THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO. 24868/2015

30/4/2015

In the application between:

JOYRIDE PROPERTIES (PTY) LTD Applicant

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

30/4/2015 DATE SIGNATURE

and

LUVHOMBA CAPITAL (PTY) LTD Respondent

Judgement

Jordaan J:

This is an urgent application for the eviction of the Respondent from the property known as Erf 295, Barolong Street, Sunderland Ridge Ext 18, Icon Park, Pretoria.

The version of the Applicant:

On 5 August 2014 the Applicant and the Respondent entered into a written agreement of lease in terms of which the Applicant let to the Respondent the above mentioned property. The lease would commence on 1 August 2014 and would endure for 12 months. The monthly rental would be payable in advance in the amount of R 198,171.90 inclusive of VAT.

In the event of breach of any terms of the agreement, the Applicant would be entitled to cancel the agreement after the expiry of 7 days written notice to remedy such breach. Provision is also made for the Applicant to be entitled to attorney and client costs in such an event.

The Respondent took possession of the property but failed to pay rental or full rental for the months of September, October and November 2014. The shortfall for September was R 7,789.99, R 198171.90 for October and R 198,171.90 for November.

In terms of the agreement the Applicant demanded payment of the arrear rental in a letter dated 10 November 2014 and when the Respondent failed to pay cancelled the agreement on 25 November 2014 and requested the Respondent to vacate the premises not later than 30 November 2014.

The Applicant issued summons for the arrear rental and for damages for holding over in the Magistrate's court, Pretoria.

On 25 November 2014 the Respondent acknowledged receipt of the summon The Respondent and stated in an E mail that the summons and steps for eviction amounted to "strong arm" tactics and issued a warning that it would employ physical means if needs be.

The Applicant, thereafter obtained default judgement against the Respondent on 11 March 2015 for the amounts referred to above. And the prayer for damages was postponed.

Before judgement was taken the Respondent's attorneys requested settlement negotiations and a meeting to attempt to settle the dispute ook place on 2 February 2015. It is in dispute whether a settlement was reached.

On 9 February 2015 the Applicant's attorneys informed the Respondent's attorneys in writing that it was not willing to participate in any further negotiations and the Respondent was requested to vacate the property. The Respondent's attorneys then indicated that it would pay, as from 1 March 2015 the normal rental and the outstanding arrears.

The Applicant, after judgement attached the goods as specified in the inventory of the Sheriff attached to the papers.

The applicant points out that the Respondent also failed to make any payment for the period December 2014 to March 2015. The Respondent also did not make any payment in respect of the judgement debt. It is alleged that the damages for holding over and the total exceeds R 1.1 million excluding costs and interest. (At the hearing of this application on 23 and 24 April 2015 I was told from the bar that the amount at this stage was R 1.8 million.)

During March 2015 the Applicant also ascertained that the electricity supy to the property had been terminated as the Respondent had not paid a single cent towards electricity consumption. The outstanding amount owing for electricity on 28 February 2015 amounted, according to an account attached to the papers, amounts to R 56,146.65.

On 23 March 2015 the Respondent's attorneys directed a letter to the Applicant's attorneys in terms whereof the Respondent offered to pay the amount of R 404,212.79 but no later than close of business on 27 March 2015 and also offered to vacate the premises by no later than 27 March 2015. The Applicant's attorneys then instructed the Sheriff not to proceed with the removal of the goods.

However the Respondent again failed to honour the above mentioned undertaking whereupon the Applicant's attorneys instructed the Sheriff to proceed with the removal of the goods attached.

When the Sheriff attempted to remove the goods the sole director of the Respondent, Mr Mulaudzi, in a violent manner prevented the Sheriff from doing so.

The version of the Respondent:

Mr Mulaudzi appeared in person on behalf of the Respondent before me. It seems as if he also drew the opposing papers and the Respondent's heads of argument.

The Respondent's defences are the following:

1. That no lease agreement exists between the parties;
2. That the Respondent has launched an application for recission of the judgement given in the magistrate's court which bars this court from granting an order in this application
3. That there is an Agreement of Purchase and Sale in place and also valid, which entitles the Respondent to occupy the premises
4. That the application is not urgent and the Respondent is financially able to meet all of it's commitments.

It is correctly pointed out on behalf of the Applicant that the invalidity of the lease agreement is a novel argument in defence of the Applicant's claim. At no stage before was this defence raised. I agree that the documents attached to the founding affidavit, some of which have been referred to above shows that the validity of the lease was not in dispute at any previous stage.

It was submitted on behalf of the Applicant that the order sought can be granted only on the allegations made by Respondent, being:

1. That no agreement of lease exists and that it had been declared null and void by the Agreement of Purchase and Sale;

2 That the Agreement of Lease, which had been concluded, was cancelled by the said Agreement of Purchase and Sale.

3 It is not in dispute that Respondent is in occupation of the premises;

4 The Agreement of Sale referred to on behalf of the Respondent was concluded with a Third Party, namely Luvhomba Legal Axe (Pty) Ltd and not with the Respondent;

5 No basis whatsoever is shown why the Respondent is entitled to occupy in terms of the Purchase and Sale entered into with the Third Party. The fact that the Respondent may be a subsidiary to the Third Party, or part of the Luvhomba Group *(sic)*, makes no difference;

6 Based solely on Respondent's allegations, Respondent is not entitled to occupy the premises. The Applicant submitted that Respondent should be evicted. Judgment in the Magistrate's Court was only granted for payment of arrear rentals and not for eviction. The Applicant had not issue summons for eviction;

7 On behalf of the Applicant it was submitted that this court, by granting an order of eviction, complies fully with the principles as laid down in the decisions of:

Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949(3) SA 1155 (T) and Plascon-Evans (Pty) Ltd Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (AD)

It was submitted on behalf of the Applicant that, solely on the basis as set out above, Applicant is entitled to an order of eviction.

I am in agreement with these submissions. These submissions are further being fortified by the following:

Even if it should be found that respondent derives any rights from the agreement of sale the right to occupy clearly commences on date of transfer of the property into the name of the Third Party;

The Respondent does not allege, and it may be regarded as not in dispute, that transfer has not taken place. Transfer was not effected. In fact, on the papers the Agreement of Sale had been cancelled.

Even if the Respondent is correct, it's right to occupy is subject to the Agreement of Lease;

In this regard clauses 17.2.7 and 18.1 are of importance.

Clause 17.2.7 reads as follows:

"The Agreement of Lease entered into between the seller and Luvhomba Capital (Pty) Ltd dated 4 August 2014 shall be ceded to the Purchaser on date of Registration of Transfer of the Property into the name of the Purchaser."

Clause 18.1 reads:

"The Purchaser is aware of the Agreement of lease entered into by and between the Seller and Luvhombo Capital (Pty) Ltd and this Sale Agreement is subject to the provisions of the Agreement of Lease, a copy of which is attached hereto for identification purposes."

It was correctly argued that the Respondent does not allege or prove any payment in respect of occupation for the period December 2014 up to date. It is not in dispute that the judgment debt remains unpaid; in terms of the Agreement of Lease Respondent is at this stage indebted to Applicant in a total amount of ±R1,4 million.

Based on the principles of the ***Jeppe Street Mansions*** and ***Plascon-Evans*** decisions, this Court should grant Applicant the relief sought.

As to the allegation that the application for recission of judgement bars any order in the present matter it is important to note that that application is solely based on the fact that the order is erroneous because the amount for which judgement was granted exceeds the jurisdiction of the magistrate's court. This application loses sight of the following:

- The Respondent, in the Agreement of Lease consented to the jurisdiction of the magistrate's court and
- The amount claimed had been claimed in three different claims, in view of one default committed by the Respondent.

Accordingly there is no merit in this point taken by the Respondent as well.

With regard to the alleged lack of urgency in this application I am of the view that it is also without any merit.

The Respondent clearly intends to remain in occupation of the premises and does not intend to pay any occupational rent. This is in fact confirmed by the Respondent in it's papers.

The Respondent is financially unable to pay Applicant. This is corroborated by:

Respondent's application for rescission of judgment;

The Respondent's failure to file a plea;

The Respondent's failure to show its ability to pay Respondent.

The Respondent's attorneys withdrew as a result of a lack of funds;

The Respondent have not paid one cent in respect of electricity consumed. The Respondent alleges that Applicant failed to supply it with accounts, while the accounts are addressed to Respondent;

If the application is dealt with in the normal course of proceedings and not earlier than at least four months from date hereof, the Applicant will suffer further irreparable loss of ±R800 000,00, as the premises cannot be let to new tenants;

The financial loss suffered by the Applicant up to date is substantial.

In the result I am of the view that the application should succeed.

The punitive cost order I intend to grant is not only because such was consented to in the Agreement of Lease but also as a result of the behaviour of the Respondent by playing cat and mouse with the Applicant for months. Its directors attitude towards the Sheriff referred to above is also of importance.

In the result the following order is made:

1. That Respondent be evicted from the premises situated at Erf 295, Sunderland Ridge, Ext 18, Icon Park, Pretoria, Gauteng;

2. That the Sheriff be authorised to evict Respondent should Respondent fail to grant Applicant access to the premises mentioned in paragraph 1 *supra* within 10 days of granting of this order;

3. That Respondent be ordered to pay the costs of this application on the scale as between attorney and client.