In the KwaZulu-Natal High Court, Durban

Republic of South Africa

Case No : 8714/06

In the matter between :

Pareto Limited Applicant

and

Tetrafull 1060 CC Respondent

Judgment

Lopes J

[1] On the 14th August 2006 the applicant applied to this court for an order ejecting the respondent from the premises at shop number 349 ('the premises'), The Pavilion Shopping Centre, Westville, KwaZulu-Natal.

[2] In the applicant's founding affidavit, reliance was placed on two factors :

(a) that the applicant is the owner of the land upon which The Pavilion Shopping Centre is situated; and

(b) the respondent is in occupation of the premises.

[3] In its answering affidavits the respondent admitted that the respondent was in occupation of the premises, and it is now also common cause that the applicant is the owner of the premises.

[4] In *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20 C, Jansen JA stated :

'The owner, in instituting a *reivindicatio*, need, therefore, do no more than allege and prove he is the owner and that the defendant is holding the *res* – the *onus* being on the defendant to allege and establish any right to continue to hold against the owner.'

[5] The respondent accordingly bears the onus of demonstrating that it has a right to occupy the premises.

[6] It is common cause between the parties that a written lease agreement was previously concluded between them, ('the first lease'), which provided for the respondent to occupy the premises from the 1st March 2001 to the 28th February 2006, when the lease ended. After the end of the first lease the respondent instituted an action against the applicant, apparently relying on an entitlement to occupy the premises pursuant to an alleged renewal of the first lease. This application for the ejectment of the respondent was then instituted by the applicant and was, initially, neither heard nor resolved. At some stage after the 21st February 2008, the applicant submitted to the respondent, an agreement of lease ('the proposed lease') which was anticipated to provide the respondent with occupation of the premises from the 1st April 2008, to the 30th March 2013. The proposed lease was signed by a representative of the respondent, and included

some deletions in the original document, together with three manuscript items under the heading 'Special Conditions' which provided :

'7. SIGNATURE OF THIS LEASE WILL CONFIRM THE FOLLOWING :

7.1 THE LEGAL ACTION IN THE PIETERMARITZBURG HIGH (sic) BETWEEN THE LANDLORD AND TETRAFULL 1080 (sic) CC IS SETTLED.

7.2 THE LEGAL ACTION TAKEN BY THE LANDLORD AND THE DEFENDANT IN THE DURBAN HIGH COURT IS SETTLED.

8. THE LANDLORD UNDERTAKES TO APPROVE AND SIGN THE LEASE BY NO LATER THAN 30TH MARCH 2008, FAILING WHICH THE COURT ACTION IN CLAUSE 7, ABOVE WILL CONTINUE.

9. THIS SETTLEMENT IS IN REGARDS TO THE COURT ACTIONS IN CLAUSE 7 AND NOT TO ANY MONETARY SETTLEMENT IN REGARD TO ANY AMOUNTS DUE TO EITHER PARTY.'

[7] The 'Overall Conditions' attached to the schedule of the proposed written lease agreement, contains at Clauses 17.1 and 17.7 the following :

'17.1 This Agreement incorporates the entire Agreement between the LANDLORD and the TENANT and no alteration, cancellation or variation hereof shall be of any force or effect unless it is in writing and signed by both the LANDLORD and the TENANT who hereby acknowledge that no representations or warranties have been made by either the LANDLORD or the TENANT.'

'17.7 This Agreement shall only take effect and become binding upon the LANDLORD when signed by the LANDLORD, failing which the TENANT may not claim the existence of the Lease from negotiations having been conducted or concluded in regard thereto or by reason of this Lease having been drafted or signed by the TENANT.'

[8] The respondent avers in its answering affidavits, that on the 21st February 2008 it concluded an oral agreement with the legal representative of the applicant, in terms of which the previous litigation between the parties was settled and the parties were to have concluded the proposed lease. The terms of that agreement, as recorded in the respondent's particulars of claim annexed to the respondent's answering affidavits, include :

'6.4 Upon signature of the New Lease Agreement by the Plaintiff and return to the Defendant, a binding agreement would come into existence between the Plaintiff and the Defendant.

...

14.3 The Defendant undertook to sign the New Lease Agreement (for record purposes) by no later than 30th March 2008, failing which the litigation would continue (Clause 8 Special Conditions), however the New Lease Agreement would remain of full force and effect;'

[9] Mr *King* SC, who appeared for the respondent, submitted that upon a proper consideration of the proposed lease as disclosed in the particulars of claim, a court should not try to interpret the proposed lease as a stand-alone document. He submitted that a real and genuine dispute of fact exists on the papers because of the possible interpretations which could be placed upon the proposed lease, and he referred to the test in *National Scrap Metal (Cape Town) (Pty) Ltd and Another v Murray & Roberts Ltd and Others* 2012 (5) SA 300 (SCA) at page 307, paragraphs 21 and 22. There, the court referred to the test where there are disputes of fact and where a court is called upon to decide the matter without the benefit of oral evidence, that 'it had to accept the facts alleged by the [respondent] unless they were "so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers" ..."a stringent test which is not easily satisfied".'

[10] Mr *King* submitted that because of the different possible interpretations of the proposed lease, I should not conclude that the respondent's version was so far-fetched, that it could be dismissed out of hand. In this regard he pointed to indications in the accounting documents of the applicant which, prima facie, indicated that the applicant was charging the respondent rental on the basis of the proposed lease. He also pointed to the applicant's record of tenant transactions which refers to a lease starting on the 1st April 2008 and terminating on the 30th March 2013. Mr *King* submitted that this made it likely that both parties regarded an agreement as having been concluded.

[11] Mr *King* also submitted that Clause 17.7 of the proposed written agreement falls to be rectified, because it was included either in error or deliberately by the applicant. Mr *King* submitted that on the basis of the affidavits there is room for a court to conclude that it should never have been included.

[12] Mr *Salmon* SC, who appeared for the applicant, accepted that there were disputes of fact on the papers, and that there is a stringent test to apply before dismissing the allegations made by the respondent. He submitted, however, that the applicant could not succeed in demonstrating that the proposed lease was binding on the parties, or that an oral agreement of lease had been concluded.

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[13] Mr *Salmon* referred to the fact that two relevant aspects emerge from the respondent's particulars of claim annexed to the respondent's answering affidavit:

(a) that the new lease agreement was to be in writing; and

(b) that it would be signed by the respondent and submitted to the applicant for consideration.

[14] Whatever else may be said about the proposed lease, and whether it constituted an offer or was a counter-proposal, the respondent bound itself, by its signature, to the fact that there would be no lease agreement until the applicant had signed the proposed lease. The applicant has not signed the proposed lease. In those circumstances, so it is submitted, there can be no suggestion that there is a concluded lease between the parties.

[15] In signing the proposed lease the respondent has, by its own hand, bound itself to the fact that the only lease agreement between them would be that contained in the proposed lease. All questions of oral representations having been excluded, no lease agreement could be concluded between the parties unless and until the applicant signed the proposed lease, which did not occur (see Clauses 17.1 and 17.7 above).

[16] In my view the intention of the parties could not be more clearly expressed. The respondent by its signature, made it clear that it anticipated that

should the lease agreement not be signed by the applicant, then the previous litigation would not be settled. That in itself envisages two aspects :

(a) that the written document was to constitute the agreement between the parties both as to the settlement and to the lease; and

(b) that in the event that the applicant did not sign the proposed lease, neither the lease nor the settlement would not be of any force or effect.

In addition, as pointed out by Mr *Salmon*, the manuscript Clause 8 (written by the respondent's representative) requires the applicant 'to approve and sign the lease'. This was further evidence of the respondent's intention that the lease would not come into existence until the applicant signed it.

[17] Mr *Salmon* submitted that if one has regard to the history of the parties, the applicant at all stages sought to protect itself by requiring the agreements between the parties to be in writing. This is evident from the initial lease between the parties which contained the same clauses 17.1 and 17.7 referred to above. In addition, Mr *Salmon* referred to Annexure B to the original lease, which was the 'Renewal of Lease Clause', and which recorded that any renewal had to be done in writing. Any suggestion therefore that an oral agreement of lease would have bound the parties is entirely inconsistent with the parties' previous conduct, and improbable.

[18] Mr *Salmon* pointed to the fact that nowhere in the correspondence was there a reference to the applicant accepting the oral conclusion of a lease

agreement. It is also made clear in the letter by the applicant's legal representatives dated the 2nd April 2008 that any proposal would be subject to a decision by the applicant's Board, who would make the ultimate decision.

[19] With regard to the indications in the applicant's documentation that a lease was accepted by it, Mr *Salmon* referred me to the applicant's tenant transactions document which records that the amount claimed by the applicant (and which accords with the rental payable in terms of the proposed lease) is described as 'holding over damages received'. Mr *Salmon* submits that there can accordingly be no suggestion that the applicant had accepted the payments as lease payments in terms of the concluded agreement between the parties.

[20] In any event, it seems likely that the parties anticipated concluding a lease, and the documentation was, in all probability, prepared with that in mind. The precaution, however of describing amounts paid by the respondent as 'holding over damages received' negates the respondent's suggestion.

[21] In these circumstances, I do not agree that the alleged oral agreement could trump the respondent's signed written offer, which unequivocally expressed its intention both with regard to the settlement of the previous action and the proposed lease.

[22] The respondent has also raised the issue of rectification in that it submits that Clause 17.4 of the lease agreement falls to be deleted. In order to establish rectification, it is necessary for an applicant to allege and prove :

(a) an agreement between the parties which was reduced to writing;

(b) that the written agreement did not reflect the common intention of the parties correctly, and the applicant is required to establish the continuing intention of the parties which may be deduced from an antecedent agreement;

(c) an intention by both parties to reduce the agreement to writing;

(d) a mistake in drafting the document;

(e) the wording of the agreement as rectified.

See : *Propfokus 49 (Pty) Ltd and Others v Wenhandel 4 (Pty) Ltd* 2007 (3) All SA 18 (SCA) at 21 g – 22 c.

[23] I have difficulty in understanding how the respondent can seek to claim rectification when there is no written contract between the parties. The law provides for rectification of a written agreement concluded between the parties, and not rectification of an offer made by one party. Unless and until that written offer was accepted by the plaintiff and a written agreement came into existence, the document constituted no more than an offer by the respondent as expressed in writing and signed by its representative. Those written undertakings do not bind the respondent insofar as it relates to a lease agreement, because the applicant declined to sign the agreement. They do, however, bind the

respondent inasmuch as they express the unequivocal intention of the respondent as to what it intended to do.

[24] In those circumstances I do not accept that the respondent has discharged the onus which it bears to show a right to occupy the premises. I make the following order :

1. The respondent is directed to vacate the premises described as Shop No 349, The Pavilion Shopping Centre, Jack Martins Drive, Westville, KwaZulu-Natal by no later than the 31st March 2013.
2. In the event of the respondent failing to vacate the premises timeously, the Sheriff of this court is authorised and directed to eject the respondent and all those occupying through it from the premises.
3. The respondent is to pay the applicant's costs of suit.

Date of hearing : 11th December 2012

Date of judgment : 14th December 2012

Counsel for the Applicant : RJ Salmon SC with DW Finnigan (instructed by Thorpe and Hands Inc)

Counsel for the Respondent J C King SC with U Lennard (instructed by Afzal Akoo and Partners)