REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case Number: 2023/076047

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

10 May 2024 _____

DATE SIGNATURE

In the matter between:

FIBRE STREAM PROPRIETARY LIMITED Applicant

and

THE YORK CHEESE FACTORY PROPREITARY LIMITED Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 10 May 2024.

JUDGMENT

Mudau, J

[1] The applicant, Fibre Stream, seeks firstly, a final interdictory relief against the respondent, York Cheese (“York”). Secondly, a costs order is sought in respect of the interdict, and in some earlier urgent proceedings launched by Fibre Stream against York enrolled for hearing on 15 August 2023, but subsequently withdrawn. The interdict sought, if granted, would interdict York from refusing Fibre Stream and its technicians or employees’ access to Fibre Stream's mast and/or equipment situated on the roof of York's premises.

[2] The facts are largely common cause. On 25 November 2016, York and Skyfi Internet Solutions Proprietary Limited (“Skyfi”) concluded a rental agreement, in terms of which York agreed to lease Skyfi "space on the rooftop of the premises to install a mast and radio equipment”. The rental payable by Skyfi to the respondent was agreed to be "R5,000.00 excluding VAT per month…”. The rental was subject to an annual increase of 10%. In the event of late payment, it was agreed that York would be entitled to charge interest at a rate equal to the prime overdraft rate charged from time to time.

[3] The breach clause made provision that should either party breach any provision of their agreement and fail to remedy that breach within fourteen 14 days of receiving written notice from the aggrieved party, that party would be entitled to terminate the agreement without notice.

[4] As for access, the relevant lease clause made provision that, York:

> "[W]ill by prior arrangement permit officials as well as employees, sub-contractors or agents of the Lessee to enter the premises/facility and specifically the site for the purposes of inspecting, servicing or repairing the lessee's equipment. There will be no fixed times for entry but such entries and repair must be exercised with due consideration to the occupants of the premises if applicable… .
>
> The Lessor undertakes to:
> Provide the lessee with access to the premises at all time (24 hours a day, seven days a week)."

[5] York, as lessor, according to the agreement, is exempted from any responsibility for any injury or loss of life suffered by the lessee, its agents, or representatives while on the premises. Clause 7.1 goes on to provide that the lessee will also comply with all the requirements of the OHS Act (insofar as safety is concerned). This is apparently with reference to the Occupational Health and Safety Act.[1] Clause 8.2 makes provision that the lessee warrants in favour of the lessor that the equipment installed and in use always complies with the requirements of ICASA and/or the South African Bureau of Standards code of practice.

[6] It is common cause that the relationship between the parties has been strained for some considerable period as the applicant was in arrears with its monthly rental payment.

[7] I turn now to the dispute of facts which gave rise to the urgent and current application. On or about 7 August 2023, York informed the applicant that it would allow it access to the premises per a letter from York's attorneys albeit with conditions. Consequently, on or about 10 August 2023, Fibre Stream served a notice of removal from the urgent roll. On the applicant's version, despite York's undertaking on 7 August 2023, York again refused the applicant access to the premises on 11 August 2023.

[1] 85 of 1993.

[8] However, the letter from York's attorneys dated 7 August 2023, records at para 3 thereof as follows:

> "Your client must please arrange the access with my client's employee, Mr. Jarrod Piel who will instruct the caretaker of the building accordingly. Your client or its employees/contractors must please provide its/their OHSA documentation/certifications (safety file) before my client will allow the people on the roof. At a minimum, these documents/certifications must include a "working at heights" certification for the person(s) concerned".

[9] According to York's version, the applicant did not comply with paragraph 3 of the letter in that there was no request received from the applicant to access the building on 11 August 2023 but on 12 August 2023. The applicants' representatives did not attend the building on 11 or 12 August 2023, but only attended on 28, 29 and 30 August 2023, on which dates they were allowed to access the building.

[10] According to York, another dispute is the agreement. It was the obligation of the applicant to pay the electricity costs of running the equipment over and above any rental. The respondent holds this position based on the wording of the lease agreement. This is based on clause 8.8 which provides that, "[t]he lessee will have his Electrician, install a meter as well for the equipment". According to York, the applicant was to create a unique circuit for their equipment and to install a meter on the circuit so that proper accounting could be made for that circuit's usage. York contends that, when read together, over and above its rental obligation, the respondent must provide access to the main power to power the equipment on the mast in respect of which the applicant is responsible for electricity consumption. In reply, the applicant contends that the aspect of electricity consumption has no relevance to this application as it has not been placed in breach.

[11] The trite position in our law is that to obtain final interdictory relief, the applicant must illustrate (i) a clear right; (ii) an injury committed or reasonably apprehended; and (iii) the absence of an alternative remedy.[2] The so-called *Plascon-Evans* test is to be applied and is of relevance. It is well established that an interdict is not a remedy for past invasion of rights but is concerned with present or future infringements.

[12] On common cause facts, the applicant accessed the premises on 14 and 17 August 2023. The respondent further alleges that the applicant's representatives accessed the premises on 28, 29 and 30 August 2023, which is not challenged.

[13] Importantly, as the respondent contends, the applicant is not without access to an alternative remedy. In the event of a breach, the applicant can approach the court for specific performance in terms of the contract. It stands to reason that, the interdictory relief sought in the application must fail and stands to be dismissed with costs. Similarly, the costs for the aborted urgent application, which was withdrawn on these facts, are unjustified.

[14] Order

The application is dismissed with costs.

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TP MUDAU

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

Date of Hearing: 06 May 2024

Date of Judgment: 10 May 2024

[2] See *Setlogelo v Setlogelo* 1914 AD 221 at 227

APPEARANCES

Counsel for the Applicant:	Adv. CRD Thomas
Instructed by:	Keith Sutcliffe and Associates Inc
Counsel for the Respondent:	Adv. C D'Alton
Instructed by:	Welman & Bloem Incorporated