

SOUTH AFRICA / JUDGMENT

European Metal Trading (Africa) (Pty) Ltd v Lee Metals CC (78/2012) [2012] ZAKZDHC 42 (6 July 2012)

[2012] ZAKZDHC 42

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Lopes

CASE / FILE NUMBER

78/2012

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In the KwaZulu-Natal High Court, Durban

Republic of South Africa

Case No : 78/2012

In the matter between :

European Metal Trading (Africa) (Pty) Ltd

(in winding up)Applicant

and

Lee Metals CCRespondent

Judgment

Lopes J

- [1] This application is brought by the liquidators of European Metal Trading (Africa) (Pty) Ltd (in winding up) ('the company'). The liquidators seek the ejectment of the respondent from three business premises owned by the company at the time of its liquidation, two in Phoenix Industrial Park and another at 20 Kent Road in Durban.
- [2] It is common cause that the company carried on business as a scrap metal dealer and recycler of secondary metals. The business thrived between 2003 and 2008. At that stage the company embarked upon an expansion programme involving the acquisition of a port facility, with equipment and a large number of vehicles to serve the port facility, giving the company the advantage of being able to load scrap metal and other metals straight into ships from its port facility. Unfortunately, the economic recession which occurred in 2008 saw

metal prices dropping to approximately 14% of their previous levels, ultimately leading to the company's demise. During this time the only shareholders and directors of the company were Iain Davie and Michael Flanagan.

- [3] The company's principal creditors were Mercantile Bank Limited and Standard Bank. Those banks had provided finance for the purchase of the movable assets of the business, and were the owners of the assets in terms of instalment sale agreements. Mercantile Bank Limited was also the mortgagee of the three immovable properties referred to above, as security for a loan of R20 million which it had advanced to the company. As matters deteriorated, various negotiations were conducted between the company and Mercantile Bank Limited, all to no effect, and on the 14th June 2011 an order was granted provisionally winding up the company. That order was made final on the 21st July 2011.
- [4] It is common cause that from the 30th September 2010 the respondent had taken over the business of the company and was running it for its own account. It was evident to the liquidators from an examination of the books of the company, that the company's business was being run without any rental being paid for its immovable property which was being used, and VAT returns had been prepared for the applicant on that basis. One Leon Muller, the financial manager of the respondent, confirmed in discussions with the liquidators that an 'operating

rental agreement' had purportedly been concluded between the company and the respondent for the use of the company's assets from the 1st October 2010.

- [5] On the 4th August 2011 the liquidators were presented with copies of two property leases. Ex facie those leases they provided for the letting of the two immovable properties at Phoenix Industrial Park and the other property at 20 Kent Road Durban to the respondent. The leases, which are in identical form, ex facie their contents provide that they commenced on the 1st November 2009. The agreements of lease had been signed on behalf of the company by Michael Flanagan and on behalf of the respondent by Elizabeth Davie (the wife of Iain Davie) and the date of the signature on each lease is October 2009. The rentals payable by the respondent in terms of those leases was R95 000 and R20 000 per month respectively.
- [6] The liquidators formed the opinion, for the reasons which I deal with below, that the leases were simulated agreements. However and without prejudice to that contention, they required that the respondent pay to them the lease payments which should have been made to the company by the respondent during the period of the lease. Those amounts were calculated from the 1st November 2009 (the month after the leases were allegedly signed), until the 31st August 2011.
- [7] In response to that demand the respondent alleged that there was an error in the dating of the leases and that they should have been dated the 10th October 2010. In addition the allegation was made that the company had received the proceeds of a sale actually intended for the account of the respondent in the sum of R1 341 595,04, and that amount was set off against the lease obligations of the respondent to the company. It was further alleged that

the respondent had paid R359 117,65 in October and November of 2010 to Mercantile Bank Limited. It is not made clear the basis on which that payment was made, but thereafter payments of R30 000 per week were made to the liquidators by the respondent, allegedly for rent.

- [8] On the 16th November 2011 a further demand was sent to the respondent by the liquidators for payment of the rentals for October and November of 2011. An outstanding amount of R182 857,14 was claimed.
- [9] In its answering affidavits the respondent has alleged that it was carrying on the business formerly conducted by the applicant with the consent of the officials of Mercantile Bank Limited, the principal creditor and owner of the movable property formerly operated by the company.
- [10] These allegations are dealt with in detail in an affidavit filed by Mr Maistry, the accounts executive of Mercantile Bank Limited, and Mr Maistry's statements are confirmed by Mr Waywell the national commercial manager, and by Mr Kumbier a director of the bank. They outline the continuing discussions with the representatives of the company which were conducted in an attempt to stave off the liquidation. It is evident from those affidavits that the steps taken to try to save the company were in vain, as none of the promised financial assistance came to fruition. The allegation of consent of the officials of Mercantile Bank Limited to the respondent running the business of the company, made by the deponent to the respondent's main answering affidavit, are emphatically denied by the representatives of Mercantile Bank Limited who were involved in the discussions.
- [11] Mr Harcourt who appeared for the applicant submitted that the respondent was then left in the position where :

either the leases were indeed fabricated; or

the leases were in fact genuine, but the respondent was in arrears with rental payments and the liquidators were entitled to cancel the lease agreements for the immovable properties and had done so.

In either case the respondents had no legal right to continue in occupation of the immovable properties.

- [12] He submitted that it is clear from the papers that the same persons who were responsible for the running of the company had taken over the business of the company, used its equipment and premises, and continued to run the company, but for the benefit of the respondent.
- [13] Although the immovable properties were owned by the company when this application was launched, they have since been sold. The ownership of them by the company, and the standing of the liquidators to sue for ejectment, was not a point taken in the opposing affidavits. This was, however, raised in argument by Mr Tobias, who appeared for the

respondent. In their replying affidavit the liquidators point out that the Phoenix Industrial Park properties have been sold to Four Arrows Investments (Pty) Ltd, which is in the process of taking transfer of the properties. The sales were made free of leases to the purchasers.

- [14] The Kent Road property has been sold and transferred to Prodicat (Pty) Ltd. Having sold the properties free of leases the liquidators would have the right to apply for the ejectment of the respondent from the properties.

See: United Building Society Ltd & Another NO v Du Plessis 1990 (3) S.A. 75 (W).

- [15] In any event, as the Phoenix Industrial Properties have not yet been transferred, the liquidators would have standing to sue for ejectment in respect of these properties. As the purchasers of the properties are entitled to have them delivered with vacant possession, and as the company owned the properties when the application was instituted, the liquidators would, in any event, have standing to apply for the ejectment of any occupiers lacking the right to claim possession.

See : Jadwat and Moola v Seedat 1956 (4) S.A. 273 (N);

Nicholas v Wigglesworth 1937 N.P.D. 376.

- [16] There is accordingly no merit in the submission that the applicant does not have locus standi to obtain the ejectment of the respondent from the immovable properties.

- [17] Mr Tobias submitted that I should refer this matter for the hearing of oral evidence in order to resolve the disputes of fact which arise on the papers, or whether I can deal with them on the papers as they stand. The main reason for referring the disputes to be resolved by way of oral evidence would be if it was likely that the probabilities in the principal case might be disturbed by such a referral.

- [18] Mr Tobias submitted that the following issues should be referred for determination by the hearing of oral evidence:

whether the lease agreements were in fact concluded;

whether payments in respect of the lease agreements were made; and

whether the respondent was given a proper default notice in respect of the late rental payments, and, consequently whether the leases were validly cancelled.

- [19] Mr Tobias referred me to Sewmungal & Another NNO v Regent Cinema 1977 (1) S.A. 814 (N) as authority for the proposition that it may be undesirable to adopt a robust approach to deciding disputes of fact on affidavits

alone without the hearing of oral evidence. In this regard Leon J stated at page 818G – 820 F:

‘The principal ways in which a dispute of fact may arise are set out in the oft-quoted case of Room Hire Co. (Pty.) Ltd. v Jeppe Street Mansions (Pty.) Ltd., 1949 (3) S.A. 1155 (T) at p. 1163, as follows:

"The clearest instance is, of course, (a) when the respondent denies all the material allegations made by the various deponents on the applicant's behalf, and produces or will produce, positive evidence by deponents or witnesses to the contrary. ... The respondent may (b) admit the applicant's affidavit evidence but allege other facts which the applicant disputes. Or (c) he may concede that he has no knowledge of the main facts stated by the applicant, but may deny them putting applicant to the proof and himself giving or proposing to give evidence to show that the applicant and his deponents are biased and untruthful or otherwise unreliable, and that certain facts upon which applicant and his deponents rely to prove the main facts are untrue. The absence of any positive evidence possessed by a respondent directly contradicting applicant's main allegations does not render a case such as this free of a real dispute of fact. Or (d) he may state that he can lead no evidence himself or by others to dispute the truth of applicant's statements, which are peculiarly

within applicant's knowledge, but he puts applicant to the proof thereof by oral evidence subject to cross-examination".

The present case falls under (b) and the question arises as to whether the Court a quo was correct in deciding the case finally on the affidavits without acceding to the application that oral evidence be heard. In approaching this particular type of problem, it is not wrong for a Court at the outset to have some regard to the realities of litigation. What appears to be a good case on paper may become less impressive after the deponents to the affidavits have been cross-examined.

Conversely, what appears to be an improbable case on the affidavits, may turn out to be less improbable or even probable in relation to a particular witness after he has been seen and heard by a Court. ... The undesirability of attempting to decide real disputes of fact on the probabilities as they appear from the affidavits was stressed by MURRAY, A.J.P., in the Room Hire case where the learned Judge said this at p. 1162 -

"inasmuch as the ascertainment of the true facts is effected by the trial Judge, on considerations not only of probability but also of credibility of witnesses giving evidence viva voce, it has been emphasised repeatedly that (except in interlocutory matters) it is undesirable to attempt to settle disputes of fact solely on probabilities disclosed in contradictory affidavits in disregard of the additional advantages of viva voce evidence..."

It is also clear from the above-mentioned case that once a case falls under (a), (b) or (c), supra,

"there is a real dispute of fact and (except where the parties specially request such a course) the Court should ordinarily decline to decide the dispute purely on the probabilities as disclosed in the affidavits, and should at its discretion select the most suitable method of employing viva voce evidence for the determination of the dispute".

Despite the approach referred to above - which I have no doubt is the proper one - there has been a tendency in recent years for Courts to decide disputed questions of fact on the probabilities emerging from the affidavits without having any or any proper regard to the advantages of viva voce evidence. ... I suspect that this tendency owes its origin to the remarks of PRICE, J.P., in *Soffiantini v Mould*, 1956 (4) S.A. 150 (E), where the learned Judge stated at p. 154H that:

"It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits."

It must be borne in mind that in that case the respondent had sworn to a number of bare denials in his affidavits and the remarks of the learned JUDGE-PRESIDENT must be viewed in the light of the setting in which they occur. ... The application of the so-called robust approach to a case involving bare denials cannot be criticised in any way. And there are no doubt other cases where the mere allegation of a dispute of fact is not conclusive of its existence for in every case the Court must examine the alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence (*Peterson v Cuthbert & Co. Ltd.*, 1945 A.D. 420 at

p. 428). ...

Where, however, the respondent does not content himself with a bare denial but "produces or will produce, positive evidence by deponents or witnesses" and there is a conflict of fact on the papers, caution must be exercised in applying the so-called robust approach, for otherwise a Court might be tempted to settle disputes of fact solely on the probabilities emerging from the affidavits without giving any or due consideration to the advantages of viva voce evidence.'

[20] This approach was confirmed by Botha JA in *Administrator, Transvaal & Others v Theletsane & Others* [1990] ZASCA 156; 1991

(2) S.A. 192 (A) at 197A-D as follows:

'For my purpose it is enough to say that in motion proceedings, as a general rule, decisions of fact cannot properly be founded on a consideration of the probabilities, unless the Court is satisfied that there is no real and genuine dispute on the facts in question,

or that the one party's allegations are so far-fetched or clearly untenable as to warrant their rejection merely on the papers, or that viva voce evidence would not disturb the balance of probabilities appearing from the affidavits.

[21] With regard to the question of whether or not the leases were valid, there are a number of inherent improbabilities and contradictions in the matters raised by the respondent in its opposition to the application and its allegations that the lease agreements were concluded in October of 2010. Those probabilities and contradictions include :

the fact that ex facie the leases, they were to operate from the 1st November 2009;

ex facie the leases they were signed in October 2009;

the leases were signed by Elizabeth Davie for the respondent, but she only became a representative member of the respondent on the 19th April 2010;

the first indication that the liquidators had that those leases were in existence at all, was at a meeting held on the 4th August 2011;

there were no accounts in the books of the company which evidenced the existence of those leases;

VAT was paid by the company for payments made to it by the respondent, but this was for the lease of the movables and on the basis that the leases for the immovable properties did not exist;

although the management of the respondent is identical to what the management of the company was during the time of its operations, no evidence is put up whatsoever to substantiate the existence of the leases; the leases were not disclosed in an offer of compromise application which had been made by the company prior to its liquidation;

the (unsolicited) payments made by the respondent to the liquidators bore no relation to the rentals reflected in the lease documents;

the lease payments reflected in the lease agreements are entirely inconsistent with the finance charges being levied on the debts owed by the company to the banks.

[22] For all the reasons set forth above I am of the view that the lease agreements are not genuine documents and were fabricated in order to attempt to establish a defence to the eviction of the respondent. I do not believe that a dispute of fact exists which would warrant a referral to oral evidence. Approaching the matter cautiously, and mindful of the pitfalls of deciding disputes of fact in a robust manner, I find that the alleged disputes in this matter are a chimera, raised only to sow doubt and confusion. The allegations of valid leases fall into the category of allegations which are far-fetched and clearly untenable.

[23] However, lest my adoption of an overly-robust approach has led me into error in that conclusion, the respondent was in any event in default of the payment of rental at the time that the second demand was made by the applicant. The respondent failed to pay within the time period set forth in the notice of default, and has failed to pay since. Mr Tobias suggests that because :

- (a) the default letter required payment 'within seven (7) days hereof ...';
- (b) the letter was only sent the next day – ie the 31st August; and
- (c) the notice period given was accordingly short of one day, and the respondent was not bound by it.

[24] This approach was considered in *Lurlev (Pty) Ltd v Unifreight General Services (Pty) Ltd & Others* 1978 (1) S.A. 74 (D) at 76D-77A, where Didcott J stated:

‘The notice to remedy the defaults was attacked. The papers do not include a copy of it. I am therefore in the dark about its actual terms. The deponent to the first defendant's affidavit has however complained that it:

"... allowed the first defendant less time than the plaintiff was obliged to allow it in terms of clause 23 of the lease to remedy the breaches alleged in such notice to have been committed by the first defendant."

In other words, as I read this, the notice called upon the first defendant to remedy the defaults within a shorter period than the opportunity of fourteen days granted by the lease. I shall assume that it in fact did so. For that reason, according to the first defendant, it was bad and could be disobeyed with impunity. Non-compliance with it had not resulted in the plaintiff's right to cancel the tenancy, and the cancellation itself was ineffective. That was the first defence. But it had no substance and was wisely abandoned during argument. Clause 23 provided in its relevant respects that:

"Should the rental not be paid on due date and remain unpaid for 14 days after written notice has been given by the landlord to the tenant requiring such payment... the landlord shall be entitled... to cancel this lease forthwith."

Clause 23, one thus sees, did not stipulate that the notice should specify the period during which the defaults had to be remedied. All the notice was required to contain was a demand that the defaults be remedied. The clause itself then fixed the period for compliance. The plaintiff was free to allow the first defendant more time and, if it had chosen to do so in the notice, it would no doubt have been bound by the concession. But it could not unilaterally reduce the period. The first defendant was therefore at liberty to disregard the addition to the notice which purported to have that effect. Such surplusage did not however invalidate the rest of the notice (cf. *Minister of Defence v Carlson*, 1971 (2) SA 231 (N) at

p. 236B - C). The demand stood and, as soon as the contractually prescribed period passed without payment, clause 23 entitled the plaintiff to cancel the tenancy. (See *Chatrooghoon v Desai and Others*, 1951 (4) S.A. 122 (N) at pp. 127A - 128B; *Tangney and Others v Zive's Trustee*, 1961 (1) S.A. 449 (W) at pp. 453F - 454B; *North Vaal Mineral Co. Ltd. v Lovasz*, 1961 (3) S.A. 604 (T) at pp. 606C - 607D; *Godbold v Tomson*, 1970 (1) S.A. 61 (D) at p. 65A - D).

[25] There was accordingly no obligation on the applicant to have set out the dies agreed upon in the lease agreements. It was sufficient merely to mention the fact that the respondent was in breach of the lease agreement and that it was required to comply with its contractual obligations contained in the lease agreement. It had not done so.

[26] The respondent's representatives do not suggest that the payments for rental as reflected in the lease agreements had been made. They refer to a set-off and a payment made to Mercantile Bank Limited without showing that these figures would have satisfied the outstanding rentals. They make no attempt to explain the non-payment of the second demand notice.

[27] In all the circumstances there is no defence to the applicant's claim for ejectment. I accordingly grant the following order :

Lee Metals CC ('the respondent') is directed, within three days of the service of this order by the Sheriff to vacate the premises described as:

Erf 123 and Erf 309 (which are notarially tied), Phoenix Industrial Park having the street addresses 7 Vulcan Place and 22 Hunslett Road, Phoenix Industrial Park, Phoenix respectively;

Portion 19 (a portion of Portion 18 of Erf 1332 Durban) having the street address 20 Kent Road, Durban.

In the event that the respondent fails to vacate any of those properties within three days of the service of this order upon it, the Sheriff of this court is authorised and directed to take all such steps as may be necessary to eject the respondent from such of the properties as the respondent has failed to vacate.

(c) The respondent is directed to pay the costs of this application.

Date of hearing : 25th June 2012

Date of judgment : 6th July 2012

Counsel for the Applicant : A W M Harcourt SC (instructed by Edward Nathan Sonnenbergs)

Counsel for the Respondent : D G Tobias (instructed by L Pillay Attorneys)

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