

SOUTH AFRICA / JUDGMENT

Icegold Trading CC v Sandton Gold & Diamond Exchange (Pty) Ltd (38229/10A) [2011] ZAGPPHC 147 (6 May 2011)

[2011] ZAGPPHC 147**COURT**

North Gauteng High Court, Pretoria

BEFORE

Hiemstra

CASE / FILE NUMBER

38229/10A

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Source record**NOT REPORTABLE****IN THE NORTH GAUTENG HIGH
COURT, PRETORIA
(REPUBLIC OF SOUTH
AFRICA)****Case number: 38229/10A****Date heard: 2011-04-19****Date of****judgment:06-05-2011****In**

the matter between:

ICEGOLD

TRADING

CC.....APPLICANT

and

SANDTON

GOLD & DIAMOND EXCHANGE (PTY)

LTD.....RESPONDENT

JUDGMENT

Hiemstra AJ

[1] This is an application for the confirmation of the cancellation of a written lease agreement, allegedly entered into between the parties; eviction of the respondent from the leased premises; and payment of rentals. The premises concerned are known as Portion 1 of erf 1433 Parkmore, Johannesburg, situated at 96 Sandton Drive, Parkmore, Sandton.

renew it for a further period of three years. The rentals were fixed in terms of a schedule for the period 1 August 2009 to 31 July

2013. The parties to the lease agreement are reflected as the applicant and an entity known as Sandton Gold & Diamond Exchange. The respondent is cited herein as Sandton Gold & Diamond Exchange (Pty) Ltd. As appears later, the respondent denies that it was a party to the lease agreement.

The relief sought

[3] Eviction is sought in prayer 1 of the Notice of Motion. The rentals claimed by the applicant are set out as follows in prayer 2: "2.1 the monthly rentals in the amount of:

2.1.1 R26 460 (excluding VAT) per month for the period 1 December 2009 to July 2010 excluding the rent of February 2010 in the amount of R26 460.00 [tax invoice IG39];

2.1.2 R27 783 per month for the period 1 August 2010 to 31 July 2011;

2.1.3 R29 172.15 per month for the period 1 August 2011 to 31 July 2012;

until date in which Respondent vacates the premises, pending the legal action instituted under case number 38229/10; [my emphasis] 2.2 all municipal charges levied on the property from 1 October 2009 until date on which respondent vacates the property excluding the refuse, sewerage, water and electricity consumed during December 2009 in the amount of R3181.23 [tax invoice IG39]."

[4] These prayers are confusing. The phrase "until date in which Respondent vacates the premises, pending the legal action instituted under case number 38229/10" is confusing. The action under case number 38229/10 is an action that the applicant instituted simultaneously with this application for identical relief (although differently formulated). The relief sought by the applicant in this application is couched in the form of final relief. If that is the case, it is unclear what is left to be decided in the pending action. Equally unclear is the purpose of the action. The confusion was compounded by the Heads of Argument of Mr D.M. Leathern SC, appearing for the Applicant, in which he said that the applicant seeks interim relief pending the outcome of the action. However, he said at the outset of the hearing that it was an error and that the applicant seeks final relief. That, of course, does not clear up the confusing phrase or the purpose of the action.

- [5] It is further unclear until when the applicant claims rentals. It may claim rentals for the remainder of the term of the lease as damages, subject to its obligation to limit its loss by finding a new lessee. However, such damages cannot be claimed in this application. Damages can only be determined after the applicant had taken steps to limit its damages by finding a new lessee. As appears from prayers 2.1.2 and 2.1.3, the applicant claims future rentals until 31 July 2012 regardless of when the respondent vacates the property.
- [6] it seems to me that, should the applicant succeed in this application, it would be entitled to arrear rentals and rentals only

until the date on which the respondent vacates the property.

Locus standi of the applicant

- [7] The applicant alleges that it is the registered owner of the property described in paragraph [1] above. The deponent to the Founding Affidavit states that the applicant had ceded its right, title and interest in and to the income in respect of the lease agreement to First National Bank Ltd (FNB) pursuant to a written cession document dated 6 September 2006, but that First National Bank had receded the rights, title and interest in the lease agreement to the applicant on 22 June 2010. Copies of the cession and re-cession are attached. The significance of the date of re-cession will become apparent in due course.

Background

- [8] The lessee, whoever it may be, fell into arrears with the rentals and the applicant purported to cancel the agreement for the first time on 30 July 2008. The matter was, however, settled and the applicant and the respondent,

represented by Mr Djordje Mihaljevic (Djordje), entered into an addendum to the lease agreement, in terms of which the lease agreement was reInstated on the terms set out in the addendum. This time, the parties are reflected as the applicant and the respondent, Sandton Gold and Diamond Exchange (Pty) Ltd. The respondent undertook to continue paying rentals and municipal charges in terms of the lease agreement. The respondent further acknowledged and agreed that in the event of a breach of any term or condition of the lease agreement or addendum on the part of the lessee, that the lessor may claim payment of any arrears, eviction of the lessee, cancellation of the lease agreement and addendum, damages and costs at a scale as between an attorney and client.

- [9] The respondent again fell into arrears and the applicant again purported to cancel the lease agreement and also the addendum for the second time on 31 August 2008 and sued for confirmation of the cancellation, eviction of the respondent, arrear rentals and other charges.

- [10] It appears from a reconciliation of the respondent's indebtedness, attached to the Founding Affidavit, that further rental payments were made after the cancellation of 31 August 2008. The inference is that, despite the cancellation and the summons, the parties continued to perform in terms of the agreement and addendum. Although the applicant never withdrew this action, it seems that it had reinstated the lease and abandoned the proceedings.
- [11] The applicant purported to cancel the agreement and addendum for the third time on 30 October 2009 on the ground of alleged non-payment of rentals and sued for confirmation of the cancellation, eviction and rentals. According to the reconciliation, the respondent again made subsequent payments of rentals and was again not evicted.
- [12] The present application was instituted when the respondent allegedly again failed to pay rentals and other charges in terms of the agreement and addendum. The applicant purported to cancel the agreement for the fourth time on 14 May 2010.

The respondent's answering affidavit

- [13] The answering affidavit was deposed to by Mirjana Mihaljevic (Mirjana), who is the mother of Djordje. She alleged that Djordje had represented his father, Miso Mihaljevic (Miso) in entering into the agreement and had signed it on his behalf, since Miso was not sufficiently proficient in English.
- [14] It is inexplicable why the answering affidavit is deposed to by Mirjana, instead of Djordje or Miso. They deposed to confirmatory

affidavits confirming the contents of Mirjana's affidavit "insofar as they relate and/or refer to me." Some aspects of Mirjana's affidavit relate or refer to Miso and/or Djordje, but the bulk of the affidavit deals with the facts and argues the case of the respondent without reference to either Miso or Djordje. Mirjana did not state the basis on which she has personal knowledge of the events and the issues. This is a highly unsatisfactory way of placing evidence before the Court. There is no explanation why either Djordje or Miso could not have deposed to the answering affidavit. Counsel for the applicant, Mr Leathern, submitted that it was done deliberately to shield them from charges of perjury on their part. As appears later, I find that the answering affidavit is replete with patent untruths. The suspicion therefore looms large that this may indeed be the case. Mr Leathern, however, did not take the issue further and argued the case as if the answering affidavit constituted admissible evidence.

- [15] The respondent raised a number of defences, none of them to the effect that it had paid the rentals in accordance with the

agreements. I shall deal with them under separate headings.

The respondent was not a party to the lease agreement [16] The respondent denied in the answering affidavit that the respondent was a party to the lease agreement. As I have already said, it is alleged that Djordje had negotiated and signed the agreement on behalf of his father, Miso. The reason is said to be that Miso was not sufficiently proficient in English.

[17] There are various reasons why this defence should not be sustained. Perhaps, the strongest reason is this. The action instituted by the applicant under case number 38229/10, referred to above, is based on similar facts. The respondent entered appearance to defend, whereupon the applicant applied for summary judgment. The respondent and not Miso as the proprietor of Sandton Gold & Diamond Exchange, filed an opposing affidavit, deposed to by Djordje. He stated that he was a director and shareholder of the defendant (respondent herein). The entire affidavit is based on the contention that the applicant had incorrectly charged the respondent for certain municipal charges levied against the leased property. Djordje never alleged that the respondent had not been a party to the lease agreement.

[18] Furthermore, Djordje signed the Addendum to the lease agreement. In the addendum the parties are reflected as the applicant and the respondent. The following is recorded in the Addendum:

[18.1] that it is an addendum to the memorandum of agreement dated 27 August 2007 (the lease agreement) made and entered into by the applicant and the respondent;

[18.2] that it is entered into between the respondent company, represented by Djordje, who alleged that he was authorised to do so and warranted that he was;

[18.3] that the parties entered into the lease agreement on 27 August 2007;

[18.4] that the lessee has breached the terms and conditions of the lease agreement in that it failed to make rental payments; [18.5] that the parties desire to reinstate the lease agreement;

[18.6] that the Addendum revives the lease agreement;

[18.7] that the lessee, which is defined as the respondent company, will make payment of arrear rentals, municipal charges and the rental for the month of August 2008 as well as legal costs;

[18.8] that should the lessee (as defined) breach any term or condition of the lease agreement, the applicant shall immediately without notice cancel the lease agreement and issue summons in the High Court;

[18.9] that the addendum forms part of the lease agreement, and the lease agreement and the addendum shall for all purposes be regarded as one agreement.

[19] The lease agreement was signed after having been submitted to the respondent's attorneys of record and after they had written a letter to the applicant wherein they:

[19.1] record that they act on behalf of Sandton Gold & Diamond Exchange (Pty) Ltd;

[19.2] refer to a telephonic discussion held between the applicant's attorney and "their client's managing director, Mr Djordje

Mehaijovic"

These and other recordings in the letter clearly indicate that their client is the

respondent and not Miso.

[20] For these reasons, I have no hesitation in rejecting the contention that the lease agreement had been entered into between the applicant and the respondent, despite the incomplete citation of the lessee in the agreement of lease.

Lis alibi pendens

[21] As appears from the background discussion above, the applicant had purported to cancel the agreement several times previously and had instituted action for confirmation of the cancellation, eviction of the respondent and for arrear rentals. These actions have not been withdrawn and are still pending. For a defence of lis alibi pendens, the respondent will have to prove (a) that the litigation is pending;

(b) between the same parties; (c) based on the same cause of action; and (d) in respect of the same subject matter.² The pending matters comply with (a), (b) and (d), but not (c). The cause of action in this case is another breach of the lease agreement and another cancellation of the lease agreement.

[22] In any event, these actions have been abandoned. The parties acted as if the lease agreement had not been cancelled and continued to perform in terms of the agreement. The respondent made payment of rentals. The lease was clearly revived by continued compliance with the terms.

[23] The actions are furthermore stillborn. The cancellation of the lease in each of the cases was invalid. As set out in paragraph

[7] above, the applicant had ceded its right, title and interest in and to the income in respect of the lease agreement to First National Bank, which later receded to the applicant. The applicant purported to cancel the lease agreement in each case after its right, title and interest had been ceded, but before it had been re-ceded. Only FNB could have cancelled the agreement at those times.

[24] It is trite that the Court has a discretion whether or not to uphold a special plea of lis alibi pendens.³ In *Stanita v ABSA Bank Ltd & Another*⁴, Andre Gautchie AJ said:

"It is true that such a position would afford a defendant the right to raise the defence of lis alibi pendens, which is invariably done by way of a special plea. But the defence is merely a dilatory one, since if it is upheld the usual practice is to stay the proceedings in the one matter. The court has a discretion whether to uphold the defence, and could refuse to do so in a proper case. Ordinarily the plaintiff would simply withdraw one of the actions. The mere fact that there are at any point in time two extant summonses does not render one or both of them invalid or inoperative."

Since the other actions are dead in the water, this is a proper case to exercise my discretion not to uphold a defence of lis alibi pendens.

Cession and re-cession

[25] The respondent attacked the applicant's particulars of claim⁵, on the ground that it had not attached the written cession of its right, title and interest in and to the income in respect of the lease agreement. The respondent requested a copy of the cession and when it was eventually produced, it turned out to be the wrong document. The applicant then furnished another document purporting to be the cession. However that document does not contain such a cession.

[26] In making this submission, the respondent ignores the fact that the applicant (plaintiff) amended its particulars of claim and attached the cession to

FNB to the amended particulars of claim. The applicant also filed a supplementary affidavit to its founding affidavit in this matter, to which the same document is attached. This is a proper re-cession and a copy of the re-cession is attached to the founding affidavit.

Lease Agreement cancelled while the applicant's rights had been ceded to FNB

[27] The applicant alleges that it had cancelled the agreement of lease on 14 May 2010. The re-cession of the applicant's right, title and interest was signed by the parties on 14 June 2010 and 22 June 2010 respectively. The applicant could therefore not have cancelled the agreement of lease in May 2010 since it had no right, title or interest therein. However, the applicant as plaintiff in the action, stated in paragraph 10 of the particulars of claim that it had cancelled the agreement of lease, alternatively hereby cancels the Lease as it is entitled to." This is a valid cancellation of the agreement of lease.

Incorrect charging for "assessment rates"

[28] The respondent alleges that the applicant had, in conflict with the agreement of lease, charged for municipal "assessment rates". According to the answering affidavit, Djordje had noticed for the first time that the applicant had been invoicing the respondent for municipal "assessment rates" when he considered the applicant's particulars of claim under one of the previous summonses (under case number 67852/09).

[29] Clause 6(1) of the lease agreement provides as follows:"THE LESSEE SHALL:(o)-
(k)

(I) Ensure that all municipal charges levied on the property are paid in full at all times during the duration of the lease and during the duration of the renewal option period."

Clause 9 provides for the cancellation of the lease in the event of the lessee failing to pay the rent and municipal charges.

[30] According to the answering affidavit, municipal charges do not include rates and taxes (or assessment rates) levied against the owner of the property. The respondent had made a similar allegation in its answering affidavit to the applicant's application for summary judgment under case number 67852/09. On strength thereof, the applicant anticipated this

allegation and attached to its Founding Affidavit all the tax invoices and statements from the date of commencement of the lease until May 2010 according to which the applicant had consistently charged the respondent for "assessment rates". It is hard to believe that Djordje would not have noticed that the applicant had charged for assessment rates. The rental was always a round fixed amount, as specifically agreed in the lease agreement, to which "electricity", "assessment rates", "water", "sewerage" and "refuse" were added. The assessment rates were consistently R1 060.83.

- [31] According to the respondent an average of R3 000.00 per month over the period 43 months (R129 000.00) should be deducted from the outstanding amount in respect of undue assessment rates. As stated above, the assessment rates were R1 060.83 per month. In view of the tax invoices that are attached to the Founding Affidavit, it is inexplicable where the respondent got the amount of R3 000.00 per month from.
- [32] To add to the confusion, the respondent alleges that a further amount of approximately R95 000.00 should be deducted from any arrears in respect of payments made in error for assessment rates.
- [33] Apart from the bland statement that "on a proper construction of clause 9 of the lease agreement" assessment rates are not included under "municipal charges", the respondent made no attempt to elaborate on this submission, or explain why assessment rates should not have been included.
- [34] This submission is contradictory, confusing and devoid of substance.

Repairs, maintenance and improvements

- [35] The respondent alleged that the applicant had, in breach of its obligations in terms of the lease agreement, failed to carry out any maintenance of the interior or exterior of the property, and that Miso had carried out this maintenance instead. It is stated that the invoices in respect thereof could not be retrieved, but that they were in excess of R100 000.00. Clause 6(e) and
- (i) of the lease agreement provides that the lessee shall: "(e) Keep the property clean, habitable and tidy and care for and maintain the property.
- (i) Be responsible for the maintenance, repair, upkeep and/or decoration, as the case may be, of the interior of the property, including all ceilings, all wall and floor coverings, all doors and windows, all cooking, heating, cooling, lighting, plumbing and air-conditioning installations (and any part of any such doors, windows and installations), all other fixtures, fittings furnishings and any machinery and equipment in or on the property, the cost of which shall be borne by the Lessee."

- [36] These clauses conclusively put paid to this submission. Consumption charges

[37] The respondent alleges that Miso had on numerous occasions paid the local council for "consumption charges" because the applicant had failed to pay them with the result that municipal services were about to be terminated. This submission is unambiguously contradicted by clause 6(1) of the lease agreement, which I have quoted in paragraph [29] above.

Improvements

[38] Miso had allegedly carried out various repairs and improvements to the property, including high tech security; replacement of doors with re-enforced security features; retiling and refurbishment of the reception area; installation of a counter with bullet-proof glass; and creation of a strong room/safe; and "in general all other steps to modify the premises."

[39] Clause 6(f) of the lease agreement provides that the lessee shall

"(f) Not make structural or other alterations, addition to or improvements in the property without the written consent of the Lessor, the cost of which shall be borne by the Lessee." This submission therefore has no substance.

[40] Apart from the above reasons for dismissing the respondent's claims for undue payments, deductions for maintenance, repairs and improvements, the respondent has not attached a shred of documentary proof for any of the alleged expenditures.

Disputes of fact

[41] Despite the numerous contradictions between the versions of the applicant and the respondent, there are in this case no genuine

factual disputes. The version propounded by the respondent contains so many inherent contradictions and unexplained contradictions of previous versions under oath that it cannot be regarded seriously. It is simply patently dishonest. I am therefore not prepared to refer the matter for oral evidence.⁶

In the result I make the following order:

1. The respondent and all persons occupying on its behalf the property known as Portion 1 of erf 1433 Parkmore, Johannesburg Township, Registration Division IR, Province Gauteng, situated at 96 Sandton Drive, Parkmore, Sandton are evicted from the said property.

2. The respondent is ordered to pay to the applicant the following:

- 2.1 The monthly rentals in the amount of:

- 2.1.1 R26 460.00 (excluding VAT) per month for the period 1 December 2009 to 31 July 2010, excluding the rent for February 2010 in the amount of R26 460.00;

- 2.1.2 R27 783.00 per month for the period 1 August 2010 to 31 July 2011;

2.1.3 R29 172.15 per month for the period 1 August 2011 to 31 July 2012, alternatively until the respondent vacates the premises, whichever occurs first.

2.2 all municipal charges levied against the said property from 1 October 2009 until the date on which the respondent vacates the premises excluding the refuse, sewerage, water and electricity consumed during December 2009 in the amount of R3 181.23.

3. Costs on the scale as between an attorney and client.

J. HIEMSTRA

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 2011-04-19

Date of Judgment: 2011-05-04

Counsel for the applicant: D.M. Leathern SC

Attorney for the applicant: Van Rensburg, Koen & Baloyi Attorneys

Counsel for the respondent: B.K. Pincus SC

Attorney for the respondent: Biccari Bollo Mariano Inc

1 It will appear later why I say that the applicant had "purported" to cancel the agreement.

2 Dreyer and Others v Tuckers Land and Development Corporation (Pty) Ltd 1981

(1) SA 1219 (T) at 1231

3 Loader v Dursot Bros (Pty) Ltd 1948

(3) SA 136 (T) at 138; Nordbak (Pty) Ltd v Wearcon (Pty) Ltd & Others 2009

(6) SA 106 (W) and several other decisions.

4 2010

(3) SA 443 (GSJ) at 446, paragraph {7}

5 In the action instituted simultaneously with this application

6 See Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another 2011

(1) SA 8 SCA, and in particular pages 131 - 14J

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