

In the KwaZulu-Natal High Court, Durban

Republic of South Africa

Case No 6281/11

In the matter between :

Deviasagren Naidoo

First Applicant

Shanoo Devi Baliraj

Second Applicant

Radhakrishnan Chetty

Third Applicant

Kogila Chetty

Fourth Applicant

and

Debipersadh Mohunlal

Respondent

Judgment

Lopes J

[1] The applicants applied for an order ejecting the respondent from the immovable property situated at 192 Sirdar Road, Clairwood. The basis upon which the applicants seek the order may be summarised as follows :-

- a) the first applicant, who was the erstwhile owner of the property, concluded a lease agreement with the respondent;
- b) that lease agreement was renewable in 12 month cycles on the 1st

February of each year;

- c) the rental up until the 1st February 2011 had been R4 300 per month. On the 11th January 2011 the first applicant gave the respondent notice that the monthly rental for the third cycle would increase to R4 730 per month with effect from the 1st February 2011;
- d) the second applicant is the current owner of an undivided half share in the property, and the third and fourth applicants together currently own the other half. When the first applicant sold the property to them, the obligation to ensure vacant possession of the property at all times rested with the first applicant;
- e) the respondent paid the February 2011 rental by way of a cheque for R4 300 to the first applicant. Allegedly regarding this as a rejection of the offer for continued occupation on the basis of the increased rental, the first applicant alleges that he issued a notice on the 14th February terminating the occupation by the respondent, and demanding that he vacate the premises within 30 days;
- f) the respondent failed to vacate the premises and paid the March rental on the 1st March 2011 in the new amount of R4 730;
- g) the first applicant alleges that no payment was made in respect of the shortfall for February (this is denied), and no payment was made for either April or May of 2011 (this is not denied).

[2] Mr *Wallis* who appeared for the applicants submitted that the letter of the

14th February 2011 was a letter of cancellation pursuant to the repudiation of the lease agreement by the first applicant. That repudiation is to be found in the payment of the cheque for R4 300 on the 1st February 2011.

[3] In assessing whether or not the respondent repudiated the contract, the approach I am to adopt is whether a reasonable person in the position of the first applicant would conclude that proper performance would not be forthcoming. The emphasis here is not on the repudiating party's state of mind, and the test is essentially an objective one approached from the view of the innocent party.

See *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) paragraphs [16] to [19].

[4] In viewing the reasonableness of the belief of the first applicant, it is necessary to take into account the following :-

- a) in paragraph 13 of his founding affidavit he states that the respondent's rejection of the offer was communicated to him on the 1st February 2011 when the cheque of R4 300 was paid; and
- b) the letter written on the 14th February 2011 by the first applicant.

[5] In his letter of the 14th February 2011 the first applicant states the following :-

'I refer to our lunch meeting on Monday 14th February 2011 at my premises.

As discussed, after having advertised the building you occupy [192 Sirdar Road]

in the open market, a confirmed sale has since resulted.

In view of the above, kindly note, that you have a 30 day notice in which to find alternate premises.

Due to our cordial relationship I however will afford you an extra two weeks, therefore kindly ensure that the premises is cleaned and available by the 31st March 2011.'

[6] In my view that letter is entirely inconsistent with the first applicant having understood the payment of the cheque of R4 300 as a rejection of the rental agreement. As stated by the respondent, the short-payment is much more likely to have been a mistake. Had it been accepted as a repudiation, and had the first applicant understood it as such, he would no doubt have referred to that in the lunch meeting on the 14th February 2011. His letter written on the same day would unquestionably have reflected that. Indeed the very tenor of the letter is that the contract is terminated because the property has been sold. This is unquestionably not a letter of cancellation pursuant to a breach. The suggestion of an acceptance of a repudiation on the 1st February, which is merely confirmed in the letter of the 14th February 2011, appears to have been an afterthought. I have no hesitation in rejecting the unreasonable assumption, by the first applicant, that the payment of the R4 300 was a repudiation of the lease agreement.

[7] Mr *Wallis* submitted that the applicants were nonetheless entitled to rely upon the non-payment of rental by the respondent for the months of April and May of 2011. He pointed to the fact that there was no denial of that non-payment. The answer to the allegations in the founding affidavit of non-payment in respect of April and May, is to be found in paragraph 22 of the respondent's affidavit where he states :-

‘... I hasten to add that the first applicant disconnected electricity and water supplies to the premises and by virtue thereof being an obvious repudiation of the agreement, which repudiation I did not accept, he was not entitled to further rental payments. That said I have already tendered payment of outstanding rentals. I annex a copy of my attorney's letter dated 20 May 2011 referring to the disconnection of electricity and water supplies ...’

[8] Two letters were written by the respondent's attorney to the first applicant's attorney on the 20th May 2011. The first was sent at 11.59 and the second at 12.28 some 29 minutes later. The first letter makes no reference to the disconnection of the electricity and water, and refers to the previous sale of the property by the first applicant to a close corporation of which the respondent was a member. It records the tender of payment of the rentals in terms of the lease agreement. The second letter refers to the disconnection of the electricity and water and requests that they be immediately reconnected, failing which the respondent would proceed with an application to compel the first applicant to do

so.

[9] In my view those two letters should be read as one. I agree with Mr *Pillay*, who appeared for the respondent, that the only interpretation to be placed upon the contents of paragraph 22 of the answering affidavit is that the respondent had not paid the April and May rentals because the electricity and water had been cut off by the first applicant. The first applicant's reply to that paragraph is significant. He simply notes what he refers to as the 'implicit admission' of the non-payment of rental, and points out that that constitutes a further ground for eviction. He states that the belated tender of rentals is a desperate attempt to avoid the inevitable outcome of the application.

[10] It is most unfortunate that in this entire application neither of the parties have seen fit fully to set out the circumstances of the lease and the various incidents which took place between the parties, with reference to a time scale, which would enable me properly to assess the matter.

[11] It may well be that the respondent did not pay the April and May rentals because of the disconnection of the electricity and water, but he does not set out exactly when that happened. This may be relevant inasmuch as the respondent's attorney only wrote the letter complaining of the disconnection of the electricity and water some 50 days after the rental for April was due. But if that was the case I would have expected the applicants in reply to set out exactly

what happened. This would have been particularly relevant if the disconnection of the electricity and water had taken place after the rentals for April and/or May were due. That was important, because if that was what happened, then the respondent would have been in breach of the lease agreement. A non-payment of rental for two months without lawful excuse would have undoubtedly constituted a repudiation of the lease agreement. In this regard each of the parties blame the other for not setting sufficient detail to enable me properly to decide the matter.

[12] I am accordingly left in the position where a dispute exists. That dispute is whether the respondent was entitled to withhold the April and May rental because of the disconnection of the electricity and water. It is not part of the applicants' case in its founding papers that the electricity and water of the applicant had only been disconnected after the dates for payment of the April and/or May rentals. Nor is this dealt with in reply. In any event and on the authority of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD) at 634 E – 635 C a court should only grant a final order if the facts averred in the applicants' affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. I am also entitled to disregard denials by the respondent where they do not appear to raise real, genuine or bona fide disputes of fact.

[13] Neither counsel in their arguments requested that I refer the matter to the

hearing of oral evidence of this issue. I, however, raised the matter with the applicant's counsel. In my view, however, the applicants face the difficulty that they are obliged on their papers to set out their case in full. The only case they have made out in the founding papers has been met by the respondent, creating a material dispute of fact. The applicants' reply does not take the matter any further. In those circumstances, the dispute of fact having been one which was reasonably foreseeable by the applicants, the application must fail.

[14] I accordingly dismiss the application with costs.

Date of hearing :24th November 2011

Date of judgment : 30th November 2011

Counsel for the Applicants P Wallis (instructed by Pather & Pather Attorneys)

Counsel for the Respondent : I Pillay (instructed by Attorney Vinay Yetwaru)