

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

Case No.: 3496/2013

In the matter between:

NEL JACOBUS FREDERICK LOMBARD N.O. &
2 OTHER

Applicant

and

STEYL MARTINUS PHILIPPUS N.O. & 2 OTHER

Respondent

CORAM:

MOLOI, J

HEARD ON:

14 NOVEMBER 2013

DELIVERED ON:

29 NOVEMBER 2013

MOLOI, J

[1] In this matter the applicant sought an order summarily evicting the respondent from a rental portion of the remainder of the farm D[...] No [...], district W[...], Free State Province and related remedies and costs. The actual litigants in this matter are the first applicant and the first respondent.

[2] There was a dispute regarding the existence or not of a lease agreement between the parties. This dispute was,

however, settled by the court declaring that the pre-drafted but unsigned agreement constituted a valid and binding agreement between the parties. This ruling was made on 31 January 2013 the date on which the applicant signed the agreement. The respondent only signed the said agreement on 18 February 2013. In terms of the agreement it came into operation on 1 June 2012 despite the dates of the signing thereof.

- [3] The lease agreement provided for two aspects that are foundational to this application viz firstly, that the rented portion of land within the 2000 hectare farm be fenced off by the respondent at his expense and, secondly, determined rental amount be payable half-yearly in advance for the duration of the agreement. The agreement also provided that failure to comply with any term of the agreement would entitle the applicant to cancel the agreement.
- [4] Eviction is an extra-ordinary relief which the court will only grant upon proof of certain requirements: **Buffalo Freight Systems Ltd v Crestleigh Trading (Pty) Ltd and Another**, 2011 (1) SA 8 (SCA). In this case the applicant must prove that a legal cause for the rental existed. This had already been proven by the court order granted on 31 January 2013 at the instance of the respondent. Evidence showed that a draft written lease agreement between the parties existed, but remained unsigned. At the instance of the respondent the court ruled that the unsigned agreement was valid and binding upon the parties who subsequently signed it as stated above. The applicant had further to prove that a

material term of the agreement was breached. According to the applicant two material terms of the lease agreement were breached by the respondent.

- [5] The first was that contrary to the express provision of the said agreement the leased portion remained un-fenced off (un-enclosed) as was required. The fencing off (enclosure) of the leased portion was to be effected by the respondent at his own cost. This failure, according to the applicant, was material and entitled him to cancel the agreement if not complied with. It is common cause that to date the leased portion remains un-enclosed (not fenced off). Due notice of the cancellation of the agreement was made by a letter of the applicant's attorneys sent to the respondent's attorneys dated 18 June 2013. Secondly, the respondent had not paid the rental amount for the period 1 June 2013 which was, according to the agreement, payable half-yearly in advance, despite reminders and demands in writing to do so. The applicant had consequently complied with the requirements necessary to seek an order of eviction: **South Coast Furnitures CC v Zecprop 30 Investments (Pty) Ltd** 2012 (3) SA 431 (KZP).

- [6] The respondent, on the other hand, stated that the alleged cancellation of the agreement by the applicant was putative and of no consequence. This was so because the requirement of fencing off the leased portion in the agreement did not specify the time-frame within which such fencing off should be made. The respondent contended further that in the absence of a specified time-frame for the

fencing-off the rented portion, a reasonable time should be allowed and that such reasonable time had not elapsed. According to the respondent, the alleged cancellation was consequently invalid and not enforceable. The respondent held this view on the fact that clarity as to the terms of the lease agreement was only settled on 18 February 2013 when he signed the agreement after the court ruled on its validity on 31 January 2013. The period before then was not to be counted as reasonable time as the agreement became an agreement only after he signed it on 18 February 2013. Over and above that, the respondent had engaged in settlement negotiations in an endeavour to avoid spending exorbitant amounts on the fencing off the property and that this period of negotiations should be taken into account in determining a reasonable time. It was also contended that the applicant did not place the respondent *in mora* by not allowing a reasonable time bearing in mind all the circumstances of the said agreement.

- [7] It must be noted that the draft agreement was in place from June 2012, that the applicant refused to recognise its validity and that the respondent, in order to enforce it, approached the court to have it declared it valid. The provision to fence-off the rented portion of the farm was already in that agreement which was eventually signed by the respondent on 18 February 2013. That means that from June 2012 the respondent knew about the requirements to fence-off the rented portion of land. The reasonableness of the time frame within which the fencing off of the leased portion should also be measured with regard to the purpose for

which it was meant: **The Principles of Law of Contract** by AJ Kerr, Lexis Nexis 2002 at p 608. The property in question was leased for the purpose of keeping lions for farming purposes by the respondent. By nature, lions are wild animals and are dangerous to men and other domesticated or wild animals and as such they must be enclosed in specially fenced-off areas to restrict their freedom of movement. They cannot be allowed to roam about freely. The need to fence-off their habitat becomes urgent and reasonable time is expedited by the fact that, if not properly confined, a dangerous situation is created: **Broderick Properties Ltd v Rood** 1962 (4) SA 447 T. The negotiations alleged by the respondent dealt largely with who must pay for the fencing off (enclosure) and whether the costs must be shared, despite the clear wording of the contract viz that the respondent was liable to fence-off the portion leased at his own expense. The alleged negotiations were simply delaying tactic.

- [8] The second basis of the breach by the respondent was failure to pay the agreed rental amount when it was due. To this the respondent contended that he was frustrated by the applicant's failure to provide him with tax invoices. He further contended that "Hurgeld is tog immers betaalbaar teen lewering van die BTW faktuur". It is trite that rental is payable when due and is not dependent on any other incident especially when there was no agreement making payment dependent on a tax invoice being supplied. It may be feasible that a lessee be provided with a tax invoice in order to effect payment but failure to do so cannot be a legal

cause to withhold payment of rental that is due and payable. This particularly so where the requirement of a tax invoice is not forming part of the agreement but failure to pay constitutes a breach. The agreement provided for how rental is calculated and when it is payable. A tax invoice serves a different purpose which is not linked to actual payment of rental. The lease agreement provided as follows:

“KONTRAKBREUK

Indien die **HUURDER** sou versuim om enige van sy verpligtinge kragtens hierdie Ooreenkoms stiptelik na te kom en steeds in versuim is 10 (TIEN) dae na skriftelike kennisgewing deur die **VERHUURDER** aan die **HUURDER** waarin die betrokke partye se versuim en regstelling daarvan geëis word; of indien die **HUURDER** versuim om enige betaling verskuldig ingevolge hierdie Ooreenkoms stiptelik te maak, dan sal die **VERHUURDER**, benewens enige ander regte wat hy mag hê ingevolge die Gemenereg, geregtig wees om:

7.1 Hierdie Ooreenkoms te kanselleer, herbesit van die Eiendom te verkry en om alle agterstallige huurgeld en skade te vorder.”

Nothing in this clause makes payment of rental subject to a tax invoice. What is clear is that the respondent must be given ten (10) days to pay which was done but he persisted in his refusal so to pay. I find that the respondent’s version is inconsistent and far-fetched and cannot be upheld: **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623.

- [9] It was submitted on behalf of the respondent that should the court find that the respondent failed to enclose or fence-off

the leased portion within a reasonable time, that his failure to pay the agreed rental was unlawful and that the termination of the lease agreement was consequently valid and that the respondent ought to be evicted from the leased portion, the respondent be given sufficient time to vacate the leased portion, say approximately six (6) months. The motivation for this request was that it required a lot of preparation including obtaining of permits to move lions. I cannot agree with that request. The respondent knew, and had apparently been preparing to vacate the leased property since he failed to enclose or fence-off the leased portion and failed to pay his agreed rental. He was moreover served with notice of cancellation of the lease agreement way back on 18 June 2013 and had enough time to make the necessary arrangements. His insistence that certain negotiations were taking place was clearly a ploy to delay the inevitable.

ORDER:

[10] In the premises I make the following orders:

1. That the respondent is ordered to vacate the farm known as "Restant van die plaas D[...] No [...], distrik W[...], Vrystaat Provinsie not later than **27 December 2013 at 17H00**.
2. That should the respondent fail so to vacate the said farm, the Sheriff of this court is hereby authorised to evict the respondent from the said farm together with all his moveable property.

3. That the respondent is ordered to pay the costs of this application.

K. J. MOLOI, J

On behalf of the applicants: Adv. W. J. Edeling
Instructed by:
Eugene Attorneys
BLOEMFONTEIN

On behalf of respondents: Adv. N. Snelleburg
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