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

Case No: 5192 / 2013

In the matter between:

CHARL MARAIS N.O.	First Applicant
CARINA MARAIS N.O.	Second Applicant
JOHANNES WILLEM MARAIS N.O.	Third Applicant

(in their capacities as trustees of the
CHARL MARAIS FAMILY TRUST, IT 869/99)

and

GEORGIOS KONDOS	Respondent

CORAM:	LEKALE, J
HEARD ON:	19 DECEMBER 2013
JUDGMENT BY:	LEKALE, J
DELIVERED ON:	9 JANUARY 2014

INTRODUCTION AND BACKGROUND

[1] This is an urgent motion for an order:

"**1.** **Dat kondonasie aan die Applikante verleen word vir nie-nakoming van die voorgeskrewe Hofreêls met betrekking tot vorm, proses en tydperke vir betekeninge en dat hierdie aansoek aangehoor word as 'n dringende aansoek ooreenkomstig die bepalings van Hofreêl 6(12);**

2. **Dat die Respondent onmiddellik die eiendom bekend as Erf 156 Kroonstad, beter bekend as Presidentstraat 41, Kroonstad, Vrystaat Provinsie (hierna 'die eiendom') moet ontruim.**

3. **Dat indien die Respondent versuim om die eiendom te ontruim die Balju van hierdie Agbare Hof gemagtig word om die hulp van die Suid-Afrikaanse Polisie Diens in te roep ten einde die Respondent uit die eiendom te sit.**

4. **Dat die Respondent die koste van die aansoek betaal."**

[2] The three applicants are the trustees of the Charl Marais Family Trust, IT 869/99 (the trust) which owns the immovable property known as Erf 156, Kroonstad, also known as 41 President Street, Kroonstad, Free State Province (the property).

[3] The respondent has been renting the property from the trust for the purposes of conducting a business therefrom under the name and style of New York Internet Café Online since the 1st September 2012.

[4] Initially the parties concluded a written lease contract for six months terminating on the 28th February 2013 with an option for renewal on the same terms with regard to duration in favour of the respondent. The said option was, however, not exercised

by the respondent at the expiry of the six months period who, on the 21st June 2013, made a written offer to purchase the property subject to a suspensive condition relating to procurement of a bond on or before the 24th September 2013. The offer was accepted by the trust on the 24th June 2013.

[5] Between the end of February 2013 when the written lease contract expired and the 21st June 2013 the respondent continued making payment of the monthly rental of R7 000.00 after he had intimated his intention to purchase the property. The loan was not procured as set out in the offer and on the 7th October 2013 the trust's attorney addressed a letter to the respondent, *inter alia*, requiring him to either pay the full purchase price if he was still interested in buying the property or to conclude a written lease agreement on or before the 9th October 2013 failing which to vacate the property.

[6] On the 10th October 2013 the respondent's attorney responded to the said letter, *inter alia*, pointing out that the respondent was still eager to purchase the property and, further, that

> "**… 'n mondelingse alternatiewelik stilswyende ooreenkoms tussen die verhuurder en die huurder bestaan dat die huurkontrak voortgaan aangesien die huurder nog stiptelik die huurgeld ten bedrae van R7 000.00 per maand betaal welke huurgeld deur die verhuurder aanvaar word.**"

[7] On the 22nd November 2013 the respondent effected payment of monthly rental of R7000.00 and, further, attempted to pay rental for December 2013, but was turned down by the estate agent on instructions from the trust.

[8] On the 6th December 2013 the respondent's attorney directed a letter to the trust's attorney conveying the respondent's offer to purchase the property for R1 million alternatively, and if the offer was not acceptable to the trust, to vacate the property on the 31st March 2014 against payment of monthly rental of R7 000.00. The offer was, however, rejected by the trust which was already in negotiations with Assupol Life for a five year lease agreement commencing on the 1st December 2013.

[9] On the 9th December 2013 the trust gave instructions to its attorneys to take legal steps against the respondent and an appointment was arranged with counsel for the 12th December 2013. On the same date *viz.* the 12th December 2013 Assupol Life confirmed that it would lease the property with effect from the 1st January 2014 provided the trust was able to give it free and undisturbed possession of the property.

[10] On the 13th December 2013 the trust launched the instant application and effected service on the respondent at the property.

<u>DISPUTE</u>

[11] The respondent effectively contends that the matter is not properly before the court insofar as Mr Jagga submits that it lacks urgency and, if anything, the alleged urgency is self-created in that the trust delayed to take action since the 1st December 2013 when it became aware that the respondent had not vacated the property by 30 November 2013 as demanded. The trust, on its part, maintains that the matter is urgent as it needs to place Assupol Life in free and vacant occupation as early as 1st January 2014.

[12] The respondent, further, contends that there exists a genuine dispute of fact which cannot be resolved on papers and, as such, in line with the respondent- friendly test, the application should be dismissed insofar as the trust should have foreseen the dispute relating to the existence of a 6 (six) months oral lease agreement terminating on the 31st March 2014 as opposed to a month to month lease contract as far back as the 10th October 2013. On the other hand the trust denies that there exists genuine and real dispute of fact on papers and beseeches the court to adopt a robust common sense approach and grant the relief prayed for.

<u>CONTENTIONS FOR THE PARTIES</u>

[13] Mr Zietsman, for the trust, submits that there was no delay in approaching the court because the trust had to wait until the respondent had failed to vacate the property at the end of

November 2013 as required in the letter of 14 October 2013 and was, as such, in unlawful occupation of the same before it could commence the present proceedings. He, further, contends that there exists no real and genuine dispute of fact because the respondent does not, in his papers, engage with issues by, *inter alia*, disclosing the date and names of people who allegedly represented the parties when the alleged six months oral lease agreement was concluded. In his view if such an agreement existed the respondent's attorneys would simply have relied on the same instead of effectively communicating the respondent's offer that the agreement terminate on the 31st March 2014 against monthly rental of R7 000.00 in their letter of the 6th December 2013.

[14] Mr Jagga, on the part of the respondent, retorts that the motion lacks urgency in that the trust has failed to demonstrate urgency as required by law. In his opinion the terms of the oral lease agreement relied upon by the trust are not clear and certain from the trust's papers insofar as it is alleged that the month to month oral agreement was express alternatively implied. He, further, submits that the trust was, in law, obliged to make out its case in the launching papers and not in replying papers as it sought to do with regard to its negotiations or agreement with Assupol Life. It is, furthermore, not apparent, according to Mr Jagga, from the founding papers that the respondent's right of occupation has been terminated. The court should be wary to have regard to probabilities in the face

of a genuine dispute of fact on the papers, so Mr Jagga reminds the court.

APPLICABLE LEGAL PRINCIPLES

[15] Rule 6(12) of Uniform Rules of Court provides a vehicle through which an applicant can jump the queue by forging its own rules with regard to service and time frames subject to the court's control in order to ensure that its matter enjoys the court's attention out of turn. In order to avail itself of such a vehicle, an urgent applicant should set out in its founding papers facts which render it necessary for the matter to engage the court the soonest. Absent urgency the matter is not properly on the court roll and falls to be struck off.

(See **Commissioner for SARS v Hawker Aviation Services Partnership and Others** 2006 (4) SA 292 (SCA).)

[16] It is correct, as Mr Jagga submits, that

> "**… an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on papers.**"

(See **<u>Wightman t/a J W Construction v Headfour (Pty) Ltd and Another</u>** 2008 (3) SA 371 (SCA) at par [12].)

[17] It is further correct, as Mr Zietsman reminds the court, that

> "**A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed…**"

(See **<u>Wightman t/a J W Construction</u>**, *supra*, at par [13].)

[18] As Mr Jagga correctly points out, a court should, in deciding disputed facts in application proceedings, always be cautious about deciding probabilities in the face of conflicts of facts in their affidavits.

(See **<u>Buffalo Freight Systems (Pty) Ltd v Castleigh Trading (Pty) Ltd and Another</u>** 2011 (1) SA 8 (SCA) at 14D – F.)

[19] The courts are, however, prepared in appropriate circumstances to take a stronger line to avoid injustice by, as Mr Zietsman points out, adopting a "**robust common sense approach**" and undertake an objective analysis of such disputes.

(See **<u>Soffiantini v Mould</u>** 1956 (4) SA 150 (E) and **<u>Buffalo Freight Systems</u>**, *supra*.)

[20] Mr Jagga is correct in his submission to the effect that in motion proceedings the applicant party's case must be apparent *ex facie* its founding papers so as to enable the opposing party a fair opportunity to deal and engage with the same in its answering affidavits.

(See **<u>Transnet Ltd v Rubenstein</u>** 2006 (1) SA 591 (SCA) par [28] and **<u>Ferreira v the Premier, Free State and Others</u>** 2000 (1) SA 241 (O) at 254C.)

<u>APPLICATION OF LEGAL PRINCIPLES AND FINDINGS</u>

[21] For the matter to enjoy the attention of the court on an urgent basis it needs to be urgent and, as such, the question as to whether or not it is urgent must be decided *in limine*. It is true, as the respondent effectively contends, that the trust did not dedicate at least a paragraph in its launching papers exclusively to this important vehicle which is supposed to bring it closer to the court out of turn. It would obviously have been convenient for the court if the trust had set out and collected together all the facts which, in its view, render the matter urgent for the court to appreciate the same easily. The question, however, is whether or not urgency is apparent *ex facie* the launching papers as filed by the applicants. I am persuaded, from a reading of the founding papers as a whole, that the motion does deserve to be heard as a matter of urgency regard being had to the fact that the application could only be launched

once the respondent was in unlawful occupation of the property, as Mr Zietsman correctly retorts. I am, further, satisfied that there was no undue delay in bringing the matter to the attention of the court insofar as the parties were in communication at the very latest on the 6th December 2013 when the respondent's attorneys conveyed his last offer to the trust. I am, further, satisfied that the respondent has not been prejudiced by service of the papers on his business manager at the property as opposed to his residential address. He did receive the papers and he, in fact, did file opposing papers.

[22] I am, further, satisfied that the trust was not entitled, in law and equity, to make out its case in the replying papers and, as such, I disregarded all allegations in the replying papers relating to, *inter alia*, the alleged activities of the respondent directed at preparing new premises for his business. I, furthermore, ignored documents seeking to prove that the alleged oral agreement was terminated in writing by the trust as well as communication between the trust and Assupol Life in line with Mr Jagga's objections.

[23] The real question for determination is whether or not, at the time when the trust required the respondent to vacate the property, it was, in law, entitled to do so. In support of its claim that it is entitled to evict the respondent, the trust relies on an oral month to month lease agreement which entitles it to terminate the same on one calendar month's notice and further

provides for the lapsing of the same upon failure by the respondent or his nominee to proceed with the sale. On his part the respondent resists the claim on the grounds that there existed a 6 (six) months oral lease agreement which would only terminate at the end of March 2014.

[24] The respondent contends that there exists a real and genuine dispute of fact with regard to the existence or otherwise of oral month to month agreement and relies, in this regard, on the respondent- friendly test set out in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A).

[25] The trust disputes the existence of such a dispute and calls upon the court to undertake an objective analysis of the dispute in question in order to avoid injustice. As correctly submitted by Mr Zietsman the respondent does not set out the date and full particulars of the alleged six months oral agreement save for deposing that

> "**Mr Bredenkamp was informed that financing would eventually be approved and that the time period until 24th September 2013 was too short.**"

And further that

> "**Mr Bredenkamp was also informed that the application for financing would only probably be finalised on 30th October 2013.**"

[26] The respondent furthermore deposes that

> "**This was one of the reasons why a further six months lease was agreed upon orally with the Trust, as it was uncertain when exactly the financing would be finalised, and I could not afford to rent the property on a month to month basis.**"

[27] The above assertions on the part of the respondent are, with respect, out of line with his initial attitude of not exercising the option to renew the lease for a further 6(six) months period and eventually opting to buy the property. The very fact that it was not certain when exactly the issue of financing would be finalised appears to me to have been the very reason and motivation for a month to month contract as opposed to a 6 (six) months contract. In my view, where finality with regard to funding is not certain, good business sense dictates against conclusion of medium to long term lease contracts. In such circumstances commercial sense opts for short term contracts because change is imminent. The contention that there exists a 6(six) months oral lease agreement is further not supported by correspondence from the respondent's attorneys who, in the letter of 10 October 2013, clearly inferred the existence of such a contract from the fact that rental got paid and accepted as Mr Zietsman correctly submits. While the fact of payment and acceptance of regular monthly rental is not *per se* proof of 6(six) months verbal lease contract, it is consistent with the existence of month to month oral agreement. The position would, obviously, be different were it the respondent's case that

he advanced full 6(six) months' rental to the trust either in September 2013 or at the beginning of October 2013. In my judgment the respondent's version is clearly untenable and, as such, worthy of being rejected on papers.

[28] Mr Jagga contends that the terms of the oral agreement relied upon by the trust are not clear or certain on the applicants' papers. Mr Zietsman, on the part of the trust, correctly points out that the relevant deposition is very clear that the oral agreement was a month to month lease which provided, either expressly or by implication, for automatic termination of the same in the event of the respondent or his nominee not proceeding with the sale, alternatively for termination on one calendar month's notice by either party.

[29] It is clear, in my opinion, that no 6 (six) months oral lease agreement was ever concluded between the parties either before or after September 2013 regard being had to correspondence between the parties which clearly shows that, as early as the 7th October 2013, the trust insisted on finalisation of the sale or conclusion of a written lease agreement. The aforegoing leaves, in my judgment, no room for any oral agreement to have been concluded between the parties after September 2013. As Mr Zietsman, further, points out, if any such agreement was in place, the respondent's attorneys would simply have relied on the same and not made a proposal for the respondent to vacate the property only on the

31st March 2014 in their letter of the 6th December 2013. I am, further, satisfied from the respondent's answering papers that he was aware and *ipso facto* notified that he was required to vacate the property on 30 November 2013.

[30] The trust was, thus, in law entitled to terminate the contract as and when it required the respondent to vacate the property.

ORDER

[31] In the result I make an order in terms of prayers 1, 2, 3 and 4 of the notice of motion.

L. J. LEKALE, J

On behalf of applicants: Adv P.J.J. Zietsman
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of respondent: Adv N. Jagga
Instructed by:
Rossouws Attorneys
BLOEMFONTEIN

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