

SOUTH AFRICA / JUDGMENT

Mthatha Mall (Pty) Ltd v Model Extensions (Pty) Ltd t/a Ideals (857/2017) [2017] ZAECGHC 98 (21 April 2017) [2017] ZAECGHC 98

COURT
Eastern Cape High Court, Grahamstown

BEFORE
M J Lowe

CASE / FILE NUMBER
857/2017

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IN
THE HIGH COURT OF SOUTH AFRICA
EASTERN
CAPE DIVISION, GRAHAMSTOWN
CASE
NO: 857/2017
Date
heard: 30 March 2017
Date
delivered: 21
April 2017
In

the matter between:

MTHATHA
MALL (PTY)
LTD Applicant
(Registration
number: 2006/011321/07)
and
MODEL
EXTENSION (PTY) LTD TIA
IDEALS Respondent
(Registration
number: 1966/008317/07)

JUDGMENT

LOWE, J

Introduction:

- [1] In this matter, and on an urgent basis Applicant seeks final interdictory relief against Respondent by way of an order for specific performance, relying on the terms of an agreement of lease concluded between the parties.
- [2] The substantive relief which is sought is twofold being an interdict restraining Respondent from closing the store referred to in the lease, and Respondent to continue trading from Shop 22 Mthatha Mall, in compliance with the Mall's trading hours, as a retail fashion trading store under the name and style of "Ideal", until 30 June 2020.

The Lease:

- [3] It is common cause that on 1 June 2015 the parties concluded a written agreement of lease (the lease) in respect of the business premises situated at Shop 22 Mthatha Mall (the premises) for a period of 5 years commencing on 1 July 2015 terminating on 30 June 2020.
- [4] The rentable area is 398 m². beneficial occupation having been given on 30 March 2015. The trading date with rent obligation was 25 June 2015. The basic monthly rental was stipulated on an increasing basis but was subject to a turnover clause, which provided that the basic monthly rental would be the minimum payable but would increase in terms of the turnover rent as defined.
- [5] The lease set out minimum standard trading hours on a 7 day per week basis. The lease provided particularly that it was a material term thereof that Respondent would keep the leased premises open continuously during business hours with a full range of merchandise available.
- [6] It was stipulated that material breach would have certain consequences, which did not contemplate specific performance, however the clause makes it perfectly clear that it is in addition to and not such as to limit ordinary common-law remedies upon breach.
- [7] In short Applicant alleged that by ceasing to trade at the premises on 20 February 2017 and in terms of its repudiation of 7 February 2017, Respondent was in material breach of the lease, and that Applicant was entitled to an order of specific performance compelling Respondent to comply with its lease obligations particularly relevant to the obligation to trade.
- [8] In response Respondent took a number of defences: lack of urgency; lack of

jurisdiction; that Applicant had an alternative remedy; that the deponent to the founding affidavit did not have the necessary personal knowledge to depose to same; that the conclusion of the agreement was induced by misrepresentation by the Applicant; that Respondent had accepted a "proposal" from Applicant; and that Applicant had not alleged compliance with the suspensive conditions in the lease.

- [9] In the Heads of Argument for Respondent urgency was contested; it was argued that Applicant having elected not to cancel the agreement had an alternative remedy being to sue for outstanding rental when this became lawfully so; and in respect of specific performance that the court was vested with a residual discretion, despite Applicant's election, to refuse an order for specific performance which should be exercised in Respondent's favour. It was also argued that Applicant had failed to make out its case in its founding affidavit.
- [10] As for the remainder of the points taken in the papers, I did not understand these to be urged upon me either in argument or in the Heads for Respondent and in my view perfectly correctly so, the remaining points having no merit.

Urgency:

- [11] In summary on 7 February 2017 Applicant was notified in writing by Respondent that it intended to cease trading from the premises. On 13 February 2017 Applicant informed Respondent that the failure to trade constituted a breach of the lease agreement and that

specific performance would be demanded. There was no response from Respondent despite a further letter from Applicant dated 17 February 2017 insisting on Applicant's rights. The application was launched on 27 February 2017, and Respondent ceased trading on 28 February 2017.

- [12] In my view, on this timeline, and in the circumstances deposed to in the papers both for and against, there is no question that the

matter attracted sufficient urgency to be brought in the manner in which it was.

Proper Approach to Final Interdictory Relief:

- [13] The requirements for a final interdict are: a clear right; injury actually committed or reasonably apprehended; no other suitable alternative remedy.
- [14] Motion proceedings such as this are not designed to resolve factual disputes. Unless concerned with interim relief, such applications are all about the resolution of legal issues based on common cause facts. In the absence of special circumstances they are not used to resolving factual issues because they are not designed to determine probabilities.
- [15] In *Plascon - Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623(A) 634-635, the rule was established that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in Applicant's affidavits, which have been admitted by the Respondent, together with the facts

alleged by the latter, justify such order. It may be different if the Respondent's version consists of bald or uncreditworthy denials,

raises fictitious disputes of fact, and is palpably implausible, farfetched, all so clearly untenable that the Court is justified in rejecting them merely on the papers. National Director of Public Prosecutions

v Zuma 2009 (2) SA 279 SCA [26].

[16] It should be emphasized that whilst generally undesirable to attempt to decide an application on affidavit where there are material facts in dispute, It is equally undesirable for a court to take all disputes of fact at face value which would enable a Respondent to raise fictitious issues of fact in avoidance. It is necessary then to examine the alleged disputes and determine whether they are real or can be satisfactorily resolved without the aid of oral evidence.

[17] In Wightman t/a JW Construction v Headfour (Pty) Ltd and Another [2008] ZASCA 6; 2008 (3) SA 371 (SCA) [13] the following was said: "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. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can be expected of him. But even that may not be sufficient if the fact

averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate

but, instead of doing so, rests his case on a bare or ambiguous denial, the court would generally have difficulty in finding that the test is satisfied. I say generally because factual averments seldom stand apart from a broader matrix of circumstances, all of which need to be borne in mind when arriving at a decision. A litigant may not necessarily recognize or understand the noyances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the

answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them."

[18] As in this matter neither party sought the referral of disputes to oral evidence. I am entitled to deal with the application on the undisputed facts. Thus if notwithstanding that there are facts in dispute, I am satisfied that Applicant is entitled to relief in view of the facts stated by Respondent together with the facts in Applicant's affidavits, which are admitted or have not been denied, I am entitled to make an order giving effect to such finding. The onus plays no role in this. In so doing a robust approach may be taken in certain circumstances to decide the issues on the affidavits. This must be cautiously adopted as the disputes on affidavit in an

application should not be settled on the probabilities solely. In practice a robust approach is adopted only where the allegations on one or other side are so clearly false or intrinsically improbable that a court could say that an oral hearing would not disturb the balance of probabilities. Civil Procedure in the Supreme Court: Harms 856-8- 64.

The

Facts:

[19] I have already set out the terms of the lease relevant to this dispute.

[20] There is no doubt whatsoever, on the terms of the lease properly interpreted, nor was there any argument to the contrary, that Respondent had an obligation to continue to trade and to trade continuously for the full period of the lease at least during the operating hours stipulated, paying the rental due accordingly.

[21] There is also no question about the reason for this prescription as to trading hours, nor can it seriously be disputed, nor was it disputed, that the hallmark of a well-managed and competitive shopping centre comprises a quality and diverse tenant mix which attracts shoppers to the centre. If all the tenants at the centre were to be permitted to simply close their doors,

notwithstanding payment of rental, or diminish stock levels, the shopping centre would lose customer feet in a highly competitive

market. Put otherwise, tenants who close their shops, being part of the quality and diverse tenant mix, inevitably has a negative impact on the surrounding tenants and Applicant.

[22] Further, Respondent operated a retail fashion store, Applicant losing the benefit of comparative shopping in that market sector at

the shopping mall, an important factor to many consumers. It is for this reason that it is important to Applicant that its tenants remain open and trade in accordance with their obligation to do so in the performance of the Mall as a whole. Further, it is obvious that if a tenant leases to trade, this deprives the landlord of its potential benefit in an increased rental being earned on the turnover clause.

[23] It is also not disputed that Respondent has stopped trading, and if it has its way, permanently.

[24] The only real defence put up on the papers, at least in the facts, is the following.

[25] Respondent contended that for the success of its business it is imperative that Respondent locates its branch shops where people

in large numbers do their shopping in order to attract customers for its clothing products.

[26] Respondent contended that:

“20. Prior to the respondent concluding the lease agreement with the applicant, the respondent was assured by Zancile Koga, who represented the applicant, that a taxi rank would be positioned at the shopping centre, known as the Mthatha Ma!I ("the Mall"), which played a decisive role in respondent's decision, to open yet another shop in Mthatha. I point out that respondent has 4 (four) other branches in Mthatha. As a general rule, respondent only opens stores which are in close vicinity of a taxi rank;”

- [27] It is to be noted, that apart from this rather terse paragraph, there are no other details concerning this alleged misrepresentation. There is no detail as to when or where, relevant to the shopping centre, the taxi rank would be situated, as at what date this would eventuate, or whether it was intended that this would be part of the lease terms and conditions.
- [28] It cannot be gainsaid that in point of fact this alleged misrepresentation formed no part of the lease between the parties, it simply not being referred to at all.
- [29] Further, it is common cause that the lease provided specifically that the lease constituted the whole of the agreement between the parties and that no agreement, representation or warranty had been made other than those set out in the lease, and no other representations were binding on the parties.
- [30] Respondent contended further that it was induced to sign the lease agreement by the representation relevant to the taxi rank

which would operate from nearby the shopping centre, which turned out to be untrue, Respondent suffering severe financial prejudice as a result.

- [31] In reply, Applicant simply took the point that the deponent was advised that the allegation concerning the taxi rank be rejected as this did not appear in the lease. He was also advised extraordinarily, apparently, that it was "impossible to misrepresent a future fact or state of affairs", or so the affidavit said.
- [32] There was no direct answer by Applicant in its papers to the allegation concerning the fact that a representation had been made that there would be a taxi rank and this by a person capable of binding Applicant, nor was there any answer to the paragraph alleging that Respondent had been induced into signing the lease by such representation relevant to the taxi rank being situated nearby the shopping centre. It was not contested that this representation had been made and had turned out to be untrue or that Respondent suffered severe financial prejudice as a result thereof.
- [33] In the circumstances, and apart from various legal points raised by Applicant, I am bound to decide this matter on the

facts

set out by Respondent which was essentially undisputed, Applicant seeking final interdictory relief with a mandamus.

Misrepresentation:

[34] The terms of the lease in this matter excludes innocent and negligent misrepresentations.

[35] Fraudulent misrepresentation, however, cannot be excluded by a no misrepresentation clause, such as the lease contained in this matter. Accordingly if there is sufficient on the facts to establish a fraudulent misrepresentation made by Applicant's representative to Respondent which Induced the lease, this would afford Respondent the usual contractual entitlement. consequent upon such fraudulent

misrepresentation being, amongst other things, cancellation of the lease agreement.

[36] The question is whether, on the common cause facts in this matter, and those to which I am entitled to have regard in terms of the test outlined above, Respondent set out sufficient to establish a fraudulent misrepresentation as opposed to one made negligently or innocently.

[37] From what I have set out above in respect to the facts, it is clear that whilst it must be accepted that one Kogo, legitimately representing Applicant, represented that a taxi rank would be positioned near the shopping centre, that this induced

Respondent into signing the lease agreement, and that this in turn turned out to be "untrue". The crux of this argument is simply whether, on what is before me, that is sufficient to establish fraud as opposed to simple negligent or innocent misrepresentation.

[38] Arising from what I have set out above, a fraudulent misrepresentation requires there to have been a representation which was, to the knowledge of the representor, false, and upon which the representor intended the representee to act, and which in fact

introduced to the representee to act, causing it to suffer damages as a result *Standard Bank of SA Limited v Coetzee* 1981 (1) SA 1131 (A) at 1145. Of course the motive of the representor is irrelevant providing only that he made the assertion without an honest belief in its truth intending it to be acted upon. Further, it is sufficient if the representor subjectively foresaw the result of his representation and was reckless as to whether the result followed or not. The representee, on establishing the necessary, may elect whether to set the contract aside or uphold same claiming damages.

[39] There is on the facts set out in the papers in this matter, simply insufficient to establish a fraudulent misrepresentation in this context. Anything less than at least the essential allegations to establish fraud are insufficient to assist Respondent in its defence in this regard. Not only does Respondent fail to allege that the representation made was to the knowledge of the representor false, it is not alleged that the representor intended the representee to act thereupon. Absent same there is simply insufficient to establish a basis for fraudulent misrepresentation.

[40] In my view, this being so, Respondent's defence, based on misrepresentation in the context of this lease, must necessarily fail, at least on what is set out in the papers in this matter.

[41] It should be particularly noted that in the Respondent's counsel's Heads of Argument, he did not rely upon the misrepresentation defence, he concentrating on the arguments to which I have already referred to above both in his heads and in argument, and in my view at the end of the day correctly so.

The Alternative Remedy Argument:

[42] The suggested alternative remedy in this matter was alleged to be Applicant's entitlement to sue for outstanding rental. This only

has to be said, In the context of the lease, for it to be perceived that the argument must fail. Not only does this not meet Applicant's entitlement to have the trading mix for which it contracted, but further, would deprive it of its entitlement to take advantage of the turnover clause in respect of rental. The argument entirely fails to meet the requirements of an alternative remedy in the concept of interdictory relief. The alternative remedy in this context, must be adequate in the circumstances; be ordinary and reasonable; be a legal remedy; and grant similar protection. In this matter this is clearly not the case.

The Specific Performance Argument:

[43] An order given to perform a contractual obligation amounts to what is known as specific performance. Put shortly Applicant/Plaintiff is always entitled to claim specific performance, in the event that he makes out a proper case therefore, and this will be granted subject only to the relevant court retaining a discretion in this regard. I should state clearly a Defendant/Respondent is not entitled to argue for damages in the place of specific performance on an adequate remedy argument.

[44] It has long been accepted that the discretion which a court enjoys, which must be exercised judicially, is not confined to specific types of cases nor is it circumscribed by rigid rules. Each case must be considered in its own circumstances. In *Benson v Old Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 782F-783 C the Court pointed out that in this regard there are no rules except the rule that the Courts discretion is to be exercised judicially upon a consideration of all the relevant facts. This is an equitable discretion, which will certainly have regard to undue hardship and whether this is involved, as pointed out in *Haines v King William's Town Municipality* 1951 (2) SA 371 (A).

[45] In this matter in arguing that I should exercise a discretion to refuse specific performance Respondent put up the following reasons:

- i) Respondent no longer occupies and/or trades from the leased premises;
- ii) Applicant has an alternative remedy as Respondent is in a financial position to meet any claim for future rental;

- iii) That directing the Respondent to return to the premises or to trade at a substantial loss would cause Respondent undue hardship;
- iv) The leased premises are eminently legible;
- v) Applicant created an expectation with Respondent that if business did not improve by the end of January 2017, the continuation of the lease would be reviewed with a view to reaching agreement on termination finding another tenant for the leased premises;
- vi) The parties are presently engaged in negotiations in order to find a resolution to the dispute;
- vii) And finally, Respondent's expectation of the taxi rank operating from the near proximity of the mall was not met.

[46] I have already dealt with the alternative remedy argument and pointed out that the damages claim in this regard would not be an

adequate result for Applicant in the circumstances. That Respondent is in a financial position to pay the rental similarly, is in my view irrelevant. That Respondent has ceased to trade is a matter of its own making, and to take up trading again does not in any event cause it in my view undue hardship in the content of that meaning. That the leased premises are said to be eminently lettable, has not been established on the papers by any means on the one hand, and on the other entirely ignores Applicant's contractual entitlement to have Respondent trade as set out in the lease. The so-called expectation created by Applicant went no further than that it might be prepared to consider re-letting in certain circumstances, to which it in no way bound itself, and in respect of which Applicant is entitled to withdraw insisting on its right. That the parties were engaged in negotiations to find a resolution is similarly not relevant to my discretion, alternatively, insufficient in this regard. Finally I have already dealt with Respondent's expectation of the taxi rank operating, this being contractually in the circumstances of this matter irrelevant, and even if relevant to my discretion, is insufficient to persuade me to exercise this in Respondent's favour. Finally, I am entirely un-persuaded by Respondent that any claim for damages would be adequate in the circumstances as I am of the view that it would be practically impossible for Applicant to adequately compute its claim for damages, let alone prove same, based on Respondent having reneged on the lease, this going far beyond the loss of rental, but entering upon the difficult area of general loss of goodwill and customer feet in the supermarket, in the mix it envisaged insofar as trading entities were concerned, and the general effect of this on both other tenants and in Applicant's hands, the general attractiveness of its Mall to others.

[47] In the circumstances, of this matter, I am entirely un-persuaded that in the context of discretion and Applicant's entitlement to specific performance generally, that there are sufficient facts viewed cumulatively to persuade me to exercise that discretion in Respondent's favour.

[48] In the result, I am satisfied that Applicant has made out a case for specific performance, on what is before me, and that I should exercise my equitable discretion, against Respondent.

[49] Finally I should mention that I could find no merit in Respondent's argument that Applicant failed to make out a sufficient case in its founding affidavit. Similarly the argument that there were suspensive conditions which Applicant failed to allege had been

satisfied, the conditions referred to being far from suspensive in any event.

The Order:

[50] In the result Applicant must succeed in an order issuing in the following terms:

1. The provisions of the Rules as to time and service are dispensed with this matter to be dealt with as one of urgency;
2. Respondent is interdicted and restrained from closing the shop known as SHOP 22, MTHATHA MALL ERF 23200, Errol Spring Avenue, Mthatha, Eastern Cape until the expiration of the lease concluded between the parties, being 30 June 2020;
3. Respondent is ordered to continue trading from the said Shop 22 in compliance with the trading hours referred to in the agreement

of lease concluded between the parties, as a retail fashion trading store under the name and style of "Ideal";

4. Respondent is ordered to pay Applicant's costs.

M.J LOWE

JUDGE OF THE HIGH COURT

Obo the Applicant: Adv. Jonker

Instructed by: Wheeldon Rushmere & Cole

119 High Street

Grahamstown

Obo the Respondent: Adv. D Schaup

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