

SOUTH AFRICA / JUDGMENT

Azam and Friends (Pty) Ltd v Boardwalk Mall Consortium (423/2024) [2024] ZAECQBHC 13 (15 February 2024) [2024] ZAECQBHC 13

COURT

Eastern Cape High Court, Gqeberha

BEFORE

N G Beshe

CASE / FILE NUMBER

423/2024

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE
DIVISION, GQEBERHA)
CASE NUMBER.:
423/2024
In

the matter between:

AZAM
AND FRIENDS (PTY) LTD
Applicant
And
BOARDWALK
MALL CONSORTIUM
Respondent

JUDGMENT

Beshe J

[1] Applicant who is a tenant at the Boardwalk Mall, Gqeberha where he runs a business at one of the shops in the mall approached this court on an urgent basis for an order in the following terms:

‘1. Condoning the applicant’s non-compliance with the Rules of this Honourable Court as regards the time limits, forms and service and disposing of this matter as one of urgency.

2. That a rule nisi hereby issued whereby the respondent is called to show cause on +++ at 09h30 as to why an order in the following terms should not be made:

2.1 That the respondent is ordered to immediately restore the electricity to shop number SH10L044A and shop number SH10L043 at the Boardwalk Mall, Summerstrand, Gqeberha.

2.2. The applicant's undertaking to forthwith make payment of R17 037.93 in respect of the outstanding utility account for shops numbers SH10L044A and SH10L043, at the Boardwalk Mall, Summerstrand, Gqeberha, and to forward proof of such payment to the general manager at the Boardwalk is noted.

2.3. A declaration that the respondent's cancellation of the current contract between the parties as alleged on 12 January 2024 constitutes a repudiation, which is not accepted by the applicant.

2.4. That the respondent is hereby interdicted and restrained from evicting the applicant from shop number SH10L044A and/or SH10L043, at the Boardwalk Mall, Summerstrand, Gqeberha, until:

2.4.1. The respondent renders an account of all outstanding money owed by the applicant to the respondents, a debatement of such an account, and an inability of the applicant to pay such account within one month of the final agreement of the correct outstanding amount.

2.4.2. Alternatively, to sub-paragraph 2.4.1. and in the event that the parties cannot reach an agreement on the outstanding amount, then on the finalisation of an action to be instituted by the applicant within 30 days of such debatement, to determine such outstanding amount, if any, in conjunction with the determination of the validity of certain clauses in the agreement which the applicant contends are against public policy and unlawful.

2.5. Costs of the application, only in the event that the respondent opposes.

2.6. Such further or alternative relief as this Honourable Court deems necessary.

3. That sub-paragraph 2.1. above shall operate as an interim interdict pending the finalisation of the application.

4. That the applicant is granted leave to supplement his founding papers if so advised.

5. Granting such further and/or alternative relief as this Honourable Court deems appropriate.'

[2] The issuing of the rule nisi is opposed by the respondent.

[3] It was contended on behalf of the respondent that the applicant has not made out a case for urgency and for that reason the matter should be struck off the roll or application dismissed. It being alleged that the matter lacks urgency or the urgency is self-created. Applicant having been served with a notice or letter that the lease agreement between the parties has been cancelled on 12 January 2024.

- [4] Applicant complains that he did not get 14 days' notice that the electricity will be disconnected due to the fact that the email in question did not come to his attention. I do not propose getting into the details of why he did not read the email that was sent to him in this regard. This, in view of the fact that prayer 2 of the notice of motion has since fallen away because electricity has since been restored at applicant's business.
- [5] In so far as this has a bearing on urgency, applicant makes the point that an application for the restoration of electricity is always urgent but more so in this case because: The absence of electricity prevents the applicant from trading and his workers from earning a living; their supplies comprising of food is rotting; they cannot prepare food, in any event it is too hot in the shop for the customers.
- [6] Furthermore, in a letter addressed to the applicant dated 8 February 2023, which is annexed to the founding affidavit as annexure AM2, the following is recoded:

'The lease agreement was duly cancelled, effective from 12 January 2024; Applicant is required to vacate the leased premises by no later than 8 March 2024.'

In my view, these factors justified the application being heard as an urgent one. According to the applicant, it was only after the electricity was cut off on 9 February 2024 that he set out to check whether there has been communication regarding the disconnection from the respondent. He thereafter sprang into action by launching the application.

- [7] In my view, the applicant has made out a case for the granting of prayer 1 of the notice of motion.
- [8] The remaining prayers concern the cancellation of the lease agreement. As I understand its case, on the basis that the cancellation was unjustified because applicant does not owe any monies to respondent or there is a disagreement about what applicant owes or what is due in terms of the contract. He denies that he is in breach of the contract. Asserting that it is respondent who repudiated the contract, which repudiation is not accepted by the applicant.
- [9] One of the prayers under 2.4.2 applicant contemplates action to inter alia determine the validity of certain clauses in the agreement Mr Azam contends are against public policy and unlawful. In the founding affidavit, the applicant does not state which clauses of the agreement are impugned and why it is contended such are contrary to public policy. Submissions were made in this regard during argument. But a point is also made that the applicant was not provided with a copy of the agreement. Submissions were made after applicant's counsel became privy to the contract which was annexed to respondent's answering affidavit. The contract annexed by the respondent to the answer has a missing page. The one provided to applicant's counsel has two missing pages. I am of the view that this justifies the request by applicant to be allowed to supplement its papers.

- [10] This has prompted the respondent to submit that no evidence, no allegations to support the assertion that some of the clauses of the agreement are contrary to public policy and therefore, the applicant has not made out a prima facie case justifying the issue of a rule nisi in this regard. But we now know that applicant was not provided with a copy of the contract.
- [11] It is my considered view that on the face of it the applicant has made out a case for the issue of the rule nisi as sought. I have already made a determination that the matter is sufficiently urgent to be heard as such.
- [12] Accordingly, there will be an order in the following terms:
1. Condoning the applicant's non-compliance with the Rules of this Honourable Court as regards the time limits, forms and service and disposing of this matter as one of urgency.
 2. It is recorded that the applicant's electricity was restored by the respondent at or about 14h45 on 12 February 2024 after the payment of R17 037.93.
 3. That a rule nisi hereby issued whereby the respondent is called upon to show cause on 5 March 2024 at 09h30 as to why an order in the following terms should not be made:
 - 3.1 A declaration that the respondent's cancellation of the current contract between the parties as alleged on 12 January 2024 constitutes a repudiation, which is not accepted by the applicant.
 - 3.2 That the respondent is hereby interdicted and restrained from evicting the applicant from shop number SH10L044A and/or SH10L043, at the Boardwalk Mall, Summerstrand, Gqeberha, until:
 - 3.2.1. The respondent renders an account of all outstanding money owed by the applicant to the respondents, a debatement of such an account, and an inability of the applicant to pay such account within one month of the final agreement of the correct outstanding amount.
 - 3.2.2. Alternatively, to sub-paragraph 2.4.1. and in the event that the parties cannot reach an agreement on the outstanding amount, then on the finalisation of an action to be instituted by the applicant within 30 days of such debatement, to determine such outstanding amount, if any, in conjunction with the determination of the validity of certain clauses in the agreement which the applicant contends are against public policy and unlawful.
 - 3.3. Costs of the application.
 - 3.4. Such further or alternative relief as this Honourable Court deems necessary.
 4. The respondent undertakes to provide the applicant with a copy of the contract on or before 15 February 2024.
 5. The applicant is granted leave to supplement its papers on or before 20 February 2024.
 6. The respondent will deliver its answering affidavit, if any, on or before 29 February 2024.
 7. The applicant will deliver its replying affidavit, if any, on or before 4 March 2024.

8. Costs of today are reserved.

N G BESHE

JUDGE OF THE HIGH COURT

APPEARANCES For the Applicant Adv: E. Crouse Instructed by KUBAN CHETTY INC. 163 Cape Road Mill Park GQEBERHA Ref: Jenna/Natasha Tel.: 041 – 373 1407 For the Respondent Adv: I. Lambrechts Instructed by REAAN SWANEPOEL INC C/o VAN HEERDENS ATTORNEYS 147 Cape Rd Glendinningvale GQEBERHA Tel.: 041

- 007 0923 Date Heard 13 February 2024 Date Reserved 13 February 2024 Date Delivered 15 February 2024

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