

SOUTH AFRICA / JUDGMENT

Gokaldas v Allah Wala Wholesalers (45779/2017) [2018] ZAGPPHC 631 (23 August 2018) [2018] ZAGPPHC 631

COURT

North Gauteng High Court, Pretoria

BEFORE

E Van Der Schyff

CASE / FILE NUMBER

45779/2017

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Source record

REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
CASE
NO: 45779/2017
NOT
REPORTABLE
NOT
OF INTEREST TO OTHER JUDEGS
REVISED
DATE:23
August 2018
In

the matter between:

ARUN
GOKALDAS
Applicant
and
ALLAH
WALA
WHOLESALEERS
Respondent

Heard:

7 August 2018

Delivered:23 August 2018

JUDGMENT

Coram: VAN DER SCHYFF, AJ

Introduction

- [1] This is an application for judgment against the respondent in the amount of R535 000.00 for arrear rental and related charges, interest on the outstanding amount and the immediate eviction of the respondent and/or any person in occupation of the premises described as Shop B4 and B5 and half of Shop B6, Acentric Bazaar, Marabastad, Pretoria - hereafter referred to as "the property".
- [2] The notice of motion was initially set down for 12 October 2017. The respondent's notice of intention to oppose was delivered on 27 July
2017. The respondent's opposing affidavit was filed on 10 October 2017. On 12 October 2017 the matter was postponed sine die and the respondent was ordered to pay the wasted costs.
- [3] The matter was re-enrolled on the opposed motion role and the notice of set down was delivered to the respondent's legal representatives on 16 May 2018. On 11 June 2018 the applicant's legal representatives received a notice of withdrawal as attorneys of record from the respondent's legal representatives.
- [4] Since there was no appearance on behalf of the respondent on the 7TH of August 2018 when the matter was called, I enquired from applicant's counsel whether the applicant's legal representatives endeavoured to inform the respondent personally of the date for the hearing of the application, since they were informed on 11 June 2018 of the withdrawal of his attorney of record.
- [5] Counsel stated that the applicant's legal representatives did not endeavour to contact the respondent since his attorneys withdrew after the notice of set down was delivered to them. He argued that the applicant would be prejudiced if the matter is postponed and drew my attention to the fact that the court previously expressed their discontent with the respondent by ordering that he pay the applicant's wasted costs occasioned by the postponement.
- [6] Note must be taken of the position as set out in *De Wet and Others v Western Bank* 1979 (2) SA 1031 (A) 1038D-F:

"At the stage when Lebos withdrew as the appellants' attorney, the case had already been set down for hearing on 16 August 1976 in accordance with the Rules of Court, and there was no need for the respondent to serve any further notices or documents on the appellants in connection with the resumed hearing. As far as the trial Court was concerned the Rules of Court had been fully complied with and the notice of trial had been duly given. When the case was

called before Van Reenen J neither the appellants nor their legal representative were present in Court, and, in the circumstances, the respondent's counsel was fully entitled to apply for an order of absolution from the instance with costs in terms of Rule 39(3) in respect of the appellants' claims and to move for judgment against the appellants under Rule 39(1) on the counterclaim. The fact that the appellants had not been advised timeously of the withdrawal of their attorney is, of course, a factor to be taken into account in considering whether good cause has been shown for the rescission of the judgments under the common law ... ".

Condonation

- [7] The respondent requested the court in the opposing affidavit to condone the late filing of the opposing affidavit. Despite the respondent not being present, the court is obliged to consider the opposing affidavit filed on his behalf.
- [8] Since the applicant was afforded the opportunity to reply I am of the view that the applicant will not unduly be prejudiced by the condonation of the late filing of the opposing affidavit, and I accordingly condone the late filing of the opposing affidavit.

Points in limine

- [9] Two points in limine are raised in the respondent's opposing affidavit.
- [10] The first point in limine is that the applicant does not have the necessary locus standi to institute this motion proceedings. After scrutinising the documents annexed to the applicant's founding affidavit and the statements made in this regard in the respondent's opposing affidavit I find that this point in limine emanates from a misconception of the legal construct known as a 'share block scheme'. Share block schemes can be categorised together with section title ownership as 'fragmented property schemes'. In a share block scheme the share block company is the owner of the immovable property, in this case a building. The right to use and occupy a part of the building is secured by shareholding in a company. (See GJ Pienaar Sectional Titles and other fragmented property schemes JUTA 2010, chapter 6).
- [11] The applicant acquired shares to the property described as Shop B4, BS, B6, B7 & B8 in terms of a Shareblock scheme. For purposes of this application his claim to the property is akin to that of an owner, and the applicant has a direct interest in this dispute. The first point in limine is accordingly dismissed.
- [12] The second point in limine relates to the commissioning of the applicant's founding affidavit. This is a purely a technical issue. The respondent is wrong in stating that the founding affidavit seems not to be signed by the applicant. The applicant's signature is indeed on the original document in the court file, and visible on the copy of the document. Without engaging the detail of the remainder of the allegations I was referred by applicant's counsel to WM Mentz & Seuns (Edms) Bpkv Katzake 1969 (3) SA 306 (T) where the court held that non-compliance by a commissioner of oaths does not per se invalidate an affidavit, and that a court could condone non-compliance. In deciding this point in limine, I considered the judgment given in ABSA Bank Limited v Botha NO and Others 2013

- (5) SA 563 (GNP) where the court held that the commissioner's non-election of either the "he/she" rendered the affidavit invalid. I also considered the judgment in *Capriati v Bonnox (Pty) Ltd and Another* (101816/2016) (2018] ZAGPPHC 345 (10 May 2018). In paragraph 8 the court states: "In the present matter there is no evidence that the founding affidavit was not sworn to properly except for an allegation that the omission indicating the correct pronoun " she" should lead to an inference that the founding affidavit was not properly commissioned The founding affidavit was attested to by an attorney of this court. In the absence of evidence to the contrary, this court accepts that, the attorney who attested the affidavit of the applicant, ..., complied substantially with the regulations save for failing to make a deletion indicating the gender of the applicant'. As stated, applicant's point in limine is purely technical. It does not go to the substance of the dispute between the parties. It is evident from the manner in which the affidavit was commissioned that the deponent understood the content of the affidavit and that the commissioner, who is an attorney of this court, complied with the prescribed provisions concerning the taking of the prescribed oath. (See also *Lohrman v Vaal Ontwikkeling* 1979 (3) SA 319 (T)). I condone the short comings since they are not material. The second point in limine is accordingly dismissed.

Facts

determined by applying the Plascon-Evans principle

- [13] I am cognisant of the fact that determinations of fact in motion proceedings aimed at obtaining final relief are not made on the probabilities disclosed in the affidavits unless this is done to enable the court to decide whether or not to reject either party's version (BR Southwood Essential Judicial Reasoning LexisNexis, 2015, 23). As stated in the well-known *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) 634E-635D: " ... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant's affidavits justify such an order... Where it is clear

that facts, although not formally admitted cannot be denied, they must be regarded as admitted." In considering the application and applying the Plascon-Evans principle, I find the facts below to be the facts on which the application must be decided.

- [14] The applicant and the respondent concluded an oral lease agreement during 1999.
- [15] The respondent invested capital, resources and time in the business.
- [16] The respondent paid his rent regularly for the most of the rental period.
- [17] The rent was paid in cash or into a nominated bank account.
- [18] The premises under the lease agreement were extended

- [19] In 2016 the applicant informed the respondent that the rental increased from R15 000.00 per month to R30 000.00 per month. (A factual dispute is evident on the papers as to the date when the rental was increased to R30 000.00 per month).
- [20] The respondent questioned the reasonability of the extent of the increase, and avers that it was expressed and/or tacitly agreed between the parties that the increase in rentals would be just, fair and reasonable.
- [21] The relationship between the parties became strained and was acrimonious.
- [22] On 2 November 2016 the applicant locked the respondent out of the property.
- [23] In February 2017 the respondent launched a spoliation application and his possession of the property was restored.
- [24] The respondent pleads that all the rent that was justly, fairly and reasonably due were paid.
- [25] The applicant however contended in the founding affidavit, and reiterated in the replying affidavit that the respondent has not made any rental payments during the last year. It is of the utmost importance to note that although the respondent deals partially with the allegation of non-payment as contained in paragraph 13 of the applicant's founding affidavit, the respondent does not expressly deal with, or deny the statement that he has not made any payment towards the rent due since 22 March 2017. In an application of this nature one would expect of the respondent more than the bare denial
- that - "The content of this paragraph in as far as it alleges a breach is denied and Applicant is put to prove same'. In *Wightman t/a JW Construction v Head/our (Pty) Ltd and Another* [2008] ZASCA 6; 2008
- (3) SA 371 (A) it was outlined in paragraph [13] that: "A real, genuine and bona.fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact, said to be disputed. " I accordingly find that the applicant has proven satisfactorily that the respondent has not paid any rent for a substantial period of time, at least since March 2017.
- [26] I am of the view that the applicant did not discharge the onus resting on him to prove the quantum of the claim and I therefore cannot make an order pertaining to the quantum of the claim. Not only is there a factual dispute relating to the validity of the increase, but the applicant did not succeed in proving the quantum of the claim, even on his version of the facts. The applicant is not entitled to monetary judgment on the present facts but is free to pursue the monetary judgment through the appropriate legal process available.
- [27] On the documents before me I am however convinced that the respondent is in breach of the lease agreement. The essentially undisputed non-payment of rent since March 2017 represents a material breach of the oral agreements and establishes the necessary ground for cancellation of the agreement.

- [28] The oral lease agreement between the applicant and the respondent is herewith cancelled.
- [29] It is trite that the eviction of commercial occupants does not fall within the ambit of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No 19 of 1998 - MC Denneboom Service Station CC and Another v Phayane [2014] ZACC 29 paragraph 17.
- [30] Since the respondent has occupied the premises for a substantial period of time and established a business on the premises, I am not convinced that it would be fair and just to order the immediate eviction of the respondent. The respondent is entitled to a reasonable period to vacate the property.

ORDER

In light of the aforesaid it is ordered that:

- [I] The late filing of the opposing affidavit is condoned.
- [2] The oral lease agreement concluded between the applicant and the respondent is cancelled;
- [3] The respondent and/or any person in occupation through him of the premises - Shop B4, B5 and half of B6, Acentric Bazaar, Marabastad, Pretoria, be evicted from the property within a period of 2 (two) months from the date of service of this order;
- [4] The Sheriff of this court is authorised, with the assistance of the South African Police Services, if required, to carry out the eviction of the respondent and any other person presently occupying the property through him after the expiry of a period of 2 (two) months referred to in paragraph 2 above;
- [5] The respondent is to pay the costs of this application.

E VAN DER SCHYFF

ACTING JUDGE OF THE GAUTENG DIVISION. PRETORIA

Heard on:

7 August 2018

For the Plaintiff/Applicant: ADV J VORSTER

Instructed by:

GERALD MAREE ATTORNEYS

For the Defendant/Respondent: NO APPEARANCE

Instructed by:

Date of Judgment:

23 AUGUST 2018

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Prepared on 10 October 2026 · Esheria