IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: 1388/2012

In the matter between:

TSOGO SUN KWA-ZULU-NATAL (PTY) LTD Applicant

and

CENTRE COURT BUFFET (PTY) LTD Respondent

JUDGMENT

HENRIQUES J

Order:

1. The applicant is granted condonation for its failure to comply with the rules relating to form and service.

2. The respondent is directed to vacate the premises occupied by it and described as Shop no. L 21, Suncoast Casino & Entertainment World comprising 778 square meters on the ground level and a 75 meters square storeroom forthwith.

3. The respondent is directed to pay the costs of the application on the attorney / and own client scale.

4. The respondent's counter application is dismissed and the respondent is directed to pay any costs occasioned by such application on a party/party scale.

Introduction

1. This is an application for the eviction of the respondent from the applicant's premises at Suncoast Casino & Entertainment World (Suncoast) premises.

2. It is common cause that the applicant is the owner of the Suncoast premises and that the parties concluded a written agreement of lease, Annexure "MD1". In terms of the written lease agreement the respondent's right to occupy would terminate on the 30 November 2012. The applicant alleges it cancelled the written lease agreement on 14 February 2011 and instructed its erstwhile attorneys to institute any action for eviction of the respondent.

3. The respondent is still in occupation of the Suncoast premises as it disputes cancellation of "MD1", and avers that after cancellation of an agreement was concluded, Annexure "MD2" in terms of which it would remain in occupation of the Suncoast premises on a month to month basis on the terms recorded therein.

4. Subsequently, the applicant provided notice of termination of the month to month tenancy as recorded in Annexure "MD2". The respondent does not dispute receipt of the termination notice.

5. In order to obtain such relief it is trite that the applicant need do no more than allege and prove it is the owner of the Suncoast premises and the

respondent is in occupation thereof. The onus rests on the respondent to allege and prove the right to continue to occupy the Suncoast premises[1].

6. On the facts of this matter, the applicant concedes that the respondent has a right of occupation and alleges a termination of that right. The respondent however relied on the right of occupation based on the non-cancellation of MD1. Consequently I agree with the submission of Adv Troskie.

7. The factual position in relation to this matter however is that the respondent denies that it occupies in terms of "MD2". It alleges that "MD1" has not been cancelled and consequently its rights of occupation emanate from "MD1". Consequently, the law as it stands was enunciated in Gordon v Kamaludin which was subsequently followed in Graham v Ridley[2] and subsequently adopted in Chetty v Naidoo[3] .

8. In Gordon's case supra the court held the following "*when an owner sues for ejectment an allegation in his declaration that he has granted the defendant a lease which is terminated is an unnecessary allegation and is merely a convenient way of anticipating the defendant's plea that the latter is in possession by virtue of a lease, which plea will call for a replication that the lease is terminated. It is the defendant and not the owner plaintiff who relies on the lease, and if the lease itself is denied by the defendant, as in the presence case, the allegation of the lease is surplusage."*

9. Consequently, this matter must be decided on whether or not "MD1" had been cancelled, and the respondent bearing the onus to show it had not been cancelled.

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[1] See Chetty v Naidoo 1974 (3) SA 13 (AD) @ 20 B-D
[2] 1931 TPD 476 @ 479
[3] Chetty v Naidoo @ Supra @ 21 D- 24 A

10. If one has regard to “MD2” titled Reinstatement of Lease Agreement, the preamble to records the cancellation of “MD1” on 14 February 2011. in addition it records that the respondent had effected payment of all arrear rentals and other costs and charges due in terms of “MD1” and the reinstated of lease with effect from 1 March 2011, subject to terms and conditions recorded in “MD2”.

11. Paragraph 2.4 of “MD2”specifically records that the lease agreement would continue to operate on a month to month basis until terminated by either party giving the other one calendar month written notice of such termination.

12. Annexed to “MD2” is a Deed of Suretyship signed by the deponent to the respondent’s opposing affidavit, Panayiotis Peter Economou (“Economou”) and the other directors of the respondent.

13. The respondent opposes the application on the following grounds and raises three points *in limine* namely that of urgency, lis *pendens* and avers that the application constitutes an abuse of the process.

14. Economou despite confirming the signature of “MD2” in May 2011 alleges that the other directors were not signatories “MD2” and he did not have the authority to sign on their behalf or bind them. He avers he signed it without considering it properly and without obtaining legal advice.

15. I propose to deal with the points *in limine* raised by the respondent. Given the nature of the application and the fact that the lease terminated in December 2011 it was clear that the matter was of some urgency to the applicant. In so far as the point *in limine* in relation to that of *lis pendens* is concerned, the applicant confirms that an initial summons was issued and that action was subsequently withdrawn. If one has regard to the opposing

affidavit filed, it is clear that the action was withdrawn despite the fact that there was no tender for costs. Consequently this point *in limine* is without merit cannot succeed.

16. In so far as the point *in limine* relation to an abuse of process is concerned the respondent's rely on lack of urgency and *lis pendens* for this ground of opposition. In light of the conclusion that I have come to in relation to urgency and in *lis pendens* I am of the view that there has not been an abuse of process.

17. The question to be determined is whether or not the denial by the respondent of the valid termination of "MD2" raises a genuine of *bona fide* dispute.

18. If the respondent is correct that then its counter application must succeed.

19. The approach taken to factual disputes was set out in Plascon Evans Paints Ltd v Van Riebeck (Pty) Ltd[4]. Gorbet JA held the following:

> "It *is correct that, were in proceedings are notice of motion disputes of fact have arisen on the affidavit, a final order, whether it be an interdict or some other form of relieve maybe granted if those facts averred in the applicants affidavit's which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief in the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact…If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to*

[4] 1984 (3) SA 623 (A) @ 634 H – 635 C

be called for cross-examination under Rule 6(5) g of the Uniformed Rules of Court… and the Court is satisfied as to the inherent credibility of the applicants factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks… Moreover, they maybe exceptions to this general rule, as, for example, were the allegations or the denials of the respondents are so far fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.

20. Various decisions have dealt with the test to be applied[5] Da Mata v Otto N O 1972 (3) SA 858 (A) @ 882 D-H. In National Director of Public Prosecutions V Zuma[6] held that were a version consists of "bald or uncredit worthy denials raises vicious decisions of fact, is palpably implausible far fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.

21. The respondent contends itself with a mere denial of the cancellation of "MD1". No facts are placed before the court to justify such a conclusion. Economou on behalf of the respondent in fact confirms signature of "MD2" but alleges that same was signed under pressure and without any resolution from his fellow directors. In addition he avers that in light of the fact that the other directors did not sign "MD2" it cannot be valid.

22. The applicant alleges that the due to the fact that "MD2" was concluded, a reinstatement of lease agreement, there was no need to contain the action. Instructions were given to its erstwhile attorneys to withdraw the actions at the time of arguing the matter the action had been withdrawn.

[5] Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) @ 1163-1165
[6] 2009 (2) SA 277 SCA @ para 26 Harums DP

23. The negotiation in respect of the “MD1” and “MD2” done by Economou on behalf of the respondent and Dowesly. Economou signed “MD1” on behalf of the respondent as tenant and signed “MD2” as well. In “MD2” he specifically records that he denies the above mentioned to depose on behalf of the respondent .The fact of cancellation of “MD1” is recorded in the preamble of “MD2”. “MD2” further records the change in tenancy on a month to month basis, the non- variation clauses and the retention of clauses in “MD1” which have not been by “MD2”

24. In so far as the cancellation of “MD1” is concerned, the respondent’s rely on the following:

    1. Economou does not have authority to lay the other directors without a resolution;
    2. “MD 5” which records denial of the valid cancellation of “MD1” on the basis of a breach by the respondent. The letter further records that the breach has been remanded and cannot be relied on;
    3. “MD 6” which once again records that the respondents dispute the validity of the cancellation of the lease agreement and the fact that it is subject to a month to month tenancy.

25. No basis for the denial of the cancellation or the monthly tenancy are recorded in “MD 5” and “MD 6”.

DATE OF HEARING: 12 MARCH 2012

DATE OF JUDGMENT: 13 NOVEMBER 2012

APPLICANT'S ATTORNEYS:	GIDEON PRETORIUS INC 8TH FLOOR, OLD MUTUAL BUILDING 300 ANTON LEMBEDE STREET DURBAN REF: ABRI KRITZINGER
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