPLICANT'S ATTORNEYS	:	Nochumsohn & Teper
2 nd RESPONDENT'S COUNSEL	:	Adv A F Arnoldi SC
1 st and 2 nd RESPONDENTS' ATTORNEYS	:	Delpont van den Berg Attorneys