

SOUTH AFRICA / JUDGMENT

Devondale Investments (Pty) Ltd v Ahmed NO and Another (17161/2008) [2009] ZAKZDHC 15 (13 May 2009) [2009] ZAKZDHC 15

COURT
Kwazulu-Natal High Court, Durban

BEFORE
Ndlovu

CASE / FILE NUMBER
17161/2008

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU NATAL, DURBAN

CASE NO. 17161/2008

In the matter between:

DEVONDALE INVESTMENTS (PTY) LTDAPPLICANT

and

NAFIS AHMED N.O.FIRST RESPONDENT

ZAHEEDA BANU AHMED N.O.SECOND RESPONDENT

J U D G M E N T

NDLOVU J

Factual

Background

- [1] This matter was set down on the expedited roll (for only one day) for the hearing of oral evidence on certain specified issues, having been referred as such in terms of a ruling made by Mnguni AJ (as he then was) in the opposed motion roll.
- [2] However, the hearing of oral evidence did not proceed. Instead both parties came up with interlocutory applications, raising preliminary issues which the Court had to consider and determine. The first was a substantive application moved by Mr Pillemer SC, on behalf of the respondents. That application related to an action for damages and other ancillary relief

instituted by the respondents (under Case No. 13413/08) against the applicant jointly with another corporate entity known as New Energy Petroleum CC in which the respondents alleged that the applicant had a controlling interest. In terms of that application the respondents sought an order consolidating the said damages action with the present matter so that both matters would be heard jointly. The respondents further sought more than one day to be accorded for the hearing of the consolidated matter, thereby suggesting that the case should be adjourned.

- [3] The second preliminary issue was raised by Mr Naidu SC, for the applicant, who sought the Court's indulgence effectively to reconsider the referral for oral evidence ruling and consider the matter on the papers. Mr Naidu's submissions in this regard were incorporated in his supplementary heads of argument which were delivered on the day of the hearing. Mr Naidu submitted that the matter was capable of being decided on the papers and that, in fact, it ought not to have been referred for the hearing of oral evidence in the first place. Hence he sought leave to reargue the matter on the papers. In this regard he referred me, in particular, to the decision in *Wallach v Lew Geffen Estates CC* [1993] ZASCA 39; 1993 (3) SA 258 (A).
- [4] I allowed counsel to address me on both the preliminary issues raised aforesaid and the merits of the main application at the same time.
- [5] In the main application the applicant sought an order ejecting the respondents from the leased premises (described hereunder) and any other person or entity occupying the premises through the respondents and payment of the sum of R143 032, 59. The pertinent facts thereto were briefly the following.
- [6] The applicant was the lawful owner of certain immovable property described for purposes of this case only as 138 Abedare Drive, Phoenix Industrial Park, Phoenix in Durban ("the property"). On 13 December 2005 the applicant leased part of the property for commercial purposes to a family trust known as ZA Ahmed Family Trust ("the Trust") in terms of a written lease agreement, a copy whereof was included in the papers. The lease agreement described the property which was the subject of the lease as "that portion of 138 Abedare Drive, Phoenix Industrial Park from which the filling station business is being operated" (clause 1.1), hereinafter referred to as "the leased premises". Concluding the agreement the applicant was duly represented by one Shaun Makadooj and the Trust represented by the two respondents in their capacities as the trustees thereof. Indeed, it was in their capacities as such that they were jointly sued as respondents herein. Hence, subject to the relevant context, the designations "the Trust" and "the respondents" are sometimes used interchangeably and synonymously in this

judgment.

- [7] The material terms of the lease agreement included the following, most of which the applicant sought to rely:

The lease period commenced from 1 January 2006 for a period of 5 years. As such the first rental was payable on or before 1 January 2006 (clauses 4.3 and 5).

7.2 The Trust could only use the leased premises for the purpose of conducting a filling station business and was not entitled to use the premises for any other purpose (clauses 7.1 and 7.2).

7.3 The Trust was entitled to preferential use of that portion immediately alongside the fuel pumps but was obliged to allow other occupiers of the property reasonable use and access to this property (clause 1.3).

7.4 The Trust was liable to pay to the applicant rental in the sum of R25 000 per month exclusive of value added tax, subject to an escalation at the rate of 10% per annum (clauses 3.1 and 3.2).

7.5 The rental was payable monthly in advance on the first day of each month without deduction or demand (clause 4.1 and 4.2).

7.6 The Trust was not entitled to withhold or delay payment of any amounts due to the applicant in terms of the lease and the Trust thereby abandoned all or any rights of set-off (clause 14).

7.7 The Trust was not entitled to effect any other improvements on the leased premises without the written consent of the applicant. In the event of the Trust effecting any improvements, it was not entitled to any compensation therefor. However, the applicant was entitled, on termination or cancellation of the lease, to retain the improvements without payment therefor or to request that the Trust remove the improvements. The Trust was not entitled to remove any improvements without the consent of the applicant (clause 9).

7.8 The Trust was not entitled to any claim against the applicant for any loss or damage which the Trust might suffer (clauses 12.1 – 12.7).

7.9 Should the Trust fail to pay the rental or any other amount in terms of the lease on due date, the applicant was entitled but not obliged, notwithstanding any previous waiver or anything to the contrary, to cancel the lease forthwith and retake possession of the leased premises (clause 20.1).

7.10 Should the applicant cancel the lease agreement with the Trust still remaining on the leased premises, the Trust would be liable to continue to pay all amounts due by it in terms of the lease to the applicant, which amount would be deemed to be damages suffered by the applicant by reason of the cancellation of the lease and for the unlawful holding over by the Trust (clause 21).

7.11 The lease agreement contained all terms and conditions of the agreement between the applicant and the Trust and no variation of the lease agreement would be binding unless it was reduced to writing and signed by both the applicant and the Trust representatives (clause 24).

7.12 A “special term” of the lease was that the lease might be terminated without notice at the election of the applicant if the Trust breached a term of the agreement concluded with New Energy Petroleum CC (clause 6.3).

- [8] The Trust took occupation of the leased premises on or about 1 January 2006 in terms of the lease agreement.

The Applicant's Submissions

- [9] The applicant alleged in its founding papers that the Trust was in breach of the lease agreement in that the Trust failed to render rental payments "from 1 March 2008 to date" and as a result the Trust was in arrears in the sum of R143 032,59, which was the amount claimed in the applicant's notice of motion (see paragraphs 20, 21 and 22 of the applicant's founding affidavit). The first respondent, on behalf of the respondents (and the Trust) responded as follows (which appeared to be the crux of the respondents' defence):

"I note the allegations contained in paragraphs 20, 21 and 22 of the said founding affidavit and wish to point out that there has been certain factors, mentioned hereinbelow, which rendered the premises unsuitable for the purposes for which it had been let that necessitated immediate urgent rectification and as a result of the extensive repairs to the site, the Trust's core business had to be shut down thereby causing the Trust excessive losses in respect of profitability and in respect of expenses and for which amounts the applicant and New Energy Petroleum are liable to the Trust, jointly and severally, for the reasons mentioned hereinbelow."

(Paragraph 13 of the respondent's answering affidavit.)

- [10] The applicant acknowledged that there was a lease agreement concluded between the Trust and New Energy Petroleum CC but submitted that such agreement had no bearing or relevance whatsoever to the current application and that any issues or problems which the Trust might have had with New Energy Petroleum CC were equally wholly irrelevant to this matter (paragraph 7(d) and (f) of applicant's replying affidavit). According to the applicant such complaint had to be taken up with Energy Petroleum CC (paragraph 12(c) and (d) of the replying affidavit).

The Respondents' Submissions

- [11] The respondents sought to link and tie the lease agreement which they had concluded with the applicant (in respect of the premises) and the lease agreement which they had concluded with New Energy Petroleum CC (in respect of the business on the leased premises). The respondents alleged that during the stage when the first respondent negotiated the rental of the premises (on behalf of the Trust) with the applicant, it was an express term of the envisaged agreement and common understanding between the parties during the negotiation process that the premises would be leased for the purpose of taking over a fully operational petroleum service station at the site. This was in accordance with the provisions of clause 7.1 of the lease agreement which stipulated that the premises "shall" be used for the purpose of conducting a filling station business. It was during that negotiation process that an arrangement was made that the lease transaction be divided into two: the lease in respect of the premises as between the

applicant and the respondents, on the one hand, and the lease in respect of the business of a petrol filling station as between the respondents and New Energy Petroleum CC, the latter being a separate corporate entity. The respondents averred, however, that inasmuch as there might not appear to be any correlation between the applicant and New Energy Petroleum CC it was clear that the effective control of both these entities (that is, the applicant and New Energy Petroleum CC) rested in the same individual, alternatively, set of individuals.

[12] Indeed, it was common cause that both lease agreements were signed on the same day, namely, 13 December 2005 and that the person who represented the respective lessors in both instances (being the applicant and New Energy Petroleum CC) was the same person, namely one Shaun Makadooj. In other words, the respondents suggested that the only reasonable conclusion in these circumstances was that the applicant had a controlling interest in New Energy Petroleum CC in one way or another.

[13] In the light of two letters (annexures “NA4” and “NA5” attached to the respondents’ answering affidavit), the contents of which are referred to hereunder it would appear that upon taking over the leased premises the Trust operated a business under the corporate name KZN Petroleum Products and Distributors CC. According to the respondents a number of problems arose in relation to the premises which rendered the premises unfit and unsuitable for the purpose for which they were let to the respondents. These problems were brought to the attention of the applicant in a letter dated 2 May 2007 which the respondents alleged they faxed to the applicant on the same day. The respondents included a copy of the letter in their answering affidavit (annexure “NA4”) but the applicant, in its replying affidavit, denied receipt of such letter and put the respondents to proof that the applicants did indeed receive the letter. The letter annexure “NA4” under the letterhead of “KZN Petroleum Products and Distributors CC” read as follows:

“DEVONDALE INVESTMENTS DATE 2/5/2007

UMHLANGA ROCKS

FAX: 031 5662231

ATTENTION: SHAUN MACK

COMPLAINTS AT DEVONDALE INVESTMENTS

On numerous occasions, we have brought to Shakiela & Mark Hansens attention of all various faults & complaints of the above

premises. It is very disappointing, that to date, nothing has been done. Every week we have been told that someone will come over to discuss all the unresolved issues. We are still awaiting this meeting.

We have also taken occupation of the Pool Room which is in a terrible condition. Many a times we have asked for this premises to be inspected by your Manager before making any changes. This premises should have been given, in a decent condition. Even though the premises is empty, we have been making payment of the rental every month. It is totally unfair, that we have come to a standstill

because of no co-operation from Devondale Investment. A Lease Agreement is not even put into place. In future no payment of rental

for the Pool Room would be made until this matter has been resolved.

Attached herewith is a list of the various faults & complaints of the above premises.

1. New Energy signage, about to fall, would cause damage to customers vehicles & fire due to electrical wiring
2. Water leakage, huge amount of water lost
3. Rats are infested
4. Driveway, massive pothole
5. Standing water, which is green, very bad odour, bad reflection on Company, collection of mosquitoes
6. Roll up door still not repaired
7. Grass unattended to
8. Pumps to be repaired

We would appreciate if the above be resolved as soon as possible.

Thanking you

Yours faithfully

AHMED”

[14] Besides the list of complaints referred to in the letter, the respondents further alleged that there was also fuel pump leakages which aggravated the horrible conditions under which the respondents operated their business on the leased premises. The problems were first brought to the attention of one Hansen, an employee of the applicant, by the first respondent and subsequently reported by the first respondent to the applicant's Shaun Makadoo. Notwithstanding these reports, nothing was done by either the applicant or New Energy Petroleum CC to rectify the problems. This pathetic situation, particularly the fuel leakage, inevitably affected negatively the profitability of the respondents' business. In this respect, the respondents had no option but to

effect the necessary repairs themselves as a matter of urgency on the basis that they would claim reimbursement from the applicant by way of a set-off from the rental payments. Whilst the respondents acknowledged that there was no set-off provision in the agreement

they submitted in their answering papers as follows (through the first respondent):

"I might add that inasmuch as the lease agreement may not provide for a set off for rentals, the conduct of the Applicant in unreasonably

withholding consent to effect the repairs and in not effecting the repairs itself despite repeated requests to do so constitutes grounds for setting-off the repair costs against rentals as the premises are wholly (un)fit (?) for the purpose for which it was let and in that regard the Trust is entitled to a complete reduction of rental owing (due) to the diminished use, and in this case the situation had reached such a state that no beneficial use could be had for the duration that the problems persisted." (Paragraph 19 of the respondents' answering affidavit.)

[15] A series of photographs were submitted by the respondents which sought to depict the terrible state of the ablution facilities on the leased premises. The respondents further averred that certain applicant's employees occasionally came over to the leased premises and disconnected water and electricity supply, thus causing a great inconvenience and nuisance to the Trust's peaceful occupation of the leased premises.

[16] Another letter of complaint dated 6 August 2007 was submitted by the respondents and included in their answering papers as annexure "NA5". The respondents alleged that this letter was faxed to the applicant but again the applicant denied its receipt. Mr Naidu contended that the two letters (annexures "NA4" and "NA5") were merely prepared ex post facto by the respondents in order to suit their false allegations. The contents of annexure "NA5" (which was also under the same letterheads as annexure "NA4") were the following:

"DEVONDALE INVESTMENTS DATE 6/8/2007

FAX: 031 566 2231

ATTENTION: FAHREEN KADER – SHAUN MACK

RE : FUEL PUMPS

We refer to your letter dated 06/08/2007.

We would like to bring to your attention that the two fuel pumps on the premises are not currently operational because of an underground

leak. The pumps is (sic) in good working condition. We are unable to use two diesel & two petrol pumps due to the severe underground leak.

This problem is going to affect our business, in which we going to suffer the loss of customers & fuel. There has been a loss of fuel from 2006 to current. We are currently experiencing terrible chaos in the driveway due to the non operational pumps.

An inspection of an underground leakage performed showed major leaks in the pipes that are interleading each other. On numerous occasions we have informed you of this problem but to date nothing has been resolved. We have faxed you the quotation of the repairs and still patiently awaits for your response in this matter.

The non-usage of so many pumps is causing a bad reflection of the Garage. If the pumps were not in working condition we would have repaired it immediately but unfortunately its not the pumps that is an issue, there is another major problem that needs urgent attention. We were not aware of the underground leakage at the inception of the lease & had only realized this matter after couple of months of trading.

We would appreciate if the above be resolved and replied to urgently as our business is being affected.

[17] It was therefore the respondents' submission that, given the problems that existed and persisted as outlined in the Trust's letters of 2 May 2007 and 6 August 2007 (that is, annexures "NA4" and "NA5") on whose behalf the respondents acted, the Trust no longer enjoyed the full beneficial use and occupation of the leased premises. On that basis, the respondents submitted that the Trust was not the party in breach of the lease agreement and, therefore, not in unlawful occupation of the leased premises. The respondents contended that, in the circumstances, no rental payment was due and payable to the full extent as claimed by the applicant.

The Court Proceedings on 7/8/08

[18] When the matter appeared on the opposed motion roll before Mnguni J on 7 August 2008 the preliminary issue which the Court invited counsel to address it on was whether or not there was any real and genuine dispute of fact which could not be sufficiently dealt with on the papers thus requiring that the matter be referred for the hearing of oral evidence. The then counsel for the applicant submitted that the matter was a simple and straightforward one and did not require any referral for oral evidence. He contended that the pertinent issues or factors which the Court had to consider in order to dispose of the matter were common cause, namely:

18.1 That there was a lease agreement between the applicant and the Trust in terms of which the Trust agreed and bound itself to pay monthly rentals at a certain fixed amount;

18.2 That in the event of the Trust failing to render payment of the rental, when due, the applicant would be entitled to cancel the lease agreement and retake possession of the premises;

18.3 That the Trust had failed to render payments from March 2008 up to the current date when the litigation was instituted;

18.4 That the Trust was not entitled, for whatever reason, to withhold any amounts due to the applicant; and

18.5 That there was no provision for set-off in the lease agreement.

[19] It was submitted on behalf of the applicant that all the abovementioned issues were common cause and that the respondents had the evidential burden to prove if, for instance, any rental payments were made by the Trust, which the applicant claimed the Trust and/or the respondents did not make. The applicant reiterated that any reference by the respondents to any problems which the Trust might have had with New Energy Petroleum CC was out of order and of no relevance to the present application and that the respondents were entitled to take up those complaints with New Energy Petroleum CC. Those complaints and problems had nothing to do with the applicant and this application. Counsel then appearing for the respondents argued that the respondents (on behalf of the Trust) were entitled to withhold the payment of rental given the Trust's wrongful deprivation of its beneficial use and occupation of the leased premises.

[20] After full argument before Mnguni J on this particular issue, the learned Judge gave a ruling directing that the matter be referred for the hearing of oral evidence on the issues specified in the order.

Analysis and Evaluation - The decision

in Wallach's case distinguished.

[21] Mr Naidu, relying on Wallach's case (*supra*) essentially sought an order that would effectively reverse the ruling by Mnguni J and that the Court allow the matter to proceed and be dealt with on the papers. As similarly held in Wallach's case, Mr Naidu submitted that it was open to this Court to re-look into the matter with a view to finding that it was unnecessary to hear oral evidence and that the matter be decided on the papers. Counsel submitted that the hearing of oral evidence would not affect the outcome of the claim for substantive relief and would only lead to unnecessary delays and unnecessary costs being incurred.

[22] The facts in Wallach's case were briefly as follows. The appellant (Wallach) concluded a handwritten settlement agreement with the respondent corporation

whereby Wallach was liable to pay to the respondent the sum of R25 000 payable on agreed terms, namely R4 000 on 6 March 1990 and R2 200 per month on the first day of each month thereafter, commencing on 1 April 1990 until the total amount had been paid in full. The money was to bear interest at 18.5% per annum, payable in advance on 6 March 1990 for the period 6-31 March 1990 and thereafter monthly, in advance, from 1 April 1990 on the balance outstanding from time to time. If any instalment was not paid on due date or Wallach committed any breach of the terms of the agreement, he would be liable to the corporation for the amount of R24 750 less any instalments paid plus interest and costs of suit on the attorney and client scale. This settlement agreement was made an order of Court accordingly. Indeed, the appellant furnished the respondent with a cheque for the amount of R4 000 dated 6 March 1990 being the first instalment in terms of the settlement agreement. However, when the respondent presented the cheque for payment on 13 March 1990 it was dishonoured by non-payment on the ground that there were

insufficient funds to meet it. On 19 March 1990 the appellant paid the amount of R4 000 in cash to the respondent's attorneys who, however, indicated on the receipt therefor that the money was accepted 'without

prejudice to the client's rights'. The appellant made a further payment of R4 000 on 2 May 1990. In these circumstances, the respondent held the appellant to be in breach of the agreement in at least two respects, namely:

"(a) the interest due on 6 March 1990 was not paid on due date; and

(b) the instalment of R4 000 due on 6 March 1990 was not paid on due date."

[23] On 9 April 1990 the respondent brought motion proceedings against the appellant for the payment of R 24 750 interest and costs on the ground of alleged breaches of the settlement agreement and court order. The appellant opposed the application on various grounds including that the respondent had failed to present the cheque for payment on its due date, namely 6 March 1990 and that had it done so then and not on 13 March, the cheque would have been paid.

[24] The opposed application came before Coetzee J for argument on 9 August 1990. The learned Judge appeared to agree with the appellant's contention on the issue of non-presentment of the cheque on 6 March. Thereupon the Court directed that the matter be referred for the hearing of oral evidence. In his judgment the learned Judge stated (a passage quoted in Wallach's case):

"No effort was made to present the cheque for payment on 6 March 1990, and it seems as if the applicant's attorney deliberately sought a way to call into effect the acceleration clause on 8 March. I have come to the conclusion that I cannot properly decide this case on affidavit and this is a matter in which I should exercise my discretion in terms of Rule 6(5)(g)." (at 262A)

[25] The Court then postponed the application to a date to be arranged for the hearing of viva voce evidence on the issue of whether the applicant was in breach of the agreement of settlement. When the matter appeared for the hearing

of oral evidence on 4 December 1990 before Lazarus J, an application was made on behalf of the respondent that the matter, notwithstanding

the prior ruling by Coetzee J, be decided on the papers without the hearing of oral evidence. Prior notice had been given to the

appellant of the respondent's intention to make that application on the date scheduled for the hearing of oral evidence.

(This seems to be the procedure followed by the applicant in the present case.)

[26] On appeal, the Supreme Court of Appeal, among other things, stated:

“With due respect to Coetzee J, there was not any proper factual basis for the view that the applicant’s attorney had acted in the manner referred to, nor was there any good reason for finding that the matter could not properly have been decided on affidavit. As pointed out by Lazarus J,

‘... presenting the cheque for R4 000 on 6 March 1990 would not have cured the breach, which was that there was no payment of the interest for the period 6 – 31 March 1990, either included in the cheque for R4 000 or separately from it.’ (at 262B-C)

The Court proceeded (at 262J-263A):

“It is plain that the order referring the matter for the hearing of oral evidence was an interlocutory order and that it was a simply

interlocutory order of the kind referred to in Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948

- (1) SA 839 (A) at 870A. ... The ‘order’ given by Coetzee J did not decide the merits. It was merely a direction that further evidence be given before deciding on the merits. It was no more than a ruling. This is clear from a long line of cases decided in this Court and in the Provincial Divisions. See *Dickinson and Another v Fisher’s Executors* 1914 AD 424 at 427-8; *Union Government (Minister of the Interior) and Registrar of Asiatics v Naidoo* 1916 AD 50 at 51-2; *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987
- (2) SA 1 (A) at 40H-41H. See also *Engar and Others v Omar Salem Essa Trust* 1969
- (2) SA 423 (D) at 425G-H and the judgment of the Full Bench in the same matter reported as *Engar and Others v Omar Salem Essa Trust* 1970
- (1) SA 77 (N) at 80E-H and *Pfizer Inc v South African Druggists Ltd* 1987
- (1) SA 259 (T) at 262C-263I.”

And concluded:

“[I]t was open to the Court a quo to hold, as it did, that it was unnecessary to hear oral evidence and to decide the matter on the papers. I do not consider that it did so lightly. Indeed there were considerations of the most weighty why it should do so. To have heard oral evidence in circumstances where that would not have affected the outcome of the claim for substantive relief, it would have been to incur wholly unnecessary costs and to involve wholly unnecessary delay.” (at 263G-H).

[27] I am of the view that Wallach’s case is distinguished from the present matter. As the Supreme Court of Appeal stated, there was no factual basis upon which the Court (per Coetzee J) found that the appellant’s attorney had deliberately sought to trigger the acceleration clause of the

settlement agreement. In any event, based on the facts in that case and the ground given by the learned Judge for referring the matter for oral evidence, the SCA held that it was a matter where there was no genuine factual dispute and that it could be decided on the papers. Indeed, it did

appear that the facts in Wallach's case clearly justified the order setting aside the ruling by Coetzee J. However, to the contrary, to say the same of the present case, would be, in my view, a serious misdirection and misapplication of the principle enunciated in the Wallach's case. It is clear that the SCA itself accepted the fact that a court would not lightly take a step of reversing an interlocutory ruling. Ordinarily the Court would lean in favour of acknowledging that the decision referring a matter for the hearing of oral evidence was the correct decision until and unless the Court was satisfied that there were compelling reasons to hold otherwise. In my view, no such compelling reason exists in this case.

[28] The referral of a motion application for the hearing of oral evidence is governed by Rule 6(5) (g) of the Uniform Rules which conferred a discretionary power on the Court in this regard. However, it was not the issue of first instance before this Court whether or not the matter should be referred for the hearing of oral evidence. That issue was argued fully on 7/8/08 before Mnguni J who then made his ruling thereon. The issue now before the Court was whether or not, notwithstanding the Court's ruling aforesaid, the Court should find that it was unnecessary to hear oral evidence on the ground that such procedure would, after all, not affect the outcome of the claim for substantive relief, in which event the procedure would only have served to incur wholly unnecessary costs and involve wholly unnecessary delay (Wallach's case, *supra*, at 263G-H). To my mind, this notion is in harmony (if not in accordance) with the long-standing principle that, in exercising its discretion whether or not to refer a matter for oral evidence in the first place, "the Court should be guided to a large extent by the prospects of viva voce evidence tipping the balance in favour of the applicant" and that "if on the affidavits the probabilities are evenly

balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant"

and further that "the more the scales are depressed against the applicant the less likely the Court would be to exercise the discretion in his favour" (Kalik v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) at 979).

[29] In the present case I am satisfied that there were sufficient and valid grounds for Mnguni J to have referred the matter for oral evidence. Besides the order (or ruling) nothing else which related to that matter such as the transcript of the proceedings on 7/8/08 and the learned Judge's reasons for his ruling, was included in the court file. The Court order was only endorsed on the front of the Court file as follows:

"(1) Granted i.t.o. Draft Order Prayed, marked "X".

(2) Applicant is ordered to pay today's costs."

The draft order prayed referred to was incorporated in a manuscript document and read as follows"

“1. That the matter is adjourned and the Rule Nisi extended, until it is confirmed or discharged to the expedited trial roll for the hearing of oral evidence on the following issues:

- (a) whether the Respondents received beneficial occupation of the leased premises?
 - (b) whether the respondents are liable to pay rentals during the period that it did not receive beneficial occupation [if that be found pursuant to sub-paragraph (a) above].
2. Should any party desire to call any witnesses who has not deposed to any affidavit, they shall not less than 10 (ten) days before the date appointed for the hearing furnish a statement wherein the evidence to be given in chief by such person is set out, provided that the Court may permit such person to be called despite the fact that no statement has been so served in respect of his evidence.
3. That the provisions of Rules 35, 36, 37 and 38 shall apply to this application.”
- [30] Subsequent enquiries with attorneys concerned revealed that the proceedings of 7/8/08 before Mnguni J were never transcribed. In the meantime I have had that done with a view to ascertaining whether there were any reasons furnished by the learned Judge for his ruling as part of those proceedings. I have ascertained that no such reasons were furnished. In any event, I do not think that they are necessary for the present purpose.
- [31] That there were material factual disputes in this matter was evident at the outset from the respondents’ answering affidavit in which the respondents raised a number of issues in the form of complaints whereby they suggested that it was in fact the applicant who breached the leased agreement. The respondents sought to establish that the appellant was aware of the respondents’ complaints by producing letters (annexures “NA4” and “NA5”) which the respondents claimed were faxed to the applicant but which the latter denied having received. I noted that annexure “NA5’s” opening sentence referred to the applicant’s letter dated 6/8/07. It did seem that this letter would have probably served as proof that the applicant was indeed aware of the respondents’ complaints if the letter was produced by the respondents and if its contents confirmed the respondents’ allegation on this point. However, I was unable to find the alleged letter in the court file. In any event, neither counsel dealt with this particular issue. Notwithstanding the apparent omission, the existence of a real and genuine dispute of fact was still not eliminated in the light of the overall defence raised by the respondents.
- [32] To my mind, the mere fact that, on the one hand, the respondents insisted that they forwarded the two letters (annexures “NA4” and “NA5”) to the applicant and, on the other hand, the applicant also insisted that it did not receive the letters, alone constituted a material factual dispute, bearing in mind the apparent far-reaching implications borne out from the contents of the letters. The respondents were entitled to submit evidence of proof of their allegation in this regard which would not necessarily be restricted, for example, to the production of facsimile transmission slips.

[33] What was significant anyway was the fact that even if the respondents were to prove that the two letters were actually received by the applicant it was the applicant's pleaded case that the complaints or problems alleged in the letters had nothing to do with the applicant and were therefore of no relevance to the present application. Mr Naidu persistently argued that such matters concerned only New Energy Petroleum CC and had therefore to be taken up with that entity. He submitted that the applicant had nothing to do with the lease agreement between the Trust and New Energy Petroleum CC which

involved the business licence and not the leased premises.

[34] After all, the two letters aforesaid were merely the instruments whereby the complaints were allegedly conveyed to the applicant by the respondents. The fact of the matter was that, regardless of the existence or non-existence of these letters, the respondents had what appeared to be genuine complaints in relation to the leased premises being in a state not suitable to provide the Trust the beneficial use and occupation for which the premises were let to the Trust.

[35] Contrary to what the applicant prophesies, I do not believe that the applicant had absolutely nothing to do with the lease agreement between the Trust and New Energy Petroleum CC. Instead, I am inclined to agree with Mr Pillemer's submission that it was evident that the applicant or set of individuals associated with the applicant had a special interest, more likely a controlling interest, over New Energy Petroleum CC. There were reasons to say so, of which I could mention a few:

35.1 Both lease agreements were concluded on the same day (13 December 2005) and at the same place (Durban) and both parties were represented by the same persons.

35.2 The two leases were so interrelated and interdependent that the successful implementation of the terms of one was virtually or practically impossible without the successful implementation of the other. The premises were leased for the purpose of conducting a filling station business. This was in terms of the peremptory provisions of clauses 7.1 of the lease agreement. In other words, the lease of the premises was worthless if the purpose of conducting a filling station business was not to be fulfilled. Conversely, the attainment by the Trust of the filling station business on this particular site was impossible without a right to occupy and use the site for such purpose in the first place.

35.3 In my view, clause 6.3 of the lease agreement cast away any doubt that the two leases were, for all practical intents and purposes, inseparable. I recall this clause:

"A special term of this lease is that it may be terminated without notice, at the election of the lessor if the lessee breaches a term of the agreement concluded with NEW ENERGY PETROLEUM CC."

[36] The question which immediately arises from the analysis of clause 6.3 is: Why then did the applicant opt for clause 6.3 in the lease agreement which carried such drastic and overreaching consequences, if this entity New Energy Petroleum CC had nothing to do with the dealings between the applicant and the Trust in terms of the lease agreement? It was also significant that not just certain specified terms of the lease agreement required to be breached by the Trust in order to trigger the invocation of clause

6.3 – it was in respect of breach of any term of the lease agreement concluded between the Trust and New Energy Petroleum CC. In other words, any breach by the Trust of the lease agreement with New Energy Petroleum CC automatically constituted a breach of the Trust's lease agreement with the applicant.

[37] In the circumstances, I am satisfied that the facts of this case are clearly distinguished from the facts in Wallach's case. Accordingly, the request to reconsider the referral ruling and decide the matter on the papers cannot be acceded to.

[38] Given the conclusion I have arrived at, I do not deem it appropriate to grant the respondents' application for the consolidation of the present application with the action instituted under case No. 13413/08. The present matter was referred not for trial but for the hearing of oral evidence on specified issues. In any event, it should remain open to the Court hearing oral evidence (which I believe should be the appropriate forum for that purpose) to decide on that matter. Likewise the issue of costs should be determined then.

[39] In the result, I make the following order:

1. The application to reverse the Court's ruling dated 7 August 2008 under case No. 7161/08 and to deal with the matter on the papers is refused.
2. The Court's ruling dated 7 August 2008 aforesaid, whereby this matter was referring for the hearing of oral evidence on the issues specified in that ruling, shall stand.
3. The application for the consolidation of this application with the action instituted under case No. 13413/08 is refused.
4. Subject to any prior court order to the contrary, the issue of all costs incurred thus far shall be determined by the Court hearing oral evidence.

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Application heard on : 20 October 2008

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Instructed by : Shaukat Karim & Company

Counsel for the respondents : M Pillemer SC

Instructed by : Ajit Severaj & Associates

Date of judgment : 13 May 2009

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Prepared on 13 October 2026 · Esheria