

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

14/3/14

Case Number: 76883/13

In the matter of:

MEC FOR EDUCATION: MPUMALANGA PROVINCE

Applicant

and

NEW HORIZON CAPITAL (PTY) LTD

TRICHARDTSFONTEIN COMBINED SCHOOL

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

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

(3) REVISED.

13/03/2014

First Respondent

Second Respondent

SIGNATURE

JUDGMENT

BAM J

1. The applicant applied for an interdict restraining the first respondent from closing a school and interfering with the school's activities and the attending learners. The application is opposed by the first respondent.
2. On 1 March 2004 the Trichardtsfontein Combined School, cited as second respondent, "*the School*", was established on the farm Trichardtsfontein. In 2006, in terms of a written agreement, "*the rental agreement*", entered into between the applicant, and the then owner of the farm, Ecencico (Pty) Ltd, "*Ecencico*", provided that the part of the farm on which the school is located was rented by the applicant for an amount of R120 000 00 per year. One of the terms of the rental agreement, clause 7 thereof, was the perpetuation of that agreement as long as the school should exist, however, subject to compliance with the other terms.
3. It is common cause that on 12 October 2012 the first respondent, "*New Horizon*", represented by Mr W Brits, "*Brits*", purchased the said farm from *Ecencico*. It was conceded on behalf of New Horizon that the farm was bought subject to the lease agreement pertaining to the school. Brits informed the applicant's officers of this purchase in February 2013 and

stated that he was not satisfied with the old contract and wished to negotiate new terms for the contract between the parties.

4. The representative of applicant, Dr Thusi, "*Thusi*", was apparently amenable that a new contract could be concluded between the applicant and New Horizon. The parties however failed to get to terms, and the negotiations were unsuccessful. One of the issues was damage to the school caused by vandalism. Certain demands were made by Brits that were not acceptable to Thusi. According to the applicant's version Brits was subsequently informed that Thusi was not in a position to negotiate a new contract and Brits was referred to the applicant's head office. Further discussions between Brits and officers representing the applicant did not result in a substituting agreement being concluded. Deliberations between Brits and representatives of the applicant proved to be unsuccessful. I will revert to that issue.
5. In terms of the agreement the rental amount had to be paid to the owner of the property. It appears from the copy of the contract attached to the applicant's founding affidavit that a clause specifying that the rental amount had to be paid on a specific time was deleted. It is the applicant's version that the yearly rental is paid in advance during April/June for the year ending the following year on 31st March, upon furnishing an invoice by the landlord of the premises. The applicant furnished proof that the rental for the year ending 31st March 2014 was claimed by Ecencico per invoice dated 31 January 2013, and paid to Ecencico on 16 October 2013. It is conceded on behalf of the applicant that the rental amount should have been paid to New Horizon instead. This was due to an administrative oversight and mistake made by the Department, which, despite demands made on behalf of New Horizon, has as yet not been rectified. New Horizon was clearly aggrieved by this situation. I will return to this issue below.
6. In the answering affidavit of New Horizon, deposed to by Brits, the following facts were stated:
 - (i) At the time New Horizon purchased the property Brits was aware of the existence of the rental agreement;
 - (ii) In October 2012 Brits made contact with the applicant's officials at the local offices in Ermelo but failed to get hold of the responsible officer;
 - (iii) In February 2013, Brits went to Ermelo personally with the intention to formally inform the first respondent of the purchase of the property and to negotiate a new lease agreement. Brits then discussed the issues with Thusi who supplied him with a *pro forma* contract.

- (iv) On 5 April 2013 Brits informed Thusi telephonically that he wanted certain amendments to the pro forma agreement and that he wanted to discuss the matter. Brits further stated that additional classrooms would be sponsored by *Sasol*, and that New Horizon would be willing to sell that part of the land, on which the School is located, to the Department.
 - (v) On 28 May 2013, after having received no counter response to his proposals, he addressed a letter to the Department of Education Mpumalanga, requesting, amongst others, that the existing agreement be cancelled and that a new agreement with New Horizon be signed.
 - (vi) On 4 June 2013 the Department responded that the request for new agreement to be negotiated and signed was accepted.
 - (vii) Consequently a meeting was held on 7 June 2013 at the school premises. Thusi was absent. The officials present agreed to revert after having discussed the issues with Thusi.
 - (viii) Brits followed up with Email correspondence on 14/17 June 2013 but no response or feedback came forth.
 - (ix) On 22 July 2013 further Email correspondence by Brits followed. The contents of the correspondence included a threatened eviction notice against the Department and the School.
 - (x) On 22 August 2013 Thusi responded and invited Brits to a meeting for the purpose of signing a new agreement. This was however not acceptable to Brits in that the parties had not yet agreed on the terms. Brits informed Thusi accordingly.
 - (xi) No response was forthcoming and on 4 September 2013 Brits requested a response, and informed the Department on the same day that the school should be evacuated by 24 December 2013 and that New Horizon will not grant any access to the Department or any learner from January 2014.
 - (xii) Further correspondence in October and November, as well as a meeting on 28 November 2013 between the parties, again proved to be unsuccessful.
 - (xiii) A follow up, concerning the rental paid to Ecencico, and several proposals, did not put an end to the deadlock between the parties.
7. In December 2013 Brits took the School keys from the principal and indicated that nobody would be allowed to enter the School premises the next year. This caused the applicant to lodge an urgent application to interdict New Horizon from interfering with the School activities. An interim agreement was reached pending the hearing of the matter in the opposed motion court, and Brits returned the School Keys.
8. The applicant's case is based on the submission that at all relevant times a valid lease agreement in respect of the School existed and that New Horizon had no right to disregard it. It was further contended by the applicant that Brits, on behalf of New Horizon, took the law into his own hands in taking the keys and indicating that the School is closed down.

9. It is New Horizon's contention that there is no agreement in place authorising the School to operate from the farm. It is further New Horizon's case that the title deed of the farm is not endorsed and that New Horizon did not receive any rental income for 2013. On this basis New Horizon's argument is that it is entitled to have the School evacuated.

10. The question to be addressed in this matter is crisp, namely whether, in terms of the provisions of section 14 of The South African Schools Act, No. 84 of 1996 (the "Act") a valid agreement existed, in terms of which the property on which the School is situated was leased by the applicant. It further concerns the question whether New Horizon was in the circumstances entitled to unilaterally cancel the existing lease agreement and to prevent any access to the school, as it is contended on behalf of New Horizon.

11. It is common cause that a valid lease agreement existed between the applicant and the former owner of the land, Ecencico, the previous owner of the farm on which the School is situated. It was conceded by Brits in New Horizon's answering affidavit that the existence of the lease agreement was brought to his attention at the time the property was purchased in October 2012.

12. Section 14(4) of the said Act provides that a real right, as is the right created by the lease agreement, is enforceable against any successor in title to the owner of the immovable property in question. This perpetuation of the lease agreement, subject to compliance by the parties with all the terms thereof, is consistent with the Roman Dutch principle, "*Huur gaat voor koop*", which is still part of our Common Law. It was therefore, correctly in my view, conceded on behalf of the first respondent that the property was bought subject to the existence of the lease agreement.

13. The first respondent's contention, in paragraph 6 of the answering affidavit, that no agreement was entered into between New Horizon and the applicant to provide for the School is therefore irrelevant and of no consequence. There was in fact a valid and lawful lease agreement in existence at the time New Horizon purchased the property.

14. Section 14(3) of the Act provides that the Deeds Registries Act No. 47 of 1937 do not apply. It means that the rental agreement does not need to be registered on the title deed of the property. The first respondent's reference in paragraph 7 of the answering affidavit to the fact that the title deed of the farm is not endorsed to record that the property is subject to the lease agreement, implying that the existing lease agreement was therefore null and void, is evenly without substance and of no consequence.

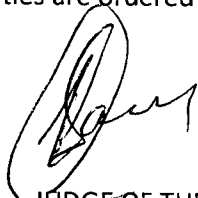
15. It is evident from the answering affidavit that Brits was aggrieved by the applicant's officers alleged frustrating and obstructing conduct in regards to his endeavours to conclude a lease agreement between the applicant and New Horizon. In paragraph 34 of the answering affidavit it is stated by Brits that the applicant's officials were not prepared to apply their minds to conclude a new agreement.
16. However, in this regard there are two sides to the story. On behalf of the applicant it is averred that some New Horizon's suggestions, or demands, of what should be included as terms of the new lease agreement were unreasonable and unacceptable.
17. Despite these two conflicting versions it is clear that the parties are ad idem that a deadlock ensued between the parties. The mere fact that a dispute of fact exists between the parties about negotiations and correspondence pertaining to a possible new contract between the parties is immaterial in regards to the question whether the relief sought by the applicant should be granted. The material issue is the existence of the lease agreement and not the side issues in respect of the new contract.
18. In paragraph 35 of the answering affidavit the following is stated by Brits:
"I was left with no alternative while this impasse existed but to give notice to the Department that as they were not interested in concluding a lease agreement or paying for the premises which they occupied to request the School vacate the premises by year end."
19. In paragraph 38 of the answering affidavit Brits refers to a letter dated 18 October 2013 addressed by New Horizon's attorneys to the Department. In the letter it is stated, amongst others, that there is "*no agreement*" in place; that no effort has been made by the Department to conclude a section 14 agreement; that New Horizon has not received any rental income from the School for 2013; and that the letter serves as a notice of evacuation.
20. Apparently the letter of 18 October elicited some response from the Department, but, eventually it all came to nothing. The deadlock remained.

21. The criticism levelled by New Horizon, in paragraph 54 of the answering affidavit, at the validity of the lease agreement, namely that the agreement fails to indicate whether the agreement was concluded directly with the applicant or whether the applicant was represented by somebody, is without substance. The agreement was concluded between the applicant in his official capacity, clearly represented by a member of his Department as is practice. In my view the agreement complies with the provisions of section 14 of the Act.
22. New Horizon's main ground for opposing the application is, as stated in paragraph 56 of the answering affidavit, that the existing lease agreement was cancelled on 5 December 2013 as a result of the Department's failure to pay rental due for 2013. In this regard it is clear that the Department was at fault. The Department paid the wrong entity, Ecencico, the previous owner of the property. There is no explanation advanced by the applicant why the wrong payment was not retrieved from Ecencico and why New Horizon was not paid. In my view there was no obligation on New Horizon to approach Ecencico, it was the Department's problem. However, the question to be answered is whether New Horizon was in the circumstances entitled to unilaterally cancel the lease agreement.
23. It is of importance to note that it is contended by New Horizon, in paragraph 151 of the answering affidavit, New Horizon denied having closed the School and stated it *"merely denied the Applicant access to the property"* because the applicant failed to pay the rental for 2013. However in paragraph 152 New Horizon re-stated that the applicant as notified that the lease was cancelled and that it was required that the School *"be vacated"*.
24. It appears from New Horizon's answering affidavit that Brits was mainly concerned about negotiating new terms of the contract and the fact that he was frustrated by the applicant's officials in that regard. On the version of Brits this is quite understandable. The explanation, or lack of explanation by the applicant for the delays since April 2013, seems to be unreasonable, even taking into account that State Departments may experience administrative difficulties regarding communication between the responsible officers.

25. It was submitted on behalf of the applicant that the School could only be closed in terms of the provisions of section 33 of the Act. This contention is indeed correct, it however does not preclude the owner of the premises, in terms of the standard Law of Contract principles, to cancel the lease agreement in circumstances where the other contracting party fails to comply with the terms of the agreement, for instance failing to pay the rental amount timeously or at all. I have already alluded to the fact that the applicant failed to comply with the provisions of the existing lease agreement by not paying the lease amount to New Horizon. It is remarkable that, whilst this issue was pertinently addressed in the answering affidavit, the applicant, as he was, in my view, in the circumstances expected to do, did not respond at all to the relevant averments pertaining to the demand for the payment of the lease amount in his replying affidavit.
26. Although New Horizon was in law justified to cancel the agreement, the subsequent taking of the keys and denying the applicant, and for that matter the School staff and learners' access to the School seems to me to be an infringement of the learners constitutional right, entrenched in the Bill of Rights, section 29 of the Constitution. In this regard Brits, on behalf of New Horizon, took the law into his own hands which he was not entitled to do. New Horizon clearly had other lawful remedies which I do not find it expedient to discuss. Neither do I deem it expedient to consider New Horizon's lawful options in regards to a possible solution to the problem .
27. It therefore follows that the applicant has made out a case for a final interdict. A clear right was established being that the applicant, the School and the learners, are Constitutionally entitled to be protected against the unlawful infringement of their rights entitled to protection should, at least partly, succeed with the application.
28. In respect of costs the following issues are taken into consideration:
- (i) The conduct of Brits to take the keys of the School from the principal was not justified in law ;
 - (ii) Brits had no right to prevent, or threaten to prevent the applicant to have access to the School;
 - (iii) Brits returned the keys of the School;
 - (iv) The applicant failed to take any steps to pay the lease amount for 2013 to New Horizon;
 - (v) The applicant failed to explain to the court, in view of the fact that the lease amount was wrongly paid to the previous owner of the farm, what steps, if any, were taken to resolve the problem and to comply with the terms of the agreement.

29. Accordingly the following order is made:

1. The first respondent , or anybody in its employ, or representing it, is interdicted and restrained from interfering, in any way, with any school activities at the Trichardsfontein Combined School;
2. The first respondent is interdicted and restrained from preventing the applicant, the applicant's officials, teaching staff, and learners, from accessing the School premises;
3. The parties are ordered to pay their own costs.

A handwritten signature in black ink, appearing to be 'AJ Bam', written over a circular stamp or seal.

AJ BAM JUDGE OF THE HIGH COURT

12 March 2014.