

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 209/2012

In the matter of:-

PARETO LTD

Applicant

and

SUBCOBIX CC t/a CARMELLO'S

Respondent

JUDGMENT BY:

DAFFUE, J

HEARD ON:

6 DECEMBER 2012

DELIVERED ON:

13 DECEMBER 2012

INTRODUCTION

[1] Applicant seeks the ejectment of respondent and all those occupying through it from shop L32 in the Mimosa Mall Shopping Centre, Bloemfontein (the “leased premises”). The application is opposed. Adv Wannenburg appeared for the applicant at the hearing and adv Pienaar for the respondent.

BACKGROUND

- [2] On 8 May 2008 applicant purchased the immovable properties on which the Mimosa Mall Shopping Centre is situated. Registration of transfer was effected on 31 October 2008. At that stage an entity known as Bamboo Rock 1229 CC t/a Caramello's leased the leased premises in terms of a written agreement of lease entered into with the previous owner.
- [3] Respondent is in occupation of the leased premises since 15 February 2010. The origin of its occupation is in dispute as will be shown later. Suffice to say at this stage that both parties rely on an agreement of lease having been entered into between them, although they differ materially as to the terms thereof and whether or not respondent breached it, entitling applicant to cancel same.
- [4] On 6 July 2011 applicant gave written notice to respondent of its termination of the agreement of lease relied upon by it.

- [5] On 15 July 2011 applicant issued summons out of the regional court, Bloemfontein, claiming arrear rental in the amount of R204 931,29. Applicant did not seek cancellation or confirmation of its cancellation of the agreement of lease and/or ejectment in those proceedings. On 5 September 2011 respondent filed its plea, relying on an agreement of lease based on different terms. It also alleged that it duly complied with its obligations in terms of the agreement and that it did not owe any rental to applicant.
- [6] On 19 January 2012 applicant launched the present application, claiming ejectment of respondent and all others holding through it from the leased premises. It specifically alleged that the matter was urgent as applicant had already signed a new lease agreement with a new tenant, Telkom, in respect of the leased premises effectively from 1 February 2012. Respondent filed its answering affidavit on 22 February 2012.

- [7] For about seven months the litigation was put on hold until applicant filed an affidavit referred to as a “supplementary affidavit”. This was done without the court’s leave and was not accompanied by a formal application for such leave. On 9 November 2012, a further two months later, applicant set down the application for hearing on 6 December 2012.

FURTHER AFFIDAVIT

- [8] Applicant’s so-called supplementary affidavit together with annexures consists of 102 pages out of a total number of 384 paginated pages.
- [9] Mr Pienaar objected in his heads of argument to the filing of the supplementary affidavit without leave of the court and argued that the affidavit should be regarded as *pro non scripto*. Consequently I ruled that counsel should present argument to me pertaining to the acceptance or not of the supplementary affidavit *in limine*. Notwithstanding the respondent’s attitude as set out in the heads of arguments of its counsel, Mr Wannenburg on behalf of applicant submitted, without a formal application for condonation for

the late filing of the document insofar as it might be regarded as a replying affidavit, or for accepting the affidavit in so far as it contains new matter, that the affidavit should be accepted.

- [10] The deponent to applicant's supplementary affidavit, Mr Quinn indicated that the attorney who dealt with this application went on maternity leave just after the application was issued and when she returned, she was involved in a number of opposed motions and trials and as a result could not give attention to this matter. The fact of the matter is that the attorney returned from maternity leave on 1 June 2012 already and it took applicant a further three months to file its supplementary affidavit. There is no proper explanation for the delay, either during the absence of applicant's attorney from office, or after 1 June 2012 when she returned. Applicant regarded the matter as urgent and it wanted respondent ejected prior to the 1st February 2012. I would have expected applicant to insist that someone else attend to an important matter such as this during the absence of the attorney.

[11] Applicant has tried to make out a case that respondent is evasive in its responses in the answering affidavit and in order to do so it tried to present evidence which should have been contained in the founding affidavit. It is specifically pointed out that respondent set out in the answering affidavit the basis of its defence which is in line with the plea filed on its behalf in the regional court long before this application was issued. Applicant, fully aware of the contents of the plea, elected not to deal at all with the serious allegations contained therein and in particular the respondent's reliance on an agreement of lease, the terms and conditions of which differ materially from those relied upon by applicant. Respondent also indicated in its plea that it complied with all its contractual obligations, but notwithstanding that applicant did not make use of the opportunity to set out facts in its founding affidavit to disprove this.

[12] It is in the interests of the administration of justice that the general rule regarding the number of sets and the proper

sequence of affidavits in motion proceedings be observed. Normally it is the respondent that seeks leave from the court to file a further affidavit after having been confronted with new matter contained in the replying affidavit of the applicant. In this instance it is the applicant that seeks leave to either supplement its founding affidavit or file the so called supplementary affidavit containing new matter as a replying affidavit out of time. I accept that the general rule should not always be applied rigidly and flexibility must be allowed in order to prevent an injustice to occur. See **JAMES BROWN AND HAMER (PTY) LTD v SIMMONS NO** 1963 (4) SA 656 (A) at 660E – H. If I allow the supplementary affidavit containing new evidence at this stage of the proceedings, nearly a year after the application was issued, it may prejudice the respondent, unless an opportunity is given to it to respond thereto. Application procedure is normally elected by a party insofar as such procedure is speedier and less expensive than action procedure. Such result will not be achieved in *casu* if further affidavits are allowed. Bearing in mind the waiting period in this court for trial dates in action procedure, it

would be possible for the parties to obtain a trial date in the first, or at the worst, the second term of 2013 if applicant elected to institute summons instead of embarking on application procedure.

- [13] Respondent was within its rights in electing not to reply to the supplementary affidavit as it was invited to do. Instead it relied on the fact that the supplementary affidavit was filed without leave of the court and it should be regarded as *pro non scripto* and an abuse of motion procedure. See **STANDARD BANK OF SOUTH AFRICA LTD v SEWPERSADH AND ANOTHER** 2005 (4) SA 148 (C) at 153H – 155E and **SEALED AFRICA (PTY) LTD v KELLY** 2006 (3) 65 (W) at 67B – E. Applicant did not show any exceptional or special circumstances why the supplementary affidavit should be accepted at this late hour. See in this regard **HERBSTEIN AND VAN WINSEN, THE CIVIL PRACTICE OF THE HIGH COURT OF SOUTH AFRICA**, 5th ed, p 433 and authorities quoted.

[14] Consequently I was not prepared to grant condonation for the late filing and also ruled that the supplementary affidavit should not be accepted. In making my ruling I indicated that my reasons would be given in my judgment on the merits and I confirm the above to be my reasons.

THE DISPUTES BETWEEN THE PARTIES

[15] There are essentially three material disputes between the parties to wit:

15.1 the terms and conditions of the agreement of lease;

15.2 whether respondent is in breach thereof; and

15.3 whether applicant is entitled to an ejectment order.

I intend to summarise the facts and make my findings in respect thereof in the following paragraphs.

[16] The parties are *ad idem* that a written proposal was made to applicant pertaining to the new lease conditions of the leased premises as set out in annexure "VL5" dated 11 January 2010. Applicant alleges that the proposal was made by respondent, whilst respondent's deponent

indicated that he made the proposal for and on behalf of a different company, to wit Caramello's (Pty) Ltd, the franchisor. On 2 February 2010 applicant made a counter-proposal attached as annexure "VL6" to the founding affidavit. On applicant's version it was a further condition that respondent's deponent would bind himself as surety and that a cession of the existing agreement of lease be signed. Respondent's version is that its deponent never intimated to bind himself as surety and that it was also not prepared to sign a cession of the existing agreement of lease on the conditions set out in annexure "VL6" read with annexure "VL7", (the draft cession).

- [17] It is respondent's case that negotiations ensued and that a written agreement of lease was prepared by applicant and handed to him for signature which he duly signed during the first two weeks of February 2010. In paragraph 18 of the answering affidavit the terms and conditions agreed upon between the parties as alleged by respondent are set out. These correspond with the allegations contained in the plea referred to above. According to respondent its

deponent did not make a copy of the agreement of lease after signature by him, but that applicant informed it on 29 July 2010 in writing as follows:

“We have pleasure in confirming an agreement of lease for a 5 year period commencing 15 February 2010 was entered into between the above-mentioned parties for shop L32 Mimosa Mall, 131 Kellner Street, Brandwag, 9301.”

Respondent assumed therefore that the agreement of lease was also signed on behalf of applicant prior to this date although he never received a signed copy.

- [18] On applicant's version no written agreement of lease was entered into between the parties and in October 2010 its representatives once again provided respondent with an agreement of lease on the terms and conditions allegedly agreed to - annexure “VL6” - which is vehemently denied by respondent. Respondent avers that Mr Quinn on behalf of applicant informed him that the written agreement of lease already entered into between the parties had been

lost or mislaid and therefore a new agreement of lease had to be executed. Respondent's deponent was fully prepared to co-operate but when he received the document he found that the terms and conditions differed materially from those agreed upon. Therefore he effected amendments and forwarded the agreement so amended, initialled and signed by him, to applicant who was not prepared to accept his so-called counter-offer. Applicant also confirms that the amendments were done unilaterally by respondent and that it was not prepared to enter into an agreement on such terms and conditions. It is disturbing to note that respondent's deponent did not only amend the basic monthly rental payable to be in line with the agreement alleged by him, but he went further to delete clauses 8 and 11 of annexure A to the agreement pertaining to operating costs and marketing fund expenses. There is no explanation why these two clauses were deleted, especially bearing in mind that Caramello's (Pty) Ltd, the franchisor, was fully prepared to pay for these costs although on a reduced basis as is apparent from annexure "VL5" to the founding affidavit. This annexure also provides for an

annual escalation in rental whilst the unilaterally amended agreement of lease provides for escalation to take effect in the third year of the lease only.

- [19] However and bearing in mind that respondent has set out the terms and conditions of the agreement of lease in its plea in the regional court matter during the September 2011 and long before institution of this application, there is no reason to find that respondent's version is an after-thought, far-fetched or so clearly untenable that it should be rejected on the papers. Applicant, to its detriment, failed to deal with the allegations contained in respondent's plea when it had the opportunity to do so. Under the circumstances I cannot find that respondent's version should be rejected. I refer to the *locus classicus*, **PLASCON-EVANS PAINTS LIMITED v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (A) at 634E – 635C as well as the following *dicta* of Heher JA in **WIGHTMAN t/a JW CONSTRUCTION v HEADFOUR (PTY) LTD AND ANOTHER** 2008 (3) SA 371 (SCA) at para [13]:

“[13] 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. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional

circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.”

[20] The next issue to be considered is whether or not respondent is in breach of the agreement of lease. Insofar as respondent's version pertaining to the terms and conditions of the agreement of lease cannot be rejected, the matter should be considered based on respondent's version of the agreement.

Applicant attached statements of respondent's account to the founding affidavit pertaining to the period March 2010 to 1 July 2011 indicating an outstanding balance of R204 931,29. Further monthly statements are also attached for September and November 2011. The monthly statements for August and October are not attached. As on 1 November 2011 the alleged outstanding amount appears to

be R284 212,82. These statements have been produced, presumably, on the basis of the basic rental, operating, marketing and other costs due by respondent on applicant's version which is disputed by respondent. Applicant failed to deal expressly with the statements of account in order to show, for example, that even on respondent's own version, it failed to pay the rental and other costs for which it was liable over the period. It is not for the court to do its own investigations in order to ascertain whether respondent is in default. See **SWISSBOROUGH DIAMOND MINES (PTY) LTD v GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA** 1999 (2) SA 279 (T) at 324F and **MINISTER OF LAND AFFAIRS AND AGRICULTURE AND OTHERS v D & F WEVELL TRUST AND OTHERS** 2008 (2) SA 184 (SCA) at 200C-E where the following *dictum* appears:

"It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be

drawn from such passages have not been canvassed in the affidavits... Trial by ambush cannot be permitted.”

[21] In motion proceedings the parties must set out the essential evidence. In this regard respondent merely alleges that it has complied with all his contractual obligations. Insofar as it has effected payment in respect of rental, the onus is on it to prove such payments. A mere allegation of compliance is not sufficient and it would generally be expected of the respondent to set out in detail when, where and in which amounts rental have been paid. *In casu* respondent’s bare allegation may be accepted in the light of its stance ever since summons was issued in the regional court and applicant’s complete failure to address the pertinent disputes raised.

[22] There is no indication in applicant’s founding affidavit that it demanded payment from respondent in respect of arrears, failing which the agreement of lease would be cancelled. The only communication in this regard is the letter, annexure “VL11”, being the written letter of termination

dated 6 July 2011. Respondent was thus not given an opportunity to rectify its alleged breach. There is sufficient reason for a finding that applicant did not obtain a right to cancel. In terms of clause 34.1.1 of annexure "A" to the agreement of lease relied upon by applicant, being the standard agreement applicable to all applicant's contracts, the agreement of lease could only be terminated once respondent had been given 14 days written notice to remedy the breach, unless any of the other sub-clauses applied.

Applicant's allegations as to respondent's indebtedness have not been challenged sufficiently for me to make a final finding in this regard. I have my doubts about respondent's *bona fides* and it is possible that this aspect could be determined easily if the matter is referred to trial or the hearing of oral evidence.

[23] The last issue to be considered is whether or not applicant is entitled to respondent's ejectment as well as those holding through it. It is possible to find in favour of

applicant notwithstanding the fact that I rule against it pertaining to the terms and conditions of the agreement of lease. However, this aspect will be dealt with after consideration of the case law referred to *infra*.

LEGAL ARGUMENTS

[24] Mr Pienaar has argued that applicant should have foreseen a *bona fide* dispute of fact and that the application should be dismissed. He *inter alia* submitted that in deciding disputed matters in application proceedings a court should be cautious about deciding probabilities in the face of conflicts of fact with reference to **BUFFALO FREIGHT SYSTEMS (PTY) LTD v CRESTLEIGH TRADING (PTY) LTD** 2011 (1) SA 8 (SCA) at 14D –F. He urged me to dismiss the application instead of referring it to trial or for oral evidence. When I pointed it out to him that the respondent neglected to play open cards pertaining to the payments made in compliance with its contractual obligations, he conceded that generally speaking a bare allegation of compliance should not be sufficient, but should be accepted *in casu* especially insofar as the allegations in

the answering affidavit are a repetition of what has been pleaded in the plea more than a year ago and which applicant elected not to attack in its founding affidavit at all.

[25] I accept that it is an acceptable method to obtain ejectment of a tenant by way of motion proceedings. However Innes, CJ remarked as follow in **FRANK v OHLSSONS' CAPE BREWERIES LTD** 1924 AD 289 at 294:

“Now it is a general rule of South African practice that when the facts relied upon are disputed an order of ejectment will not be made on motion; the parties will be ordered to go to trial. The reason is clear; it is undesirable in such cases to endeavour to settle the dispute of fact upon affidavit. It is more satisfactory that evidence should be led and that the court should have an opportunity of seeing and hearing the witnesses before coming to a conclusion. But where the facts are really not in dispute, where the rights of the parties depend upon a question of law, there can be no objection, but on the contrary a manifest advantage in dealing with the matter by the speedier and less expensive method of motion.”

[26] Mr Wannenburg relied strongly on the *locus classicus*, **CHETTY v NAIDOO** 1974 (3) SA 13 (A) and authorities before and after this judgment. **CHETTY** *loc cit* does not support applicant's case insofar as Mr Wannenburg did not appreciate the essence of a portion of the quotation relied upon by him in his heads of argument and repeated in his oral address. For purposes hereof I repeat the quotation and underline the relevant part not properly considered by the learned counsel. See **CHETTY** *loc cit* at 20F - G:

"If he 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, say 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, which might, in the case of a contract, also entail proof of the terms of the contract."

The following *dictum* in **CHETTY** *loc cit* at 21G-H is of particular importance:

“Here there is clear authority for the general proposition that, although a plaintiff who claims possession by virtue of his ownership must *ex facie* his statement of claim prove the termination of any right to hold which he concedes the defendant would have had but for the termination, the necessity for this proof falls away if the defendant does not invoke the right conceded by the plaintiff, but denies that it existed. Then the concession becomes mere surplusage as it no longer bears upon the real issues then revealed. If, however, the defendant relies on the right conceded by the plaintiff, the latter must prove its termination.”

It is acknowledged that the court in **CHETTY** *loc cit* considered the difficulties that may arise where a tenant relies substantially on the right conceded by the landlord, but disputes a point material to the landlord's case, such as a term of the contract. See **CHETTY** *loc cit* at 23H – 24B. I am of the view that it was for the applicant to prove the contract relied upon, furthermore the breach thereof and its

entitlement to cancellation and ejectment, which it failed to achieve.

- [27] Mr Wanneburg argued in the alternative that the matter should be referred for trial or the leading of oral evidence in order to allow for a proper adjudication of the disputed issues referred to above. Mr Pienaar was of the view that there was no need for such referral and that applicant has made out no case for the relief claimed in the notice of motion. In *casu* applicant knew that the terms and conditions of the agreement of lease are disputed. It also knew that respondent denied any breach of contract and a right to cancel. Notwithstanding this applicant instituted these motion proceedings six months after it allegedly terminated the agreement of lease and four months after the respondent filed its plea in the regional court proceedings. Although the issue of payment and the proof thereof might be an easy exercise, there can be no doubt that the dispute as to the terms and conditions of the agreement of lease might take a considerable period of time to adjudicate. If the matter is referred to oral

evidence or trial, two actions/proceedings will be conducted in two different courts between the same parties based on the same factual matrix, although the causes of action do differ. This does not appear to be appropriate at all.

APPLICATION OF THE LAW TO THE FACTS

[28] If **CHETTY** *loc cit* is considered the onus is on the applicant not only to prove the terms and conditions of the agreement of lease, but also its breach and consequent termination thereof which afforded it a right of ejectment. Applicant has, for the reasons advanced earlier, not made out a case for the relief claimed. I have given due consideration to Mr Wasserman's alternative argument that the matter be referred to trial or oral evidence, but in light of what I have indicated above, I have finally decided not to accede to such a request. Although respondent's response in its answering affidavit, particularly pertaining to its allegations of proper compliance are far from satisfactory, I am satisfied that the applicant has not made out a case for the relief claimed.

RELIEF AND COSTS

[29] Under the circumstances applicant is not entitled to the relief claimed in the notice of motion or any other relief. There is no reason why respondent as the successful party should not be granted costs.

ORDER

[30] The application is dismissed with costs.

J. P. DAFFUE, J

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On behalf of the respondent: Adv. C. D. Pienaar
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