IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.
(3) REVISED.

DATE **SIGNATURE**

CASE NO.: 52176/2021

Case Heard: 9 February 2023

Judgment: 1 March 2023

In the matter between:

RIVERWALK OFFICE PARK (PTY) LTD Applicant/Plaintiff

and

THE REGENCY APARTMENT HOTEL (PTY) LTD 1st Respondent/Defendant

RODNEY WOLMER 2nd Respondent/Defendant

NOMAWETHU BOLANI 3rd Respondent/Defendant

JUDGMENT

1. This summary judgment application at first glance concerns itself with whether the impact of the Covid-19 pandemic, could entitle a commercial tenant, alleging to have lost, at least partially the envisaged or agreed use of leased premises, to cancel or claim a remission in rentals, notwithstanding the express terms of the written lease prohibiting this.

2. That question becomes less relevant, however, at least at the summary judgment stage, where the landlord has, in response to an attempt to unilaterally cancel, locked its tenant out, premised on a claim by the plaintiff to have acted, on own accord, on its landlord's hypothec.

3. This is an opposed application for summary judgment. The plaintiff is the applicant and the first, second and third respondents are respectively the first, second and third defendants in the action. The fourth defendant has not entered an appearance to defend and default judgment has been granted against the fourth defendant. I herein therefore do not concern myself with the fourth defendant.

4. The second and third respondents signed surety for the indebtedness due by the first respondent to the applicant. From the plea, filed by the defendants, it appears that separate defenses were raised on behalf of the sureties, but Mr. Hershensohn, appearing for the defendants, conceded that for purposes of summary judgment the sureties stand and fall by my decision in respect of the principal debtor.

5. The plaintiff and the first defendant entered into a written lease agreement. The lease is attached as annexure “A” to the plaintiff’s particulars of claim. The first defendant let premises situated at Block A, Ground Floor, South Wing, Riverwalk Office Park, Matroosberg Road, Ashlea Gardens Extension 6, measuring 811 square meters together with another portion in the same premises (herein “the premises”) from the plaintiff. The lease commenced on 1 July 2019 and would terminate on 31 August 2022.

6. Pivotal to this case is the following issue. On 29 October 2020, the attorneys for the opposing defendants wrote a letter to the plaintiff. In the letter the defendants confirm the existence of the lease. The opposing defendants point out that the lease requires the defendants to use the premises for administrative offices and parking and for no other purpose whatsoever. Paragraph 4 of the letter then claims that it is common cause that the first defendant used the premises as a conference facility to accommodate up to 120 delegates. The first defendant confirms that it altered the premises since 1 July 2019 to suit the business activities of the first defendant, being a conference facility which it alleges was done with the consent of the plaintiff.

7. In the same letter the first defendant alerts the plaintiff to the fact that, as from 15 March 2020, in accordance with Government Gazette Number 43096 a National State of Disaster was declared. The first defendant lists several dates recording the different levels of lockdown that were implemented from time to time. With reliance of the principle of “*force majeure*”, as contained in the definitions of the lease, the first defendant claims that the lockdown qualifies as force majeure.

8. If one considers the definition, as it appears under the definition clauses in the lease, this contention appears to be correct, because the definition of "*Force Majeure"* includes "*official declared state of emergency*" (clause A1.1.10).

9. The definition in the lease, however, does not assist much, because there is no further reference in the remainder of the commercial lease to the term "*force majeure*", or at least I could not find such a reference and counsel for the plaintiff and the opposing defendants could not point out such a reference. The only relevance therefore is that it was agreed that the official declared state of disaster constitutes an event of force majeure.

10. In the letter of 29 October 2020, the attorney for the opposing defendants claims that a lessee is entitled to a remission of rent if there is a loss of use of enjoyment due to force majeure or *casus fortuitous*. Further legal submissions are made in the letter and then the following paragraphs are relevant for purposes of this judgment, which I quote:

> "*18. Our client is prevented by the above to make use of the property concerned. Insofar as our clients listed above are concerned as guarantors, their obligations are equally suspended. Our client is not able to conduct its business or to fulfil its obligations. It is furthermore due to the publication of the Covid-19 Regulations and National State of Disaster in the Government Gazette of 15 March 2020 that precludes our client from opening and conducting unrestricted business prior to the entire suspension of the National State of Disaster.*
>
> *19. The contract concluded between our clients specifically makes provision in the definitions for Force Majeure. In terms of the common law, or client is entitled to cancel the agreement concluded between the parties. It is our*

instructions, to inform you, as we hereby do, that our client hereby cancels the agreement concluded with Riverwalk Office Park (Pty) Ltd with immediate effect due to force majeure."

11. This is the bone of contention between the parties. The plaintiff claims that it did not accept the attempt to cancel and that it insists on specific performance. In the present action it sues for arrear rentals as from January 2021 up until September 2021, being as from approximately two months after the "purported" cancellation. Premised on a thoroughly researched exposition of the applicable case law Mr. Gibbs, in court, argued that:

11.1. the defendants cannot rely on a supervening event of force majeure or vis major premised on the word and letter of the written agreement and the plaintiff is protected by the well-known Shifren-principle.

11.2. that the first defendant had no entitlement to resile from the agreement because the leased premises could still be utilised for its purpose, which on a strict interpretation of the agreement was to be used for, and I quote:

"*The Tenant shall use the Leased Premises for administrative offices and parking and for no other purpose whatsoever.*"

12. During argument, and by means of a supplementary set of heads of arguments, referencing *inter alia* the case of Hansen, Schrader & Co. v Kopelwitz 1903 TS 707[1], the plaintiff argued that the purpose for which the property was let, is relevant. This, so the argument went, is true because during the period in respect

[1] In that case the purpose for which the business premises were let, were relevant, since it also concerned two bars and a restaurant, which had to be closed during the war by proclamation. I resulted in a remission of rentals during the period of non-use.

whereof arrear rentals are being claimed, the different levels introduced did not impact upon the ability of the first defendant to use the premises for “administrative offices”. Since the agreement contains a non-variation clause, I am prevented from investigating the true and actual use of the property during the period of the lease, so it was further argued.

13. Although my decision later herein, does not require me to investigate the argument proffered, I cannot turn a blind eye on the evidence presented in the defendants’ plea and answering affidavit.

14. In respect of the actual use of the property, I am requested to negate what the opposing defendants have to say in their affidavit opposing summary judgment. This is set out in paragraph 3 of the answering affidavit. The defendants say that the property was leased with the knowledge and permission of the plaintiff and altered at the first defendant’s expense for the specific purpose of holding conferences and use it as a conferencing venue. That, according to the opposing defendants became the sole purpose of the agreement. It is said that it was a term of the agreement that the premises leased was to be a conference facility, designed and built for the purposes of hosting conferences of approximately 120 to 180 persons. They claim that to demonstrate this the first defendant intends to adduce expert evidence in this regard.

15. The notion that the use was changed is further premised on an allegation in the opposing affidavit that there was an addendum to the agreement where it was expressly recorded that the premises were to be used for a conference facility and ancillary services.

16. There is no such addendum attached to the answering affidavit nor to the plea wherein these contentions are also set out. Although the version may lack some credibility, I cannot, however, at the summary judgment stage ignore the possibility that such an addendum may exist, and it may be discovered at some later stage. All that the defendants, at this stage, must do is to *"at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence." [see: Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426A - E].*

17. The defendants are not required to provide all the evidence upon which they intend to prove their contentions. I also do not deem it apposite to for purposes of summary judgment ignore the positive averment that the premises were in fact used for purposes of conference facility, and that this occurred with the knowledge and consent of the plaintiff landlord.

18. A slightly more important consideration will be this. Could the opposing respondents ever have acquired the right to have unilaterally cancelled the agreement premised on the first respondent's so-called inability to use the conference facility "*fully*" during the different stages and levels of the lockdown. Considering the express terms of the lease agreement, I find it doubtful whether a cancellation premised on that notion would be proper. This is *inter alia* so, because the common cause lease between the parties contains the following clause:

"*A31.1 Save for the Landlord, its principals, directors, employees, licensees, contractors, agents and/or any other similar category of persons, gross negligence or willful misconduct, the Tenant shall have no claim or right of action of whatsoever nature against the Landlord, its principals, directors, employees, licensees, contractors, agents and/or any other similar category of person for damages, loss or otherwise, nor shall it be entitled to withhold or defer payment of rent or any other amounts due in terms of this Lease, nor shall the Tenant be entitled to a remission of rent or any other amounts due in terms of this Lease, by reason of an overflow of water supply or fire or any leakage or any electrical fault or by reason of the elements of the weather or by reason of the Leased Premises or any other part of the Building or development being in a defective condition or falling into disrepair or any particular repairs not being effected by the Landlord or by reason of there being any defect in the equipment of the Landlord or as a result of any other cause whatsoever.*"

19. It was argued that "*any other cause whatsoever*" would include the inability of a partial use and enjoyment of the building due to the ongoing Covid-19 restrictions. As such, it was argued by Mr. Gibbs for the plaintiff that the cancellation was not well-founded. On a strict interpretation of the lease, this may very well be the case, but the events that took place after the so-called cancellation, do not require me to decide on the cancellation issue.

20. In any event, with reference to the recent case of *Freestone Property Investments (Pty) Ltd v Remake Consultants and Another 2021 (6) SA 470 (GJ)* a summary judgment seems not be the correct approach in circumstances where, due to the laws of the lands, the exercise of the respective rights of the parties for use and enjoyment has become restricted or impossible. In the quoted case, the Johannesburg Division of this Court dealt with alike circumstances. It had to do

with a clause that is identical to the clause quoted on paragraph 18 above. In paragraph 46 of that judgment, the following was mentioned:

"*46. Given the stringent and extraordinary nature of summary judgment proceedings, I am unable to find that these clauses, including clause 22.1, are so clearly applicable to the situation that presented itself that summary judgment should be granted. A more restrictive interpretation of the clauses might be called for. I have already emphasised the potential bilateral incapacity of the plaintiff and the first defendant to perform their respective obligations as lessor and lessee. Questions arise whether the clauses, correctly interpreted with recourse to such evidence as is admissible in aiding the interpretative exercise, which is now more generously received than before, does permit the plaintiff as lessor to claim rental for a period for which it may not have been able to tender lawful occupation. The plaintiff states in its affidavit that it has already granted discounts in respect of the rental during the period of the national disaster. Although the plaintiff states that it was not obliged to do so, it nonetheless did so and this may constitute subsequent conduct that can aid in the interpretation of clause 22 and the lease agreement generally, even in the absence of ambiguity…*"

21. In such an instance, the approach therefore at the summary judgment stage ought to be that one has to consider that both the plaintiff and the first defendant were impeded, albeit partially, in complying with their reciprocal duties. What the impact thereof should be, on a possible remission in rental or not, can only be determined at a future hearing. Whatever the addendum, as alleged, says, if it exists, which is not a question that I can decide upon, is something that needs to be determined in an upcoming trial.

22. On a strict interpretation of the lease agreement, it could be found in the future that the first defendant was not entitled:

22.1. to cancel the lease as it did; and/or

22.2. to claim a remission of rentals.

23. That is not the end of the enquiry. In this case, none of the above issues constitute the real basis upon which I intent to grant the defendants leave to defend the pending action.

24. Bearing in mind that summary judgment is claimed in respect of alleged arrear rentals from the period of January 2021 until October 2021, the following event is pertinently relevant to my decision. In paragraph 5 of the particulars of claim, the plaintiff makes the following positive averment:

> "*The Plaintiff complied with all its obligations in terms of the Lease Agreement and duly gave the First Defendant occupation of the leased premises. Notwithstanding claims by the First Defendant that they have cancelled the Agreement of Lease, which is in any event denied, the First Defendant is still in occupation of the leased premises and is the Plaintiff not able to relet the premises to a third party….*"

25. If the evidence of the defendants, as set out in the answer to the summary judgment application, is to be accepted, the notion that the plaintiff complied with the lease agreement and that the first defendant is still in occupation of the leased premises is plainly incorrect. In paragraph 3.24 of the answering affidavit, the first defendant tells this court that once the letter of cancellation was received by the plaintiff, it proceeded to lock the conference center and applied chains to the doors

of the venue effectively prohibiting access thereto to the defendants, their employees or any other person acting on their behalf.

26. This is for present purposes undisputed. In argument it was accepted that this event occurred. The plaintiff argues that it did so to protect its landlord's hypothec in respect of the movable goods that were in the premises.

27. Upon being questioned in that respect, counsel for the plaintiff conceded that his client was not entitled to take the law in own hands. It was, however, argued, that since in a subsequent letter, delivered after the lockout, the plaintiff insisted on specific performance and sought an undertaking that the defendants were to return to the premises and continue with trade, the act did not constitute a locking out, but rather a "locking in" of the movables. It was argued that the letter of the plaintiff constituted an apparent insistence on specific performance and the locking out was simply an act to protect the hypothec.

28. The latter argument requires scrutiny.

29. The plaintiff's approach seems to be premised on a general misapprehension of the applicable law in this respect. The notion that a landlord, without the intervention of a court of law, can take steps to protect its tacit hypothec is plainly wrong and offends the common law principles which apply in this respect. In the case of *Kleinsakeontwikkelingskorporasie Bpk v Santambank Bpk 1988 (3) SA 266 (C)* Tebbutt J considered the same issue. I quote from page 270 and further:

> "*Dit word egter geleer dat, alhoewel die verhuurder se hipoteek outomaties ontstaan wanneer die huurgeld agterstallig raak oor die goed*

van die huurder, of 'n derde in die omstandighede hierbo uiteengesit, wat op die verhuurde perseel deur die huurder gebring word, dit nodig is alvorens die verhuurder dit kan afdwing, of die 'voordeel' van die hipoteek kan verkry, dat hy dit moet perfek maak of bevestig deur 'n bevel van 'n bevoegde hof (sien De Wet & Yeats (op cit op 322); Van der Merwe Sakereg op 497 - 8; Kerr The Law of Sale and Lease (1984) op 257 - 8; Lee & Honoré Family, Things and Succession para. 486; Joubert (red) Law of South Africa band 17 para. 509; Cooper SA Law of Landlord and Tenant op 174, 175).

Kerr stel dit so:

'The hypothec comes into existence automatically, ie without the intervention of the court but, apart from the fact that there is a valuable preference on insolvency over goods subject to the hypothec at the date of sequestration, the benefit is not automatically obtained. To enable the creditor to get the benefit of his hypothec attachment by process of court is necessary.'

Cooper sê so op 174:

'To render this hypothec legally effective a lessor must by judicial process perfect his hypothec over the invecta er illata while they are still on hired premises.'

en op 175 sê hy:

'A lessor's hypothec comes into operation as soon as rent is owing, but to perfect this hypothec over invecta et illata the lessor is required to obtain a judicial order and, in the absence of such an order, the goods may be removed and the security is lost.'

Lee & Honoré stel dit kortliks so:

'The landlord's tacit hypothec is secured by judicial attachment of the movables while on the premises or in the act of being removed.'

Al die skrywers steun vir hulle gesag op die bekende Appélhofbeslissing in Webster v Allison 1911 AD 73 wat in talle sake daarna met goedkeuring aangehaal is (sien bv Reddy v Johnson (1923) 44 NLR 190; Frank v Van Zyl 1957 (2) SA 207 (K); Elliott Bros (EL) (Pty) Ltd v Smith 1958 (3) SA 858 (OK); Barclays Western Bank Ltd v Dekker and Another 1984 (3) SA 220 (D)."

30. The judge then refers to several other similar decisions and concludes with the following words on page 271:

"*Ek is derhalwe van mening that the applikant toe die masjiene nog op die perseel was, of terwyl hulle daaruit verwyder geword het, daarop beslag moes gelê het of deur die verkryging van 'n interdik of by wyse van 'n bevel van beslaglegging. Dit is gemene saak dat 'n bevoegte hof nie die applikant se stilswyende hipoteek perfek gemaak of gevestig of bevestig het nie.*"

31. To perfect the tacit hypothec an interdict had to be obtained, alternatively an order authorizing the attachment should have been obtained. My view in this regard is supported further by a decision of the full court of this division in *Eight Kaya Sands v Valley Irrigation Equipment 2003 (2) SA 495 (T)*, where I read from page 514:

"*My gevolgtrekking is dat die verhuurder, sodra huurgeld agterstallig raak en vir solank as dit agterstallig bly, 'n beperkte saaklike sekerheidsreg verkry oor die invecta et illata van die huurder, waarby onder gepaste omstandighede die goed van 'n derde ingesluit is. Hoewel dit 'n saaklike reg is, is dit minder omvangryk as bv eiendomsreg en ook onseker in die sin dat die objek van die reg van dag tot dag kan wissel (bv die voorraad in 'n winkel) en dat die huurder die reg heeltemal kan verydel deur selfs*

voor die oë van die verhuurder die goed van die perseel te verwyder sonder dat hy iets daaraan kan doen. Die verhuurder kan nie eie reg toepas nie, en sy enigste remedie is om 'n interdik of beslagleggingsbevel te verkry en blykbaar ook te beteken voordat die goed hulle bestemming bereik. Aan die ander kant geniet hy egter die volkome beskerming van 'n saaklike reg vir solank as die goed op die huurperseel bly…"

[my underlining]

32. Again, the requirement that an attachment order or interdict is required to be obtained to be able to hold the movables under attachment. Without an interdict or attachment, a lessee is free to remove its goods and do whatever it wants with its property situated in the leased premises. It follows that, on the common cause accepted facts before this court, the plaintiff had taken the law in own hands.

33. In my view the locking out must be seen in the following light:

33.1. it constituted unlawful conduct, in that the plaintiff landlord decided to take the law in own hands and not approach a court of law to first perfect the landlord's hypothec.

33.2. by "locking in" the movable goods (whatever that may mean) within the leased premises, the first defendant was locked out. It could not freely access the premises.

33.3. objectively viewed, although I do not pronounce on this issue, it may very well be regarded as a repudiation of the agreement, bearing in mind that an insistence on specific performance, on the one hand, with a locking out

on the other hand operates mutually destructive. It *prima facie* and objectively conveys the intention (notwithstanding anything to the contrary written in a letter), that the plaintiff did not deem itself bound by its obligation to provide undisturbed possession.

33.4. for as long as the locking out continued (and this might have been the case until the end of the lease) the plaintiff did not give the first defendant occupation of the premises and was accordingly in breach of an obligation of the lease and was not entitled to insist on the first defendant complying with its reciprocal duties.

34. No evidence is provided in any of the papers, presently before this court, for what period the locking out of the premises may have endured, but there is certainly nothing before court indicating that the plaintiff had removed the chains to the premises, allowing again free and undisturbed access.

35. Against this issue, I am of the view that none of the other defenses need much more scrutiny, because the plaintiff did not come to court, on a conceded version, with clean hands. The question whether the first defendant remained bound by the agreement, after the locking out, most certainly constitutes a triable issue. As such, this is a case where the first to third defendants ought to be granted leave to defend.

36. I mention, at this stage, that I do not deal with any of the further defenses raised. It may or may not have merit, but Mr. Hershensohn, who appeared with Miss Stroebel, in a well-presented argument, and with reference to a case of the

Supreme Court of Appeal of South Africa,[2] argued that the plaintiff was not required to "prove" its defenses. I agree with his view.

37. This leaves the question of costs. The first to third defendants argue that where a plaintiff knew that the respondent relied on a contention that would entitle it to leave to defend, costs on an attorney and client scale ought to be granted against such a plaintiff. Further that the action be stayed until such costs have been paid. That discretion I have in terms of Rule 32(9)(a).

38. The opposing defendants' reliance in this case on the right to a unilateral cancellation premised on the notion of "*force majeure*", is not supported by any of the terms of the written lease and is therefore doubtful. In the absence of a copy the somewhat vaguely pleaded addendum, the plaintiff sought to convince me, that I am not entitled to look beyond the four corners of the written agreement. Had it not been for the locking out event that took place, the issues on summary judgment might have been different.

39. Although inconsistent with the applicable legal principles, the notion that the plaintiff believed that it was entitled to protect its landlord's hypothec was defended even during argument in court. The fact that such view might be ill-advised does not allow the inference that the plaintiff "knew" that the defendants would be entitled to leave to defend. In the plaintiff's view, most of the issues only required legal argument, even the locking out, so the plaintiff argued, and should not be

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[2] *Andries Visser and Another v Ereka Kotze (519/2011) (2012) ZASCA 73 with reliance on para. 11 of the judgment emphasized that the defendant only needs to set out a bona fide defense and that the word "satisfy" does not mean "prove". The only requirement is that the defendant must set out in his/her affidavit facts, if proved at the trial, will constitute an answering to the plaintiff's claim.*

raised as a challenge, since it was accompanied by pertinent written insistence on specific performance.

40. As such I am not inclined to grant the costs as requested.

41. I issue the following order:

41.1. The summary judgment is refused.

41.2. The first to third defendants are granted leave to defend.

41.3. The costs of the summary judgment application shall be costs in the cause.

_____

D VAN DEN BOGERT
Acing Judge
High Court of South Africa
Gauteng Division, Pretoria

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