

SOUTH AFRICA / JUDGMENT

Basenzi Construction CC t/a Power Wheel and Tyre and Another v Hofmil Investments (Pty) Ltd Hofmil 4 (Warehouse) (3573/2016) [2017] ZAGPPHC 848 (10 November 2017)

[2017] ZAGPPHC 848

COURT

North Gauteng High Court, Pretoria

BEFORE

Van der Schyff

CASE / FILE NUMBER

3573/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO.: 3573 /2016

DATE:

10/11/2017

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matters between:

BASENZI

CONSTRUCTION CC t/a POWER WHEEL AND TYRE

(REG

NI: 2002/081957/23) 1ST
APPLICANT
WINKIE
AMOS PETA
(...) 2ND
APPLICANT
and
HOFMIL
INVESTMENTS (PTY) LTD HOFMIL 4(WAREHOUSE)
(REG
N0:1959/002691/07) RESPONDENT

HEARD: 19 October 2017

DELIVERED: 10 November 2017

JUDGMENT

Coram: Van der Schyff AJ

- [1] This is an application for condonation of the late filing of an application for rescission of a default judgment, and the late filing of a replying affidavit, and the subsequent rescission of default judgment. Due to the fact that the second applicant appeared in person this judgment is comprehensive.

THE

FACTS:

- [2] Summons was issued against the applicants on 19 January 2016. The summons was served on the applicants on 17 February 2016.
- [3] Plaintiff claimed R328 635.17 for loss of rent and 'holding over damages' based on two lease agreements concluded between plaintiff and first defendant. Second defendant provided a written suretyship for first defendant's liabilities towards plaintiff. By the end of September 2016 applicant was in arrears of the amount of R 708 417.74.
- [4] If the applicants wanted to defend the action, a notice of their intention to defend had to be delivered on or before 2 March 2016. Default judgment was granted on 31 March 2016 since no notice of intention to defend the action was delivered by the defendants.
- [5] The applicants became aware that judgment by default was granted against them on 17 June 2016 when the writ of execution was served upon them. The application for rescission was filed on 27 July 2016. The application had to be instituted before 15 July

2016. No application for condonation accompanied the late filing of the application for rescission of judgment. Respondent filed a notice of intention to oppose on 11 August 2017. The opposing affidavit was served on 5 September 2017.
- [6] The matter was subsequently set down (by the respondent) for hearing on 31 May 2017. On this date the second applicant appeared in person, representing himself and first respondent. The court granted a final postponement order and applicants were ordered to deliver their replying affidavit together with an application for condonation of the late filing thereof. A supplementary affidavit and a replying affidavit were filed by the applicants. Since both these affidavits essentially deal with the same issues, and since the respondent received them respectively on 29 May 2017 and 31 May 2017 and had the opportunity to respond to all the statements made in these affidavits, the court will, due to the fact that the applicants were not represented by legal representatives, be extremely lenient and consider both these affidavits as constituting applicants' reply to respondent's opposing affidavit. I am however not going to consider the applicant's "application for leave to bring new information into the application for rescission of judgment" and its concomitant affidavit since the court rules have already been stretched to its limits in an effort to accommodate the applicant - and, the aspects raised in this affidavit have already been raised previously.
- [7] The matter was subsequently set down by the respondent for hearing on 16 October 2017. It was stood down and heard on 19 October 2017.

Ad applicant's condonation application

- [8] In the replying affidavit the applicants requested the court to condone the late filing of the motion.
- [9] It is important that the applicants must understand that condonation is not merely there for the asking. The condonation of non-observance of court rules is not a mere formality. A party seeking condonation must satisfy the court that there is sufficient cause for excusing the non-compliance. Whether condonation should be granted or not is a matter of discretion that has to be exercised having regard to all the circumstances of the particular case (*Torwood Properties (Pty) Ltd v South African Reserve Bank* 1996 (1) SA 215 (W) at 2288 - F). The applicants who are seeking an indulgence, are required to show good cause for condonation to be granted. Good (or sufficient) cause has two requirements. The first is that the applicants must furnish a satisfactory and acceptable explanation for the delay. Secondly, it must be shown that they have reasonable prospects of success on the merits (*United Plant Hire (Pty) Ltd v Hills and Others* 1976
- (1) SA 717 (A); *Federated Employers Fire & General Insurance Co. Ltd. and Another v. McKenzie* 1969 (3) SA 360 (AD) 362F-H).
- [10] The application for condonation of the late filing of the application for rescission of judgment as well as the application for condonation of the late filing of the replying affidavit are dealt with simultaneously.

Re: Satisfactory and acceptable explanation for the delay

[11] It seems as if the applicants had extreme misfortune pertaining to their choice of legal representatives. No less than 3 firms of attorneys represented the applicants during the course of this matter. In each instance the applicants were disappointed and let down by their legal representatives. This resulted in the applicants fending for themselves as the applicants parted ways with their latest attorney of record due to him not filing the replying affidavit. Although second applicant states in his replying affidavit that he sought new legal representation but was not successful due to time constraints, he stated during oral argument that none of the firms he approached were willing to represent him as they were of the opinion that non-compliance with the court rules was so severe that no court would grant condonation.

[12] It is unfortunate that the applicants do not give any indication as to the extent that they attempted to remind their legal

representatives to attend to their matters. Even when represented, a claimant or defendant cannot merely hand over his case to his legal representatives and stand back only to re-emerge at the dawn of the hearing of the matter. The court needs to establish whether the applicants have furnished the court with a satisfactory and acceptable explanation for the delay and the silence of the applicants pertaining to the extent of the effort to keep their legal representatives on their toes is not in their favour. I do not believe, however, that the non-compliances in question were so flagrant and gross that merely because of them the application for condonation should be dismissed without considering the appellant's prospects of success on the merits (see *Ferreira v Ntshingila* 1990

(4) SA 271 (A) 281J-282A and *Darries v Sheriff*, Magistrate's Court Wynberg, and another 1998 (3) SA 34 (SCA) at 44H-J). In the circumstances the fate of the condonation application will be dependent on the applicants' chances of success in the main application.

Re: Applicants' chances of success on the merits

[13] The applicants' defence is set out in their founding affidavit, and elaborated on in the replying affidavit.

[14] In considering the applicants' chances of success on the merits the court takes into consideration that the applicant initially went through much trouble to settle the matter. Since service of the summons an amount of at least R 337 000.00 have been paid over in favour of the respondent. In addition, a notice of offer of settlement in terms of Rule 34(1) & (5) was sent to the

respondents. This notice is attached to the applicants founding affidavit and is indicative of the applicants' intention to settle

the matter and continue with the lease agreements. Payments were made as late as 26 June 2016 and 14 July 2016.

[15] The applicants' defence essentially comes down to 4 main issues described in paragraphs [16]-[19] below.

[16] Defence 1: Applicants contend that they could not occupy the leased building on signature of the lease agreement due to structural and visible defects. Although these were brought to the respondent's attention nothing was done to rectify the situation. The building was not suitable for occupation and second respondent effected major renovations. According to applicants the building plans did not have dimensions, and were ineligible. Multiple layers of concrete were found that were not documented in the building plans and there was no Engineers Certificate that signed off the foundation slabs.

[16.1] Based on the information above, applicants contend that the lease is an invalid lease. Their case is that the building is an illegal structure and that the leasing thereof is a statutory violation. They also aver (without confirmatory affidavits supporting the claim) that the building has neither a proper building plan nor an occupation certificate.

[16.2] Applicants argue that they have severely been prejudiced by the lack of proper building plans in that the removal of the "undocumented sub-surface multiple layers of concrete" extended the completion date of upgrades undertaken by the applicants and depleted the business start-up budget.

[17] Defence 2: Prior to concluding the agreement the landlord did not reveal that several environmental hazards, such as urination, defecation on the building site, vandalism and drug 'infestation' was rife in the immediate area where the building is situated.

[18] Defence 3: Second applicant attended to all the defects and environmental and health hazards mentioned above and spent a considerable amount rehabilitating the building. (In the founding affidavit the amount of R1.95million is mentioned and in the replying affidavit the amount of R3.598million is mentioned.)

[19] Defence 4: The essence of this defence set out in applicants' replying affidavit is that the National Environmental Management Act: Environmental Impact Assessment Regulations, 2014 requires the developer of an area to inform businesses affected or to be affected by the proposed development, of the development. City Property, who is not a party to the proceedings before the court but a party who acted as intermediary when the lease agreements were concluded, did not disclose the impact of the development known as the 'Struben street shopping centre development'. Applicants contend that if they knew about this proposed development they would not have entered the lease agreement

[20] Ad defence 4: The issue raised here by the applicants is not connected to the respondent before the court. Even if the court accepts City Property's involvement in the Struben street shopping centre development, there is no link or nexus between this development and the respondent-plaintiff before this court. The court cannot find that merely because City Property acted as intermediary when the lease agreement was concluded that the plaintiff is liable for an omission on City Property's side. It is not to say that City Property represented

the plaintiff when it was engaged in the said development. This defence cannot be regarded as a bona fide defence for purposes of considering the condonation application.

- [21] Ad defence 3: In the case of *Business Aviation Corporation (Pty) Ltd and Another v Rand Airport Holdings (Pty) Ltd* 2006 (6) SA 605 (SCA) para 6 at 609 it was held: 'An appropriate starting point for a discussion of the questions raised by the appeal appears to be a statement of the generally accepted principle that in Roman-Dutch law, following Roman law, lessees were originally in the same position as bona fide possessors as far as claims for improvements to leased properties were concerned. It follows that absent any governing provisions in the contract of lease, lessees, like bona fide possessors, had an enrichment claim for the recovery of expenses that were necessary for the protection or preservation of the property (called *impensae necessariae*), as well as for expenses incurred in effecting useful improvements to the property (called *impensae utiles*) ... More pertinent for present purposes, lessees, like bona fide possessors, who were still in possession of the leased property, also had an enrichment lien (a *ius retentionis*) that allowed them to retain the property until their claims for compensation had been satisfied.'
- [22] Even if the court accepts that the applicants spent a considerable amount on rehabilitating the leased building, the reality of the matter is, as indicated by the respondent in its opposing affidavit, that it is expressly provided in the signed lease agreements in paragraph 8.1 thereof: 'The Tenant may not affect any improvements, alterations and/or additions ("Modifications") to the Leased Premises (including without limitation to the installation of shop fittings or decor, the air-conditioning units or the relocation thereof), without the prior written consent of the Landlord, which consent shall not unreasonably be withheld... Notwithstanding the provisions of clause 9, all modifications effected to the Leased Premises and /or Property shall become the Landlord's property and the Landlord shall not be obliged to compensate the Tenant in respect thereof.' In view of the above defence 3 cannot be regarded to be a bona fide defence for purposes of condonation application.
- [23] Ad defence 2: The applicants took occupation of the building and remained in occupation thereof, despite the nuisance set out in paragraph 16 above. They aver that the intermediary never disclosed the impact of these factors prior to concluding the lease agreement. The applicants essentially aver that the respondent, through his agent, withheld information pertaining to the environmental conditions that impacted on the business conducted from the leased premises. Even if this was found to be true, I am not convinced that this constitute a valid, and thus bona fide defence against the respondent- plaintiff's claim. Non-disclosure of vital information amounts to misrepresentation (*Stainer and Others v Palmer-Pilgrim* 1982 (4) SA 206 (0)). The applicable legal principle has been set out in *Bowditch v Peel and Magi*/11921 AD 561 at p572, Innes C.J held: 'A person who has been induced to contract by the material and fraudulent misrepresentations of the other party may either stand by the contract or claim a rescission. ...It follows that he must make his election between those two inconsistent remedies within a reasonable time after knowledge of the deception. And the choice of one necessarily involves the abandonment of the other. He

cannot both approbate and reprobate.' The environmental conditions complained about would have existed before and since the inception of the lease agreement. Applicants

chose to stand by the contract and cannot now claim a rescission. In view of the above defence 2 cannot be regarded to be a bona fide defence for purposes of the condonation application.

[24] Ad defence 1: Applicants claim that the building they leased was not suitable for the purposes they wanted to use it for. This claim is later extended to state that the lease agreement is invalid since the building that is the subject matter of the lease contract is an illegal structure because it does not conform to the Building Regulations and Building Standard Act, 1977 in that neither proper building plans, nor an occupational certificate exists. This claim is not substantiated by any confirmatory affidavit from the appropriate authorities. However the question is not whether the applicants can, at this stage, prove their defence on a balance of probabilities, but whether the defence if proven, would be a valid defence.

[25] It is trite, that to constitute a valid agreement the lease agreement must be legal. The question is thus whether a lease agreement

concluded over a building for which an occupational certificate has not been issued, would be legal? In *Hyprop Investments Limited and Another v NSC Carriers and Forwarding CC and Another* (2009/12568, 2009/47543) [2010] ZAGPJHC 20 (12 April 2010), as in the case before me, the respondent contended that 'occupation of each of the premises was given without the issue by the local authority of a certificate of occupancy in respect of the buildings in which each of the premises is situated'. The court held that 'The lease agreement the parties concluded, is not an illegal contract neither is it a nullity nor is it void ab initio.' Based on the decision in *Hyprop Investments Limited* I cannot find that non-compliance with the Building Regulations and Building Standard Act, 1977, if proved, will constitute a bona fide defence.

[26] In the final instance applicants' defence that the building they leased was not suitable for the purposes they wanted to use it for, needs to be considered. Even if it is accepted that the building had to be renovated before it could be occupied and even if it is accepted that the removal of the undocumented sub-surface multiple layers of concrete extended the completion date of upgrades, the reality is that the written agreement between the parties expressly stipulates in paragraph 4.4 thereof that the landlord does not guarantee that the 'Leased Premises are fit for the purposes of the business to be conducted by the Tenant or for any other purposes and this Agreement is not made conditional thereon.' Accordingly I cannot find that this is a bona fide defence.

[27] In view of the fact that. I cannot find that any of the defences offered by the applicants constitute bona fide defences against the respondent-plaintiff's claims, I cannot find that the applicants have succeeded in showing good cause for condonation to be granted.

ORDER:

[28] The application for condonation of the late filing of the application for rescission of judgment is dismissed with costs.

E VAN DER SCHYFF

Acting Judge of the High Court

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