IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 4126/2014

In the matter between:-

TRANSNET SOC LTD t/a TRANSNET PROPERTY Applicant

and

EBS FUNERALS AND TOMBSTONES CASH AND CARRY Respondent

JUDGMENT BY: TSATSI, AJ

HEARD ON: 20 NOVEMBER 2014

DELIVERED ON: 19 FEBRUARY 2015

INTRODUCTION

[1] This is an application in terms of which the applicant sought an eviction order to eject the respondent from the properties that the respondent leased from the applicant. The applicant is a state owned company with limited liability and the respondent is a close corporation, a private business owner. There are two lease agreements between the applicant and the respondent. At the beginning of the hearing the respondent's counsel made an application for condonation for filing and serving the respondent's opposing affidavit out of time. Counsel for the applicant opposed the condonation application. The applicant asked the court to grant it an order in the following terms:

"1. That the Respondent and all those occupying the premises by, through or under him be ejected from the premises being the building situated on a Portion of the Remaining extent of Erf 1964, at 2 Charles Road, Bloemfontein (herein after "the first premises").

2. That the Respondent and all those occupying the premises by, through or under him be ejected from the premises being the building situated on a Portion of the Remaining extent of Erf 1964, at 2 Harvey Road, Bloemfontein (herein after "the second premises").

3. In the event that the Respondent and all those occupying the premises by through or under it do not vacate the premises within 5 (five) days of the date of this order, the Sheriff is permitted to eject the Respondent and all those occupying the premises by, through under him.

4. The Sheriff is to approach the South African Police Service for any assistance that may be required and the South African Police Service is directed to render such assistance or support that may be required to enforce this order;

5. That the Respondent be ordered to pay the costs of this application; and

6. Further and /or alternative relief".

<u>FACTS</u>

2. <u>The first lease agreement</u>

2.1 The parties entered into a three year lease agreement on 23 March 2011 of immovable property called the first premises. The lease would be from 1 April 2011 to 31 March 2014. The monthly rental was R1449. 46 excluding value added tax, subject to annual escalation at a rate of 10%. The respondent would be liable for the costs of all water and electricity consumed on these premises. This would include the costs of the rates and taxes, sewer removal, and refuse removal raised by the local authority which the respondent was obliged to pay directly to the local authority.

2.2 The respondent was expected to pay a rental deposit of R4 349.00 and an administration fee of R570.00. The total monthly rates and taxes was R139, 26.

2.3 It was common cause that the respondent used the first premises as a mortuary and other related activities. The respondent was still in occupation of the first premises.

[3] <u>The second lease</u>

3.1 The parties entered into a three year lease agreement on 15 June 2011 of immovable property called the second premises. The lease would be from 1 July 2011 to 30 June 2014. The monthly rental was R1127.36, excluding value added tax, subject to annual escalation as a rate of 10%. The respondent would be liable for the cost of all water and electricity consumed on the second premises. This would include costs of the sewer removal and refuse removal raised by the local authority, which the respondent was obliged to pay directly to the local authority. A rental deposit of R3382.08 and an administration fee of R570.00 was to be paid by the respondent. The monthly rates and taxes in respect of the second premises was R139.26.

3.2 It was common cause that the second premises was used as a storage. The respondent remained in occupation of the second premises. There were no persons occupying both the first and second premises. It was also common cause that the applicant was the owner of both premises.

4. The respondent remained in occupation of the two premises after the expiry of the lease agreements. This was based on the fact that there was a renewal of the previous three year agreement which was concluded in 1998 in respect of the property situated at number 4 Harvey Road.

5. The parties allegedly concluded a written "renewal agreement" signed and dated 11 July 2005 in terms of which their previous lease agreement ending on 30 June 2005 was renewed to continue on a month to month basis, until termination thereof by either party on notice of one month.

6. The applicant addressed a letter to the respondent on 8 February 2012 in which it alleged that the respondent breached both the lease agreements. The letter indicated that the respondent failed to pay rent in arrears in the amount of R43 435. 50. In response the respondent's accountants addressed a letter dated 14 June 2012 and indicated that they were performing a reconciliation in respect of the schedule of amounts payable by the respondent in order to verify the correctness thereof. The accountants also queried the amounts of the electricity billing. The respondent's accountants sent

another letter dated 10 July 2012 to the applicant. In this letter the accountants requested a detailed monthly billing of water and electricity separate from other excluding rent. The applicant allegedly failed to respond to the two letters written by the accountants and never provided the respondent with the information requested.

7. On 22 April 2013 the applicant's acting manager addressed a letter to the Mangaung Local Municipality in respect of which permission was given to the proprietor of the respondent to open an account for water and electricity in his own name for the leased properties. As at 3 June 2014 the total amount of the arrear rentals outstanding was allegedly R370 629.85.

ISSUES

[8] The main issue in this application was whether or not the applicant was entitled to evict the respondent from the two leased premises. The other issue was whether or not the applicant could hold the movables of the respondent as security by hypothec.

SUBMISSIONS

[9] Counsel for the applicant submitted that the applicant issued a letter of termination of the lease to the respondent. As a result the applicant cancelled the contract it had with the respondent. He told the court that the amounts due were not for electricity but for basic rental, rates, taxes and administration fee. The respondent failed to make payments as agreed between the parties. There was no proof

of payment of the rental provided for by the respondent. It was further submitted on behalf of the applicant that the letters written by the respondent's accountants enquiring about water and electricity accounts were not evidence before this court that such accounts were in dispute.

[10] It was submitted on behalf of the applicant that the respondent was no longer entitled to occupy the two leased properties as he breached the terms of the contract. Counsel for the applicant further submitted that the respondent's movable properties were subject to a tacit hypothec. The hypothec was security for the arrears in rental. He asked the court to evict the respondent from the properties on the basis of *rei vindicatio*.

[11] Counsel for the respondent submitted that the disputes of facts arising in this application were material. He submitted that the resolution of such disputes was significant for purposes of determining the lawfulness of the purported cancellation of the lease agreements. He further submitted that this application required the proper ventilation of issues at trial. It was further submitted on behalf of the respondent that the applicant knew at the time of launching this application that the respondent questioned the correctness of the alleged outstanding amounts. It was counsel for the respondent's submission that the applicant did nothing to provide the respondent with the information that the latter's accountants required.

[12] Counsel for the respondent argued that the respondent had been paying his rentals in respect of the two leased premises. He queried

the amount the applicant alleged the respondent was owing. His argument was that the respondent owed far less than what the applicant submitted. He further argued that the tacit hypothec application to this court was not in the notice of motion. He submitted on behalf of the respondent that this application was not rei vindicatio. He asked the court to dismiss the applicant's application with costs. He further argued that the matter be referred to trial.

THE LAW

[13] The *rei vindicatio* is a remedy available to the owner to reclaim his property from whomever is in possession of it. The remedy is available to the owner in respect to both movable and immovable property. The remedy merely restores proprietary interest, it does not award damages. The owner has the right to recover the property from whomsoever is in possession or has detention thereof irrespective whether the possession or detention of the thing is *bona fide* or *mala fide* (Siberberg & Schoeman: The Law of Property 4th Edition p225.).

[14] An owner who initiates *rei vindicatio* to recover his or her property is required to allege and prove (a) that he or she is the owner of the thing; (b) that the thing was in possession of the defendant at the time the action was commenced and (c) that the thing which is vindicated is still in existence and clearly identifiable (**Chetty v Naidoo 1974(3) SA 13(A) 20 B-C).** In **Chetty v Naidoo** **1974 (3) All SA 304** (AD**)** at page 309 Jansen JA set out additional rules to be considered when proceeding by way of the *rei vindicatio* action namely, that if the owner

> "… concedes in his particulars of claim that the defendant has an existing right to hold (e.g., by conceding a lease or a hire-purchase agreement, without also alleging that it has been terminated…) his statement of claim obviously discloses no cause of action. If he does not concede an existing right to hold, but, nevertheless, says that a right to hold now would have existed but for a termination which has taken place, then ex facie the statement of claim he must at least prove the termination."

[15] The landlord's tacit hypothec refers to the security a landlord retains under common law over his tenant's movables situated on the leased premises for unpaid rent (**Holderness NO and Others v Maxwell and Others** (6518/11) [2012] ZAKZPHC 49 (31 July 2012, para 24). The scope of the principle of tacit hypothec and its historical basis were spelt out by Innes J in the leading case of *Webster v. Ellison* 1911 AD 73 at pp 86 and 87. This is what he said:

> "A tacit hypothec over so undefined a subject matter would be of little practical value (save in a concursus creditorum), without some special machinery to enforce it. The law of Holland, therefore, allowed a landlord whose tenant was in default, by a species of informal attachment . . . to earmark the invecta et illata on the property, and thereby to perfect and complete his lien. Apparently no order of Court was necessary, but when the tenant failed to pay his rent, a public official entered the premises at the request of the landlord, made an inventory of the movables, affixed his seal, and then closed the doors . . . The result was greatly to strengthen the landlord's position; not only were the articles identified and impounded, but he thereafter enjoyed preference over their proceeds. He became a privileged creditor. The exact machinery thus provided in Roman-Dutch practice is unknown in our modern procedure; but the principle of assisting a landlord by summary process to protect his rights is one approved by all

South African Courts. Sometimes an interdict restraining removal or alienation by the tenant pending an action for rent is applied for and granted; but the issue of an order of attachment is also well recognized. And such an order operating as it does directly upon the goods themselves, seems the appropriate form of relief in such cases, and the one which most nearly resembles the remedy afforded by Roman Dutch law….:"

[16] The common law tacit hypothec was also stated in W E Cooper **The South African Law of Landlord and Tenant (2nd ed) p 194**:

> *"In modern law a lessor perfects his hypothec by applying to court for an order of attachment or an interdict restraining the lessee from disposing of or removing the movables from the hired premises pending payment of the rent or the determination of proceedings for the recovery of the rent."*

[17] In Room **Hire Co (Pty) Ltd v Jeppe Street Mansions Ltd** 1949 (3) SA 1155 (T), this is what Murray AJP stated at page 1161;

> "…There are certain types of proceeding (e.g., in connection with insolvency) in which by Statute motion proceedings are specially authorised or directed... There are on the other hand certain classes of case (the instances given…are matrimonial causes and illiquid claims for damages) in which motion proceedings are not permissible at all. But between these two extremes there is an area in which…according to recognised practice a choice between motion proceedings and trial action is given according to whether there is or is not an absence of a real dispute between the parties on any material question of fact" (I was referred to this case by Counsel for the respondent)."

[18] In **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** [1984] ZASCA 51; 1984 (2) All SA 366 (A) at page 368 Corbett JA stated:

> "…where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order." (I was referred to this case by counsel for the respondent)."

APPLICATION OF THE LAW

[19] *Rei vindicatio* is a remedy available to an owner to reclaim his property, from wherever it is found and from whosoever is holding it, entitling him to "exclusive possession." The *rei vindicatio* is clearly a claim to ownership in a thing, in this case the applicant was claiming ownership of its two premises. It cannot on any reasonable interpretation be described as a claim for payment of a debt. It is my view that the applicant satisfied the requirements of rei vindicatio which are: the applicant is the owner of the two premises, that the respondent is in possession of the said premises and that such premises are still in existence and identifiable.

[20] Since the applicant succeeded in its application based on *rei vindicatio*, it is my considered view that the applicant should succeed in its security under common law over the respondent's movables situated on the leased premises for unpaid rent. The hypothec will allow the applicant to sell the movable goods of the respondent which are on the leased premises, because the respondent failed to pay rent. The applicant is entitled to tacit

hypothec on the movables of the respondent. My views is that even though the applicant did not include an order for a tacit hypothec in its notice of motion, the applicant included such order in its affidavit. I was therefore required to grant an order authorising the applicant through the sheriff to perfect its hypothec and attach all movable properties at the leased premises.

[21] The respondent is alleged to have been owing rent since 2012. My concern was that even though the respondent was very evasive when it came to whether or not the rent was paid, the respondent failed to produce any proof of payment. Submissions made on behalf of the respondent did not clearly specify how much rent was owed, from when it was owed. It was argued on behalf of the respondent that there was a dispute regarding the figures submitted by the applicant. The respondent did not assist the court by presenting what he purported to be the correct figures owed. I am of the view that the explanation that the respondent gave as to why he was owing so much money was not satisfactory. Such explanation was not adequate and complete

[22] As regards dispute of facts, it seemed to me that the respondent's argument faced difficulties. Counsel for the respondent quoted the case of **Scania Finance Southern Africa (Pty) Ltd v Go Liner Tours (Pty) Ltd** (2010/505970) (2011) ZAGPJHC 99, to support the respondent's argument about the material disputes of facts, to refer the matter to trial. I disagreed with counsel for the respondent's argument that the **Scania Finance SA** (*supra)* bore striking similarities to those which were apparent in the present case. My reasons emanated from the fact that in the **Scania** matter, the respondent stated the following:

22.1 That it had continued paying in terms of the agreement, despite the fact that the amounts remained in dispute.

22.2 The respondent also attached to the answering papers an accountant's report which sort out a number of discrepancies in the applicant's accounting.

22.3 The report then tabled the amounts paid by the respondent as against those recorded by the applicant.

[23] The respondent *in casu*, did none of the above as it happened in the **<u>Scania</u>** matter. In my view, the respondent faced an insurmountable obstacle in showing a sustainable defence. In my view, there were no reasons for doubting the accuracy of the applicant's calculations. The reason being that the respondent failed to disprove or proof the accuracy or inaccuracy of the applicant's calculations regarding rent payments. Nothing was put before me to show that any of the applicant's calculations were at any time wrong. The respondent only submitted that the applicant alleged he owed rent without denying or confirming same. The application was not based on failure of payment of electricity and water accounts but on rental accounts. Even though there was dispute of facts regarding water and electricity these are independent from rental payments.

[24] The respondent was already owing an amount of R370 629.85 as from June 2014. There was no indication that the respondent was paying any rental to the applicant on the day of the hearing. The respondent cannot have it both ways, refuse to pay the rent for occupying the two premises and at the same time remain in

occupation of the said premises. In my view there was no reason for not accepting the amount of R370 629.85 as having been duly owed by the respondent in favour of the applicant as at 3 June 2014.

[25] I am of the view that the applicant is entitled to the relief sought. I accordingly make the following order:

25.1 Condonation is granted for the late filing of the respondent's opposing affidavit.

25.2 The applicant is granted an order, authorising it, through the Sheriff, to perfect its landlord's tacit hypothec, over the movables of the respondent at the two leased premises, to recover the arrears rental.

25.3 An order is granted in terms of prayers 1, 2, 3, 4 and 5 of notice of motion.

E.K.TSATSI, AJ

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