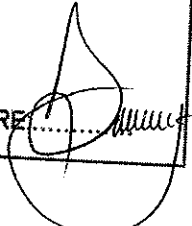


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 5331/2017

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED
DATE: 30.8.2017 SIGNATURE: 	

In the matter between:

THORNHILL SHOPPING CENTRE (PTY) LTD : APPLICANT

And

AFRICA AUTOMOTIVE SOLUTIONS

(PTY) LTD t/a MIDAS

: RESPONDENT

JUDGEMENT

SEMENYA J:

1. The applicant is the landlord of Thornhill Shopping Centre (the premises) situated at Centre Management Office, Cnr Veldspaat & Munnik Avenue, Polokwane, Limpopo (the Centre).
 2. On or about the 12 October 2015, the applicant and the respondent entered into a three year written agreement in terms of which the respondent leased from the applicant certain premises situated at shop 67 at the Centre. The contract was to commence on the 1 September 2015 and end on the 31 August 2018.
 3. It was a term of the lease that the premises were to be used solely for the retail of motor spares and accessory shop and for no other purpose whatsoever. The respondent was further required to trade from 9:00 to 19:00 from Mondays to Saturdays, 9:00 to 17:00 on Saturdays and Sundays and 9:00 to 13:00 on public holidays.
 4. A penalty of R2000.00 per day (excluding VAT) or 10% of the basic rental, whichever is bigger, was payable by the respondent for failure to remain open for the full period of the trading hours as agreed upon by the parties.
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5. The applicant launched this application on an urgent basis, in which it claims specific performance, interdict and other ancillary relief. It alleges that the respondent has repudiated the contract. The applicant alleges further that the repudiation was in the form of the respondent's failure to open the shop for trade on the morning of the 18 July 2017. It is alleged further that the respondent had partially covered the windows of the premises with paper and removed more of its assets from the premises. Trading never resumed since then. The applicant elected not to accept the repudiation.
6. The applicant contended that the respondent's conduct will make it (the respondent) unable to meet its financial obligations such as payment of rent. It was further argued that this conduct is detrimental to other tenants in that it will render the Centre unattractive to customers. It was submitted on its behalf that an action for damages will not avail a proper remedy for the applicant in that firstly, it will be difficult to quantify its damages and secondly, there is no guarantee that the respondent will be able to satisfy the judgement.
7. The respondent is not disputing most of the facts as set out above. It however denies that it is obliged, in terms of the contract, to maintain a fully operational

business at the premises. It alleges that its obligations are to pay the rent, maintain the property and return it in an acceptable condition at the end of the lease.

8. The respondent further states that an order of specific performance, as claimed by the applicant, would be inappropriate in that it has already vacated the premises, transferred staff to other branches or retrenched them in view of the fact that it has been running the business at a loss. It further alleges that there was never an agreement between the parties that the respondent would be required to operate at a loss.
9. The respondent argued that the applicant must resort to the remedies provided for in the agreement signed by the parties viz, a penalty of R2000.00 per day or 10% of the rent. It was contended that the applicant can still claim damages as a remedy.
10. The respondent argued that it has not repudiated the contract as there was no clause in it that required it to remain fully operational even when business was not good. In support of its argument that the respondent has repudiated the

contract, counsel for the applicant referred the court to the decision in **Aucamp v Morton 1949 (3) SA 611 (A) at 613** in which Watermeyer CJ stated as follows:

"We are dealing in this case with a contract involving reciprocal obligations of which several, of varying importance, rest upon the appellant, and it is usually laid down with regard to such cases that a breach by one party of one of the obligations resting on him will only give the other a right to treat the contract as discharged if the breach is one which evinces an intention on the part of the defaulter no longer to be bound by the terms of the contract for the future, or if the defaulter has broken a promise, the fulfillment of which is essential to the continuation of the contract."

11. I agree with counsel for the applicant that the only interpretation one can arrive at from the respondent's failure to open the premises for trade and to remain open for the hours as agreed upon by the parties, the covering of the windows with papers and the removal of stock and shelves from the shop, is that it no longer wished to be bound by the terms of the contract. I am satisfied that its conduct amounts to repudiation.
12. Furthermore, the respondent's argument that the applicant cannot force it to remain open even though it was running a business at a loss cannot stand, so is the contention that the contract does not state that the respondent is obliged to trade until the end of the term. The contract entered into by the parties is for a

period of three years, during which the respondent is to operate a business of selling motor spares. The applicant's argument that the Centre it operates from requires a diversity of business entities, and that the respondent's failure to operate will negatively impact on other businesses, is found to be valid. These are the relevant and admissible circumstances that should be considered when one has to find a meaning to the words used in the contract - **Bothma-Batho Transport v Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 SCA at 499 [12]**. I therefor find that the contract required the respondent to remain open for the duration of the contract period.

13. The respondent contended that an order of specific performance sought by the applicant will subject it to hardships. In response to this submission, counsel for the applicant contended that it is not the respondent's evidence that it is impossible for it to meet its obligations. In other words, the respondent is not relying on impossibility of performance. It did not state clearly in its affidavit as to what makes it unable to run its business profitably. All it state is that the premises fail to attract customers. I am inclined to accept the applicant's submission the respondent's submission should be rejected.

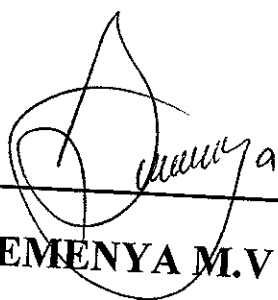
14. With regard to the respondent's argument that the applicant should resort to the remedies available to it in terms of the contract, counsel for the applicant referred the court to **Haynes v King Williamstown Municipality 1951 (2) SA 371 (A) at 378D - E**, as referred to in **Edrei Investments v Dis-Chem 2012 (2) SA 553 at 556 G-J**. It was stated in that case that the plaintiff has a right of election whether to hold a defendant to his contract and claim performance or to claim damages for breach. The defendant has no right to elect and cannot claim to be allowed to pay damages instead of having an order of specific performance granted against him.

15. The applicant in the instant matter has elected to go for specific performance and not to claim damages. I have no reason, in the exercise of my discretion, to deny it this right. The respondent will therefore have to find ways and means of attracting customers to its business and in order to make profit out of it. In any event, its papers are silent about the steps it took, if any, to improve its trade.

16. In the result I make the following order:

16.1. The matter is disposed of as one of urgency in terms of Rule 6 (12) of the Rules of Court;

- 16.2. The respondent is ordered to continue trading from shop 67, Thornhill Shopping Centre, Cnr Veldspaat & Munnik Avenue, Polokwane, as Midas, in compliance with the shopping centre's trading hours, fully stocked and adequately staffed;
- 16.3. The respondent is interdicted and restrained from closing the store and to cease trading therefrom until 31 August 2018;
- 16.4. The respondent is ordered to pay the costs of this application.

A handwritten signature in black ink, appearing to read 'Semanya M.V.', is written over a horizontal line. The signature is stylized with loops and a long tail.

SEMENYA M.V

JUDGE OF LIMPOPO DIVISION;

POLOKWANE

APPEARANCES:

COUNSEL FOR THE PLAINTIFF: ADV. DANNIE WIJNBEEK

INSTRUCTED BY	: BEN GROOT ATT.
COUNSEL FOR RESONDANT	: ADV. ROSALIND J. STEVENSON
INSTRUCTED BY	: DE VRIES INC.
DATE OF HEARING	: 21 AUGUST 2017
DATE OF JUDGEMENT	: 30 AUGUST 2017