

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No. : A22/2005

In the appeal between:-

MAIM GAMUR (PTY) LTD

Appellant

and

AFGRI OPERATIONS LIMITED
(previous OTK Ltd)

Respondent

CORAM: HATTINGH J *et* EBRAHIM J *et* VAN DER MERWE J

HEARD ON: 14 NOVEMBER 2005

JUDGMENT BY: EBRAHIM J

DELIVERED ON: 9 FEBRUARY 2006

[1] This is a civil appeal against the dismissal of an application launched in the court *a quo* by the appellant for payment of arrear rental in terms of two leases. The appellant appeals against the judgment of the court *a quo* with the leave of the Supreme Court of Appeal.

[2] In its Notice of Motion launching the application the appellant pleaded the relief sought as follows:

“2. Dat vonnis teen die respondent verleen word vir betaling van die bedrag van R102 600.00 (Een Honderd en Twee Duisend Ses Honderd Rand), alternatiewelik dat die Respondent gelas word om die maandelikse huurverpligtinge ten opsigte van persele 7342 en 5592 teenoor Applikant na te kom, welke sal insluit betaling van huurgeld ten opsigte van beide persele vir die periode November 2003 en Desember 2003, hangende die instel van ‘n aksie deur die Applikant vir spesifieke nakoming van aanhangsel “A” en “B” welke aksie ingestel moet word binne 20 dae na die verlening van hierdie bevel;”

(Aanhangsel “A” and “B” refer to the 2 leases.)

[3] The application was based on the following common cause background facts:

3.1 The appellant is the owner of two properties in Kroonstad, namely stand 7342 and stand 5592. The two properties are adjacent to each other.

- 3.2 The respondent occupied shop premises and a warehouse on stand 7342 (“the general dealer premises”) with effect from 1 August 2002 pursuant to a written lease which it concluded with the appellant on 21 October 2002 (“the first lease”). The first lease is for an initial period of 5 years. The monthly rental for November and December 2003 is R31 350.00 (i.e. R27 500.00 plus VAT).
- 3.3 Whilst the respondent was in occupation of the general dealer premises the appellant gave it free use of stand 7342 for parking.
- 3.4 In early 2003 the respondent obtained the Massey Ferguson Tractor Agency. The respondent negotiated with the appellant that the appellant would build a showroom and workshop on stand 5592 (“the new building”) which the respondent would lease from the appellant for the purpose of conducting its new business of selling, servicing and repairing tractors.

3.5 These negotiations resulted in the conclusion of a written lease on 20 June 2003 (“The second lease”) in terms of which the respondent leases the new building from the appellant for an initial period of 5 years with effect from 1 June 2003 (Annex “B”). The monthly rental for the first year (which included November and December 2003) was R19 950.00 (i.e. R17 500.00 plus VAT).

3.6 The new building was not built by 1 June 2003. This being so the appellant assisted the respondent in alleviating the problem of where to store goods which were arriving for the purpose of its new business by giving it the free temporary use of other premises.

3.7 Despite an undertaking that the new building would be ready for occupation by 13 August 2003 it was not.

3.8 The respondent was only given occupation of the showroom part of the new building on 4 September 2003. That part was itself not fit for the purpose for which it had

been hired in that the cement floor cracked under the weight of a tractor.

3.9 In the result and on 17 October 2003 the respondent (i.e. through its attorneys) put the appellant on terms to make the new building available for occupation by the respondent within 7 days failing which the respondent would cancel the lease.

3.10 The appellant failed to do this and on 28 October 2003 the respondent's attorneys informed the appellant that the respondent had cancelled the second lease.

3.11 The appellant then began to move its equipment from the incomplete building but was unable to complete its move until 3 December 2003 because it was unable to secure alternative premises until then.

3.12 Despite the common cause fact that the appellant had not given the respondent occupation of the new building, the

appellant obtained payment of rental from the respondent for the new building for the 5 months from June to October 2003 (i.e. in a total sum of R99 750.00 (i.e. 5 x R19 950.00)).

3.13 The respondent alleges that this was done fraudulently.

This, the appellant denies and alleges that it was entitled to the rental.

3.14 The respondent remained in occupation of the general dealer premises but failed physically to pay the rental in respect thereof to the appellant in terms of the first lease for November and December 2003.

3.15 In a letter written on 24 November 2003 the appellant denied that the respondent was entitled to cancel the second lease, recorded that it had been informed on 21 November 2003 that the respondent had no interest in taking occupation of the new building and demanded payment of rental for November 2003 in respect of both

properties.

3.16 In its response of 28 November 2003 the respondent's attorneys reiterated that the respondent had cancelled the second lease and informed the appellant that payment of the November rental for the general dealer premises had taken place by way of set-off "**against the payments wrongfully obtained from it in respect of Erf 5592 ...**" and that the respondent intended to set-off future rentals against those payments.

4. During argument in the court *a quo* counsel for the appellant abandoned his claim for final relief and confined his submissions to the claim for interim relief in accordance with the alternative prayer in the Notice of Motion. Rampai J however, was quite incorrectly, requested to apply the test for final relief as set out in **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (A) in adjudicating the matter. This in all likelihood led him to making a final judgment, dismissing the application on the basis that a

valid cancellation of the second lease had been effected by the respondent. In dealing with the matter on this basis Rampai J, with respect, erred as the only question before him was whether or not the requirements for the granting of interim relief had been satisfied by the appellant in these proceedings.

- [5] On appeal before us counsel for the appellant, in conceding the erroneous approach adopted by the court *a quo*, extended the ambit of the appeal arguing that different relief ought to be granted in respect of the two leases. He requested that final relief be granted in the sum of R62 700.00 in respect of the first lease and the interim interdict be granted in respect of the second lease. He argued that final relief is competent in respect of the first lease on the basis that the set off of rentals claimed by the respondent against the amounts due to it under the second lease is prohibited by clause 5.8 of the first lease

5.1 Clause 5.8 reads as follows:

“5. **HUURDER SE VERPLIGTINGS**

DIE HUURDER SAL:-

5.8 Nie geregtig wees om betaling van huurgeld of ander geld aan die VERHUURDER te weerhou as gevolg van enige beweerde defek of tekortkoming wat betref die gebou of die toestand daarvan of om enige ander rede nie, onderhewig aan paragraaf 7.1 hiervan.”

5.2 There are two cogent reasons why this argument must fail and why a final judgment cannot be granted in respect of the first lease:

5.2.1 the relief was expressly abandoned at the hearing in the court *a quo*; and

5.2.2 withholding payment cannot be regarded as equivalent to a set-off. It is the very antithesis thereof. A set-off is a payment by operation of law.

[6] In any event in the present case if one applies the restrictive rule of interpretation and the *eiusdem generis* rule the words “om enige ander rede” in clause 5.8 clearly relate to the condition or state of the premises under the lease. Any

withholding in the present case is for monies wrongly paid in respect of another transaction in which fraud is alleged to have been committed by the appellant and not as a result of shortcomings in the landlord's performance which have manifested during the currency of the lease and which would at common law have given the tenant the right to withhold rental or part thereof.

[7] Turning to the second lease and the request for interim relief in respect thereof, it is clear the salient issue here is whether the requirements for the grant of such relief have been met. It is trite that there are four essential requirements for the granting of an interim interdict. The applicant for interim relief must:

- 7.1 establish a *prima facie* right to the relief sought;
- 7.2 show that he will suffer irreparable harm if the relief sought is not granted;
- 7.3 that the balance of convenience is in his favour; and
- 7.4 that he has no satisfactory alternative remedy.

See WEBSTER v MITCHELL 1948 (1) SA 1186 (W);
SETLOGELO v SETLOGELO 1914 (AD) 221 at p. 227;
ERIKSEN MOTORS (WELKOM) LTD v PROTEA MOTORS,

WARRENTON AND ANOTHER 1973 (3) SA 685 at 691 (AD);

BEECHAM GROUP LTD v B-M GROUP (PTY) LTD 1977 (1)

SA 50 (T) at 55 B – G.

Although I have accepted without deciding finally, in the appellant's favour that he has made out a *prima facie* case, there appears to be no case made out by the appellant that it has a reasonable apprehension that it will suffer irreparable harm and/or that it has no satisfactory alternative remedy were the relief sought not to be granted. The only case made out by the appellant in its founding papers (which is the proper place to make out its case) is that it has incurred obligations in respect of the improvements which it has made to the leased premises for the purpose of making it suitable for the respondent's needs. In addition the applicant alleges that non-payment of rentals will result in serious cash flow problems for it. A cash flow problem is by definition a temporary shortage of cash despite the availability of sufficient assets. Clearly this does not prove a probability of irreparable harm. It is not disputed that the respondent is a public company that will be

able to pay any amount found to be due by it to the appellant. The appellant therefore also did not establish that an action for payment is not a satisfactory remedy in the circumstances.

- [8] A further reason which militates against the appellant succeeding in this appeal is that the application launched in the court *a quo* amounts to an attempt to deny the respondent its procedural rights under Rule 22(4) of the Uniform Rules of the Superior Court. See Erasmus **Superior Court Practice**. The appellant proposes to institute action. It is clear that the respondent will raise its claim for repayment of rent irrespective of whether or not same is capable of set-off. (See paragraph 5.16 p. 23 of the Respondent's Heads of Argument.) Assuming such is not capable of set-off, the procedural rules would afford the respondent a stay of the appellant's claim for rent, pending the determination of its counterclaim for repayment of its rent. No compelling reasons exist in the appeal for the denial of the respondent's procedural rights under Rule 22(4) in the proposed action.

[9] The respondent also raised the issue of the appellant's *locus standi* to bring the proceedings. The respondent contends that since the appellant had ceded its claim to Nedbank, it could not establish a *prima facie* right to the relief sought as it had no *locus standi* to launch the proceedings in the first place. According to the respondent the only basis on which the appellant could have launched the proceedings in the court *a quo* was if it had taken re-cession of its claim from Nedbank. In view of the approach I have adopted to the issue whether or not the appellant had satisfied the requirements for the granting of interim relief, I am of the view that it is not necessary for the question of whether or not the claim had in fact been ceded and whether or not the appellant had *locus standi* to bring these proceedings, to be finally decided.

[10] In the circumstances the appeal is dismissed with costs.

I agree.

S.EBRAHIM, J

G.A. HATTINGH, J

I agree.

C.H.G. VAN DER MERWE, J

On behalf of the appellant: Adv. A.J.R. van Rhyn SC and
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