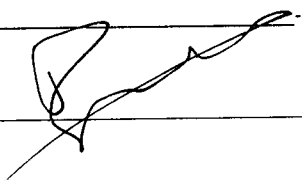




IN THE NORTH GAUTENG HIGH COURT PRETORIA

(REPUBLIC OF SOUTH AFRICA)

21/8/15
CASE NO. 51408/2011

Reportable	Yes/ No
Of interest to other judges	Yes/ No
Reviewed on	28/8/2015
JUDGE	

In the matter between:

N.N. METALS (PTY) LTD

APPLICANT

and

TRANSNET LTD

RESPONDENT

CORAM: EBERSOHN AJ

**DATE HEARD: VARIOUS DATES HEARING CONCLUDED ON 7
MAY 2013**

DATE JUDGMENT HANDED DOWN: 21st AUGUST 2015

JUDGMENT

EBERSOHN AJ

[1] After having heard argument over a period of time regarding the application for leave to appeal judgment was reserved and I was appointed in the Venter Division of the High Court and relocated.

[2] My erstwhile secretary was tasked to obtain a transcribed copy of the argument delivered both at the original hearing and at the application for leave to appeal. The reason for ordering the transcription was to attempt to better understand the defendant's counsel's argument as will appear later herein.

[3] When I was transferred back to Pretoria it appeared that neither the court file nor the transcription could be found.

[4] I then had a sudden heart attack which necessitated open heart surgery and I was indisposed for quite a while. I, in the *interim*, learned that the

transcription had come to light but that the court file was still missing. A new record was prepared at my request and I could then start writing my judgment.

[5] The parties will be referred to in this judgment as “plaintiff” and “defendant” respectively as in the main case. Before dealing with the defendant’s alleged grounds of appeal it is necessary to give a short overview of what the case is really about.

[6] In response to the summons wherein plaintiff claimed ejectment of the defendant from the premises as the lease regarding the premises had expired, the defendant filed a plea and two counterclaims and the plaintiff filed exceptions to the defendant’s counterclaims.

[7] To be better informed of the method the defendant employed to delay the matter the court will here and there refer briefly to the merits of the matter, which were in any case comprehensively dealt with in the main judgment.

[8] The court will first refer to the 5 exceptions the plaintiff lodged and they are dealt with in paragraphs [9] - [68] (pages 9 to 23) of the main judgment and the plaintiff’s exceptions to the defendant’s first and second counterclaims.

[9] In the **first exception**, paragraphs [12] - [17] pages 11 to 14 of the main judgment, the defendant did not deny the fact that the lease agreement expired

but alleged that it occupied the property in terms of an express contract of lease alternatively tacit lease which came in existence by virtue of some correspondence between the parties. The provisions of Act 18 of 1969, which was dealt with in paragraph [9] b) of the main judgment were apparently once more overlooked by the defendant. This contention of the defendant was dismissed on the evidence on record.

[10] In the **second exception**, paragraphs [18] - [25] of the main judgment, (pages 11 to 14) with regard to the issue of the occupation of the property it was the case of the defendant that the parties concluded a tacit contract of lease during the period of May and June 2011. See in any case the provisions of Act 18 of 1969. This contention of the defendant was dismissed on the evidence on record.

[11] In the **third exception**, paragraphs [26] – [36] of the main judgment, (pages 14 to 16) the defendant contended that it had a right to retain possession of the leased premises by reason of alleged improvements by it thereon. This contention flies in the face of clause 44 of the lease, the full text being quoted in paragraph [31] of the judgment on page 15 of the main judgment.. This contention of the defendant was dismissed on the evidence on record.

[12] In the **fourth exception**, paragraphs [37] - [44] of the main judgment, (pages 16 to 18) the defendant contended that its occupation of the leased

premises was lawful because it holds a lien for the improvements made by it to the leased premises. This contention also flew straight into the face of the facts and the law. This contention of the defendant was dismissed on the evidence on record.

[13] In the **fifth exception**, paragraphs [45] - [54] pagesd 19 -20 of the main judgment, with regard to the issue of the occupation of the property it was the case of the defendant that at the time the improvements were made by it there was no agreement between the parties in respect of the expenses. In paragraph 40.2 of the written lease (referred to in paragraph [49] of the main judgment the parties agreed that the plaintiff did not accept responsibility for any improvement constructed by the defendant on the leased premises regardless of whether the plaintiff consented to the construction or not. In clause 44 of annexure ("POC1) referred to in paragraph [51] of the judgment any improvements to the leased premises shall accede to the land and the ownership thereof shall vest in the Lessor, being the plaintiff, without any compensation whatsoever being payable by the plaintiff to the defendant. The contention of the defendant was dismissed on the evidence on record.

(14) The defend also filed two counterclaims to which the plaintiff excepted.

[15] **Exception by the plaintiff to the defendant's first counterclaim.**

The defendant's first counterclaim arises from alleged improvements made by it to the leased premises prior to the period August and September 2009 and averred that it held a lien. It was already dealt with in paragraphs [55] - [57] of the main judgment on pages 20 – 21, and set out and found that it had no lien and consequently ruled that the defendant had no counterclaim in this regard and that the exception should succeed.

[16] Exception by the plaintiff to the defendant's second counterclaim.

The contention of the defendant in paragraph [10] of its second counterclaim, was that in the event of it being found that there was no express agreement it was impoverished by the making of monthly payments of R32 700,00 to plaintiff and that the plaintiff was enriched at the defendant's expense. This aspect was dealt with in paragraphs [60] – [67] pages 21 to 23 of the main judgment and it was clear that the exception should succeed.

[17] GROUND OF APPEAL NOW RELIED UPON BY DEFENDANT:

There is no clear indication in the notice which paragraphs of the notice deals with which specific grounds of appeal. Part of it is repetitive.

[18] FIRST ALLEGED GROUND OF APPEAL:

- a) According to the defendant the court should not have condoned the late filing by the plaintiff on the 11th June 2012, of its exceptions to the defendant's plea and the two counterclaims..

- b) The defendant was totally inactive in this regard and totally ignored the exceptions and never applied in terms of rule 30 to set the exceptions aside as irregular processes.
- c) On 12 February 2013, in the plaintiff's Heads of Argument, (page 23) reference is made to the exceptions and it is prayed that the various exceptions be upheld.
- d) In the defendant's heads of argument dated the 8th March 2013 counsel extensively dealt with the merits of the exceptions and no indication nor notice was given in the defendant's said heads that a point *in limine* would be raised that the exceptions were filed out of time.
- e) It is common cause between the parties that the counsel for the two parties spoke per telephone on the morning of the the 7th May 2013, it being the date on which the argument would continue in this court, and that the defendant's counsel did not inform the plaintiff's counsel of the *point in limine* about the lateness of the filing of the exceptions he would take later that morning when the matter was further heard by the court. He only informed him at the court about it leaving no time to plaintiff's counsel to investigate the issue and to do research on it. Why he kept mum about it is quite clear although he stated, when addressing the court, that he did not intended to embarrass "him in any way". Well, he did embarrass him and also the court as the court also did not have time to do research on this very

late point sprung by the defendant's counsel on both the court and the plaintiff's counsel.

- f) Counsel for the defendant then continued his argument and stated that Rule 26 "seems to be the decisive yardstick here". Erasmus:Superior Court Practice on page B1-169 (footnote 4) , however states the following:

"An exception is a pleading and cannot be objected to as having been filed out of time unless a notice of bar has been given."

(The defendant *in casu*, diidn't put any proof before this court that a notice of bar was ever served and no allegation was made in this regard).

The following authorities are quoted under footnote (4):

"Tyulu v Southern Insurance Association Ltd. 1974 (3) SA726 (E); Felix v Nortier NO (2) 1994 SA 502 (SE) at 506E; Landmark Mthatha (Pty) Ltd. v King Sabata Dalinyebo Municipality in re: African Bulk Earthworks (Pty) Ltd. v Landmark Mthatha (Pty) Ltd. . 2010 (3) SA 81 (ECM) at 86A-B."

- [19] Even the case of **Stockdale Motors Ltd. v Mostert** 1958 (O) SA 270 (O) quoted by defendant's counsel in court did not support the defendant's contentions. The facts of the Stockdale case do not

clearly appear from that judgment and it cannot be regarded as an authority in any way in favour of the defendant. The text of the Orange Free State Rule 37 was not placed before this court by the defendant. Even Erasmus in the quoted cases did not even regard the Stockdale case as being authoritative.

[20] From the quoted passage from Erasmus it seems as if condonation was not required.

[21] The plaintiff's counsel stated clearly in his long heads of argument which was filed timeously that an order including condonation should be granted (probably in so far as may be necessary) against the defendant.

[22] Furthermore, and in case an application for condonation may have been necessary, this court in terms of Rule 27 (3) has the inherent power to condone any non-compliance with these rules. The good cause, not that it is required in terms of rule 27(3) shown by the plaintiff appears from the clear facts of the matter and the obvious attempt by the defendant to delay the case, and the court in the exercising of its discretion in so far as may have been necessary, granted condonation

[23] It is clear that there is no chance of success on appeal on ground 1.

[24] **SECOND ALLEGED GROUND OF APPEAL:**

- a) According to the defendant this court should have arrived upon the conclusion that the issues are interwoven with evidence that has to be led at a trial and at a trial the defendant **may establish that an express agreement** came into being. It is stated in paragraph 10 of the application that an interpretation of annexures "DEF 1" and "DEF 2" was required and that this court could not do it during exception stage. The two annexures are clear and required no interpretation by the court. The contentions of the defendant was mere speculation in any case.
- b) Its is clear that there is no chance of success with the second proposed ground of appeal.

[25] **THIRD ALLEGED GROUND OF APPEAL::**

- a) The third proposed ground of appeal is that this court erred and should have found that with regard to the improvements, namely that the improvements were done prior to the commencement of the written lease upon which the plaintiff relies.
- b) The agreement by the parties with regard to the improvements is clear and this proposed ground has no foot to stand on and is apparently a smoke screen and attempt to delay the case.

- c) Its is clear that there is no chance of success with the third proposed ground of appeal.

[26] It follows that the application cannot succeed. There is no reasonable prospect that any appeal in the matter would have a reasonable prospect of success. Section 17 of the Superior Courts Act, No. 10 of 2013 reads as follows:

“17. Leave to appeal.-

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success”

In the circumstances , leave to appeal should be refused with costs.

[27] The following order is made:

1. The defendant's application for leave to appeal is dismissed with costs which costs will include the costs of Senior Counsel.


P.Z. EBERSOHN

ACTING JUDGE OF THE HIGH COURT

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