

SOUTH AFRICA / JUDGMENT

Dormex 115 CC v Fred Jones Cockrell t/a Boulevard Motors (18448/2007) [2008] ZAWCHC 166 (19 March 2008) [2008] ZAWCHC 166

COURT

Western Cape High Court, Cape Town

BEFORE

Oosthuizen

CASE / FILE NUMBER

18448/2007

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JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION) CASE NO: 18448/2007

DATE: 19 MARCH 2008

In the matter between:

DORMEX 115 CC Applicant

And

FRED JONES COCKRELL t/a Respondent

BOULEVARD MOTORS

OOSTHUIZEN. AJ:

- [1] in the instant application it is not in dispute that applicant is the registered owner of certain property being erf 1586 Goodwood, that respondent is in possession of the property and that at such property respondent operates a motor vehicle service and petrol station.
- [2] Applicant acquired the property from Polsta (Pty) Ltd (hereinafter referred to as "Polsta"). In 1987, Polsta concluded a lease with BP Southern Africa (Pty) Ltd (hereinafter referred to as "BP") and respondent in turn sub-leased the property from BP. Erf 1586 Goodwood is hereinafter referred to as "the leased property".

- [3] On acquiring the leased property from Polsta, applicant, by operation of law, stepped into the shoes of Polsta as lessor in respect of the lease with BP. Applicant contends that the main lease with BP expired on 31 August 2007. This contention is borne out by the lease which is annexed to the founding affidavit and which is alleged to be that main lease. Clause 2 thereof reads as follows:

"This agreement of lease commences on 1 September 2002 and shall endure until 31 August 2007".

- [4] The legal position as regards the rights of a sub-lessee where the main lease has lapsed is correctly reflected, inter alia, in two judgments of this Division; that of *Laubser v Foster & Foster* 1944 CPD 380 and *United Watch & Diamond Company (Pty) Ltd & Others v Dfsa Hotels Ltd & Another* 1972(4) SA 409 CPD. In both those cases it was held that a sub-lease comes to an end when the main lease lapses. I see no basis for departing from the reasoning and conclusions of law set out therein.
- [5] In the instant application the applicant seeks an eviction order on the basis that the main lease has come to an end on 31 August 2007 by virtue of the clause already referred to and that the rights of the respondent as sub-lease lessee have accordingly also lapsed in view of the authorities to which I refer above.
- [6] The respondent advances various grounds of opposition. As to urgency, the respondent contends that no case is made out for dealing with the matter on an urgent basis and submits that that being so, the application falls to be dismissed.
- [7] It is well established that, in urgent applications, the applicant must make out a case as to why the matter must be dealt with as one of urgency. If the Court is not satisfied that the applicant has done so, there are various options open to it. It may, depending on the circumstances, dismiss the application, strike the matter from the roll or postpone the hearing thereof to a later date (see *f L & B Marow Caterers (Pty) Ltd v Gretermans SA Ltd & Another* and *Aroma N (Pty) Ltd v Hypermarket fPty) Ltd & Another* 1981(4) SA 108 CPD).
- [8] The application now before me was launched on 18 December 2007. It was postponed on four subsequent occasions. Three months have lapsed since the launching of the application. It appears to me that the respondent has had adequate opportunity of setting out the grounds on which he opposes the relief sought against him and of resisting the application and canvassing all matters relative thereto. There is nothing indicating that the launch of the proceedings on an urgent basis constitutes an abuse of process by the applicant. The applicant states that he wishes to make use of the lease premises to operate a petrol station, workshops and as a venue for the sale of motor vehicles. This intention is not disputed.
- [9] The respondent contends that the operation of this type of business requires certain licences issued by the regulatory authorities, and that the issue thereof may take several months. The details, put up by the respondent are unclear as to how long that process or

those processes may take but the facts thus advanced do not, in my view, defeat the applicant's right to the eviction order sought. There is no reason why the applicant should not in the meantime be placed in occupation and permitted to commence with whatever steps are open to him preparatory to launching the business. There is furthermore no tender by the respondent to vacate the premises once the regulatory approval is granted.

- [10] An argument was put up on behalf of the respondent that the founding papers contain no details showing that the respondent is a man of straw. The respondent would therefore be able to continue paying the rental due in terms of the sub-lease and also, so it was contended, any holding-over damages that may later be awarded to the applicant. For that reason it was submitted the eviction proceedings cannot be entertained on an urgent basis.
- [11] That contention loses sight of the fact that the applicant has stated that it requires possession of the leased property and it requires to utilise the leased property for its own ends. It does not require the property for purposes of re-letting to another person. No authority was cited to me in support of a proposition that a right to eviction is negated simply because the Eessee is in a position to pay damages or compensation in some other form, should it be found that the lessee's continued occupation of the property was unlawful. That factor does not, in my submission, negate the applicant's right to have the matter dealt with on an urgent basis. I can see no reason why, in the circumstances I have outlined, it is inappropriate to deal with the matter on an urgent basis.
- [12] Turning then to the application itself. The respondent contends that the main lease which was annexed to the founding affidavit

containing, inter alia, clause 2, the terms whereof I have already quoted, is not properly before the Court and cannot permissibly be had regard to. The respondent's contention is that in making allegations as to the conclusion of this (lease and placing the document before the Court, the applicant breached the evidentiary rule relating to hearsay evidence.

- [13] Applicant's averment that he purchased the property subject to this lease is of course not hearsay. Applicant is aware of the terms governing the sale of the property to it and encumbrances resting on the property at the time. There is nothing in the documentation and the material before me indicating that the lease in question is anything but genuine. In addition, the existence of the lease is confirmed by various letters included in the record from BP and their attorneys. Furthermore, the existence of a lease is acknowledged in the sub-letting agreement concluded between BP and respondent during 2002 and no facts were, in my view, put up by respondent indicating that he had any reason to believe that some lease agreement other than that annexed to the founding affidavit as Annexure ES2 is in existence or was concluded between the applicant's predecessor and BP.

[14] Lastly on this issue, even if the evidence regarding the conclusion of the lease does amount to hearsay, as submitted by respondent, the Court is vested with a discretion to receive such evidence by virtue of section 3 of Act 45 of 1988. The manner in which that discretion is to be exercised depends on the nature of the proceedings, of the evidence proffered, of the purpose which the evidence would serve, of the reliability thereof and of prejudice to the other party if the evidence is allowed.

[15] To the extent that the document in question (Annexure ES2 to the founding affidavit) does involve and is introduced by allegations

which amounted to hearsay, I am of the view that this is a proper case for such evidence to be received in terms of section 3 of Act 45 of 1998.

[16] The next point raised by the respondent arises from the fact that prior to the institution of the instant application, the applicant launched an action claiming the same relief in this court under case number 14712/2007. In that action (hereinafter referred to as "the previous action") a notice of withdrawal was served on 12 December 2007. Respondent contends in argument that such notice of withdrawal was not competent because, prior to the service thereof, an application for summary judgment had been launched and a date for the hearing of the summary judgment had been fixed.

[17] An application for summary judgment requires, by virtue of Rule 32(2), that the notice of motion pertaining thereto must indicate the date on which the application will be set down for hearing. That does not constitute a set-down of the trial as envisaged in terms of Rule 41(1)(a) and Rule 41(1)(a) is, therefore, inapplicable. In any event, it cannot be said in this matter that respondent objected to the notice of withdrawal. Respondent's stance was confined to the issuing of a notice in terms of Rule 41(1)(c) demanding that the costs of the previous action be paid. There is therefore, in my view, no substance in the contention that because of the action previously instituted, the application before the Court constitutes, in some or other sense, a *res iudicata*.

[18] The respondent next relied on the doctrine of tacit relocation of a lease. That doctrine is described in Cooper: Landlord & Tenant (2nd ed.) at page 340 in the following terms:

"The tacit relocation is an implied agreement to re-let and is concluded by the lessor permitting the lessee to remain in occupation after the termination of the lease and accepting rent from the lessee for the use and enjoyment of the property. In general our courts have not followed the Roman-Dutch writers but have made the duration of a tacit lease dependent upon the rent period. Thus the effect of a tacit relocation of premises originally let for one year at a monthly rent (it has been held) is to renew the lease from month to month and each time only for one month. On this reasoning upon the expiration of the period, the lessee should be entitled to vacate the premises and the lessor to claim his eviction but the courts hold that the tacit relocation can be terminated unilaterally only upon reasonable notice being given, the reason presumably being that in the absence of an indication to the contrary, the parties have tacitly agreed that the relocation will be for an indefinite period".

[19] The aforesaid passage was approved in the matter of Pareto Ltd v Mythos Leather Manufacturing 2000(3) SA 999 (W) at 1004H where the Court said the following:

"The sufficiency of the termination notice is then relevant As I have said, on both the scenarios which I have outlined and in which the sufficiency of the termination became relevant, a periodic lease comes into existence. Cooper op cit at 65 footnote 43) says that such a lease could be called an open-end lease. Our courts have accepted that a day's notice is reasonable in the case of a daily lease and a month's notice in the case of monthly lease".

[20] In the instant matter, notice has been given to the respondent to vacate the premises at the end of August 2007. Such notice was given firstly in a letter from BP to respondent dated 28 May 2007 notifying him that his occupancy of the leased premises would expire at the end of August 2007 and secondly, in a later letter from BP dated 14 June 2007 which contains the unequivocal statement that the lease would terminate on 31 August 2007. Respondent does not deny the receipt of these letters and was accordingly, some two and a half months prior to the expiry of the lease, notified of the fact that his right of occupation would terminate on 31 August 2007.

[21] A tenant or sub-tenant who ignores a valid notice of termination of this nature and, contrary to the terms of such notice, remains in occupation of leased property, cannot contend that a tacit relocation has occurred. Even if, however, there was scope for finding that a tacit relocation had taken place, the respondent was given more than sufficient notice of the termination thereof and has failed to put up any facts showing that the period of the notice or notices that he was given was unreasonable.

[22] The respondent next contended, relying on clause 18 of the lease (Annexure ES 2 to the founding affidavit), that a right of first refusal was enjoyed by the respondent in respect of certain transactions and that he had not been given an opportunity of

exercising that right of first refusal. Clause 18 reads as follows:

"During the subsistence of this lease or any renewal thereof, the lessee shall have the sole and exclusive right to match any bona fide offer from any third party relating to the sale, lease or disposal of the leased premises which the lessor may wish to accept".

[23] Firstly, and upon a plain reading of the clause which I have just quoted, it applies only during the subsistence of the lease or any renewal thereof. It does not, as was contended for by the respondent, survive the lapsing of the lease. The lease in the instant case, as already pointed out, terminated on 30 August 2007, there has been no renewal thereof and the clause is therefore inapplicable.

- [24] In any event, the right of first refusal pertains only to the circumstances where the applicant wishes to effect the sale, lease or disposal of the leased property to someone other than BP. There is no indication on the material before me that any such disposal, sale or lease to a third person is contemplated so that even if the right of refusal did remain extant, the circumstances under which it would come into operation have not arisen.
- [25] Reliance was then placed on a contention that contractually the doctrine of legitimate expectation came into play and that by reason of such doctrine, the respondent had a legitimate expectation that he would be entitled to remain in occupation of the premises for a further three years or, alternatively, that a further sub-lease for a three year period would be concluded with him.
- [26] In this regard, reliance was placed on the judgment of *Lamprecht & Another v McNeillie* 1994(3) SA 665 AD. That matter concerned the dismissal of an employee employed in terms of a contract of employment concluded between two private persons. The question arose whether it was a term of the contract of employment that in dismissal proceedings certain disciplinary guidelines which the employer had caused to be published to its employees had to be followed. The Court found that those disciplinary guidelines did not have any contractual force. The Court at 671C-D expressly left open the question whether the doctrine of legitimate expectation can operate in the field of contract, finding it unnecessary to decide on this issue.
- [27] It must be borne in mind that *tamprecht & Another v McNeillie* concerned disciplinary guidelines and there is abundant authority that an employer who has published such guidelines cannot, without good reason, depart there from in the conduct of disciplinary proceedings.
- [28] Leaving aside, however, that consideration specific to the *Lamprecht* case, it is well established, in regard to the doctrine of legitimate expectation, that the party raising such an expectation must show that the representation underlying the expectation was clear, unambiguous and devoid of relevant qualifications and that the expectation generated thereby must be reasonable. (See in this regard *National Director of Public Prosecutions v Phillips & Others* 2002(4) SA 60 (W) at 61; *South African Veterinary Council & Another v Szymanski* 2003(4) SA 42 (SCA) at 49E-I)
- [29] In the instant case and in relation to the legitimate expectation which the respondent says he has, he refers to the fact that at a stage prior to the launch of the instant application the applicant indicated an interest in buying the respondent's business. The applicant also allegedly at some or other stage indicated that it was not interested in continuing the relationship with BP, and indicated that it had had a fall-out with BP.
- [30] Even if one accepts these allegations as true, I cannot by any stretch of imagination see that they would give rise to the

expectation alleged, namely that the respondent would be entitled to remain in occupation of the property for a further three years and the reliance on the doctrine of legitimate expectation is, in my view, misplaced.

- [31] Lastly, the respondent contended that he is entitled to remain in occupation of the premises by virtue of an enrichment lien. It is well established that such a lien exists where the person asserting the lien has expended money or done work in respect of the property alleged to be the subject matter of the lien. (See LAWSA (1st re-issue) Vol. 15 paragraph 50, paragraph 64)
- [32] In the instant case at best for the respondent it appears that he has operated a successful business at the premises for some period of time. There is nothing in the material put up showing that he has expended money or labour in the improvement of the property and as such there is nothing which would give rise to any lien recognised in terms of the applicable principles of our law,
- [33] In the premises, I am of the view that none of the grounds raised by the respondent in resisting the relief sought constitute a legally valid reason for refusing the eviction that the applicant seeks in these proceedings. The applicant is accordingly entitled to succeed. As regards the costs of the application, I am of the view that the costs on the ordinary scale are appropriate and that there is no basis for ordering any costs on a punitive scale.
- [34] In the circumstances, an order is issued in terms of prayers 2, 3 and 4 of the notice of motion. As regards costs, it is ordered that they shall include all the costs standing over in respect of previous occasions on which the matter was heard.

OOSTHUIZEN, A J

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