

SOUTH AFRICA / JUDGMENT

Powerline Communications (Pty) Ltd and Others v Power (A3004/2017) [2018] ZAGPJHC 508 (28 August 2018) [2018] ZAGPJHC 508

COURT

South Gauteng High Court, Johannesburg

BEFORE

G Kairinos, PA Meyer

CASE / FILE NUMBER

A3004/2017

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION,

JOHANNESBURG

APPEAL COURT CASE NO: A3004/2017

COURT A QUO CASE NO: 17827/2016

In the matter between:

POWERLINE COMMUNICATIONS (PTY) LTD First Appellant

BENJAMIN MOUTON Second Appellant

GERTRUIDA DOROTHEA MOUTON Third Appellant

and

ADELE MELANIE POWER Respondent

J U D G M E N T

KAIRINOS AJ (MEYER J CONCURRING):

1. This is an appeal against the judgment and order of the Magistrate's Court for the District of Johannesburg North granted on 29 September 2016 and reasons for judgment dated 11 October 2016 pursuant to a request in terms of Rule 51(1) of the Magistrate's Court Rules, in terms of which the Respondents were evicted from the property situate at Holding Number 22, Glenferness Agricultural Holding known as Plot 22 McInnes Road, Glenferness, Midrand ("the property").
2. At the hearing of the appeal this Court was informed that Appellants' legal representative had withdrawn on Friday 17 August
2018. The Second Appellant appeared in person and the First and Third Appellants were unrepresented. However, the legal submissions made by the Second Appellant were in any event the same defences raised by the First and Third Appellants and in the hearing a quo, one answering affidavit and heads of argument were delivered by all three Appellants and they made common cause in their opposition to the eviction application.
3. Furthermore, this appeal had already lapsed as a result of non-compliance with various Rules relating to appeals. There was no proper condonation application or application for reinstatement of the appeal. Although the Appellants had delivered heads of argument on a previous occasion, they did not deliver any fresh heads of argument and also the record did not comply with the Rules and Practice Directives of this Court. However, in light of the view which this Court has taken on the merits of this matter and in order to bring finality to this matter and to dispose of it on the merits, the appeal is reinstated and the Appellants' failures to comply with the Rules are condoned.
4. The material facts in this matter are common cause and they are as follows herein.
5. The First Appellant, represented by the Second Appellant, concluded a written lease agreement in respect of the property on 9 May
2016. The duration of the lease was from 10 May 2016 until midnight on 30 April 2017. Importantly, in terms of clause 1.1.1 of the lease, the premises let were Portion 22 and the "Building: Main House and Stables" situated Number 22 MacInnes Road, Glenferness, Midrand.
6. Prior to the conclusion of the lease and on 9 May 2016, the Respondent's representative sent an email to the Second Respondent (who at all times represented the First Appellant) in which she stated "They wish to know that you understand that the agreement is for the main house and stables only, they refer to this as section as C (as per map provided to you). The Second Appellant responded on the same day and in reply to the above quoted extract of the email, he stated "Yes, we are clear on this". It is therefore apparent that the parties understood that the First Appellant was leasing the main house and stables only.
7. The First Appellant and the Second and Third Appellants, through the First Appellant, took occupation and possession of the premises. However, it appears from the affidavits of the respective parties that from the very outset the Appellants took occupation of more than just

the main house and the stables and that they contended they were also entitled to occupy a separate building on the property which had a private office therein and also contended that they were entitled to the occupation and use of the separate complex which included a servant's quarters and laundry and wash bays. The Appellants also contended that they were entitled to occupy a shop which adjoined the stables as being part of the stable complex.

8. The Respondent's representatives wrote to the Appellants and informed them that they were in breach of the lease agreement in that they occupied or intended to occupy more than just the main house and the stables. The Respondent's contention was that upon a proper interpretation of the lease, the First Appellant and all those occupying through it, were only entitled to occupy the main house and the stables and nothing more. It was common cause that there were other tenants on the property that had lease agreements in respect of other buildings on the property such as the school.
9. Save for making payment of the first months' rental, the First Appellant refused to make any further payments. This refusal was based on its contention that it had not been granted occupation and possession of all the buildings it was entitled to in terms of the lease agreement and it contended it was also entitled to occupy the private office building and the shop at the stables. It is immediately apparent that the First Appellant contended for a different interpretation of the lease agreement to that relied upon by the Respondent.
10. It is common cause that following a flurry of correspondence between the parties, the Respondent's attorney wrote to the First Appellant on 13 July 2016 and demanded payment of the arrear rentals within seven days from the date of receipt of the letter, failing which the Respondent would cancel the lease, claim damages arising from such cancellation and seek an order for the eviction of the First Appellant from the premises. It is common cause that other than to reply in writing on 18 July 2016 and contend that it was not being granted occupation of the other buildings and to contend that the Respondent was in breach of the lease, the First Appellant did not comply with the demand.
11. On 25 July 2016, the Respondent's attorney delivered a letter to the First Appellant at the leased address in which the First Appellant was informed that it had failed to remedy its breach within the seven days afforded and the Respondent had considered the First Appellant's conduct to constitute a repudiation of the lease, which the Respondent accepted and the lease was therefore terminated and in any event the Respondent cancelled the lease due to the First Appellant's failure to remedy its breach pursuant to the demand letter. The First Appellant was afforded until 31 July 2016 to vacate the property failing which eviction proceedings would be instituted. It is also important to note, for reasons which will become apparent, that the Respondent's attorney placed on record that the provisions of section 14 of the Consumer Protection Act, 68 of 2008 ("the CPA") are not applicable to the lease.

12. The Appellants refused to vacate the property and the eviction proceedings were launched and were ultimately successful and this culminated in the present appeal. The Appellants contend that the Magistrate erred in granting an order for their eviction on various grounds. Each of these grounds will be dealt with below.
13. The first ground and the ground which the Appellants relied upon and which the Second Appellant emphasised during the hearing of the appeal, is that the Respondent did not have locus standi to seek the eviction of the Appellants from the property. This contention was premised upon the contention that the Respondent had ceded its right to seek eviction in securitatem debiti to First Rand Bank Limited (“the Bank”) in the mortgage agreement which the Respondent had concluded with the Bank. The Appellants relied on the provisions of clause 8 of the mortgage agreement which states as follows:

“Should the Bank give its consent to the letting of the mortgaged property, the Mortgagor cedes, transfers and assigns to the Bank all the Mortgagor’s rights, title and interest in and to all rentals and other revenues of whatsoever nature, which may accrue from the mortgaged property as additional security for the due repayment by the Mortgagor of all amounts owing to or claimable by the Bank at any time in terms of this bond, with the express right in favour of the Bank irrevocably and in rem suam –

8.1 To institute proceedings against the lessees for the recovery of unpaid rentals, and/or eviction from the mortgaged property.”

14. The Appellants relied on this clause to contend that the Respondents had ceded their right to seek eviction and therefore had no locus standi. The Appellants have however misconstrued and misinterpreted the above clause. The Respondent will only cede its right to seek eviction if the Bank gave its consent to the letting of the mortgaged property. There is not a shred of evidence in the affidavits that the Bank gave its consent to the lease in question. There was therefore never a cession of the right to seek eviction to the Bank. It is so that the Respondent may have breached the mortgage agreement by not seeking the Bank’s prior written consent to the lease in terms of clause 7.2 of the mortgage agreement which requires the Bank’s prior written consent for the letting of the mortgaged property for a period in excess of three months. However, that is a potential contractual dispute between the Bank and the Respondent and does not invalidate the lease and more importantly does not lie in the mouth of the Appellants to raise. Most certainly the failure to obtain the Bank’s consent to the lease means that no valid cession has taken place and the Respondent had the locus standi to seek the eviction of the Appellants from the property.
15. The Appellants reliance on the decision in *Picardi Hotels Ltd v Thekwini Prop (Pty) Ltd* [2008] ZASCA 128; 2009 (1) SA 493 (SCA) and *PG Bison Ltd and Others v The Master and Another* 2000 (1) SA 859 (SCA) is misplaced. Both those decisions merely establish that once cession has occurred the rights are immediately transferred and are not suspended. This begs the question whether the rights have been transferred and this depends on whether the cession has occurred. As set out above, in casu, it has not been established that the

pre-requisites for the cession (being the Bank's consent to the lease) have been fulfilled. In casu there is no cession and the two decisions are therefore distinguishable. The Appellants' contention that the Respondent did not have locus standi to seek their eviction must therefore fail and the Magistrate did not err in this regard.

16. The next contention relied upon by the Appellants was that the First Appellant was not obliged to make payment of any rental whatsoever (despite occupying the main house and stables) because they had not been granted occupation and possession of the private office building, the laundry and washing complex building and the store at the stables. The Appellants relied on the application of the exceptio de non adimpleti contractus. This principle applies where a contract contains reciprocal obligations. However, it does not apply where parties have expressly

or by implication waived reliance on the exceptio de non adimpleti contractus.

17. In order to succeed with the reliance on the exceptio de non adimpleti contractus, the Appellant had to prove that it did not obtain full performance of the Respondent's reciprocal obligation. In order to attempt to do so, the Appellants averred that on a proper interpretation of the lease, the First Appellant was not only entitled to occupation of the main house and stables as clearly set out in clause 1.1.1 of the lease, but because clause 1.1.1 referred also to Portion No. 22, the First Appellant was entitled to occupy the entire Portion No. 22. This contention is contrary to the express and unambiguous grammatical interpretation of the lease in respect of which buildings the First Appellant is entitled to occupy, which expressly states "Main House and Stables". There is no ambiguity in this regard. If the Appellants interpretation is correct, it would make those words superfluous. There is a presumption against superfluous words in an agreement and a Court must try give all the words in an agreement meaning and application when interpreting the agreement.
18. The interpretation of contracts involved a two-stage approach as Wallis JA set out in Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA) [12] as follows:

Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being . . . Interpretation is no longer a process that occurs in stages but is essentially one unitary exercise."

19. In relation to extrinsic evidence, Malan AJA, in Engelbrecht v Senwes Ltd 2007(3) SA 29 (SCA) [7], held as follows:

"There are three classes of admissible evidence. Evidence of background fact is always admissible. Those facts, matters probably present in the minds of the parties when they contracted, are part of the context and explain the "genesis of the transaction" or its "factual matrix". Its aim is to put the Court "in the

armchair of the author(s)” of the document. Evidence of “surrounding circumstances” is admissible only if a contextual interpretation fails to clear up an ambiguity or uncertainty. Evidence of what passed between the parties during negotiations that preceded the conclusion of the contract is admissible only in the case where evidence of the surrounding circumstances does not provide “sufficient certainty”.

20. Even if there was any doubt or not sufficient certainty as to what was intended with use of the words “Building: Main House and Stables” in clause 1.1.1 of the lease, the evidence of what passed between the parties during negotiations and particularly the exchange of emails on 9 May 2016 is admissible and clearly establishes that the First Appellant was aware that it was leasing only the Main House and Stables.
21. The Appellants however contended further that the Court should also have regard to clause 8.1 which in relation to the use of the premises, stated that the premises could only be used as a residential home and private office and no other purpose whatsoever. The Appellants contended that on a proper interpretation this meant that the First Appellant was also entitled to occupy the separate building which is a private office. This interpretation is incorrect and strained. Clause 8.1 merely means that the buildings which are being leased, being the Main House and Stable, may be used as a residential home and private office. In other words, the First Appellant was entitled to convert a room in the Main House into a private office. It did not mean that it could occupy other buildings on the property merely because they were also used as a private office. On this interpretation of the lease, the Appellants are clearly wrong in contending they were entitled to occupy anything more than the Main House and the Stables. They were indeed granted occupation of the Main House and Stables and therefore cannot rely on the exceptio de non adimpleti contractus for their refusal to pay any rental after the first months’ rental.
22. There is however a further reason that they the Appellants could not rely on exceptio de non adimpleti contractus and that is the provisions of clause 18.2 of the lease which provides that the lessee may not under any circumstances whatsoever withhold payment of the rental or any part thereof by reason of an alleged default by the lessor or for any other reason whatsoever. This clause is at the very least an implied (if not express) waiver of the right to rely on the exceptio de non adimpleti contractus. Furthermore, if the First Appellant contended it had not obtained beneficial occupation of all the buildings in the lease, it was entitled to claim a remission of the rental in terms of clause 10.1 of the lease. The First Appellant never claimed a remission of the rental.
23. The First Appellant’s interpretation of the lease was therefore incorrect. The First Appellant’s attempt to enforce the incorrect interpretation of the lease entitled the Respondent to objectively view this conduct as a repudiation of the lease, to accept such repudiation and to terminate the lease (see *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 (2) SA 835 (A) at 845A-B; *OK Bazaars (1929) Ltd v Grosvenor Buildings (Pty) Ltd*

[1993] ZASCA 56; 1993 (3) SA 471 (A) at 480I–481A; Metalmil (Pty) Ltd v AECI Explosives & Chemicals Ltd

[1994] ZASCA 96; 1994 (3) SA 673 (A) at 684I–685C). This the Respondent did on 26 July 2016.

24. Even if the First Appellant's conduct had not amounted to a repudiation of the lease, the Respondent in any event afforded the First Appellant seven days to remedy its breach of the lease and the First Appellant failed to do so, thereby entitling the Respondent to elect to cancel the lease on 26 July 2016, which it did in the alternative to the repudiation.
25. The Appellants contended that First Appellant had not been given 20 days' notice of the cancellation of the lease in terms of section 14 of the CPA. The reliance on section 14 of the CPA is also misplaced since more than twenty days have elapsed since the Respondent cancelled the lease and the First Appellant had therefore had more than twenty days' notice of the cancellation. In any event, on the First Appellant's own version, it never remedied its breach, even after twenty days elapsed from when it received the demand on 13 July
2016. The provisions of section 14 of the CPA are aimed at entitling a consumer to adequate notice of a landlord's intention to cancel a lease. This objective was complied with in casu. There is therefore no merit in this point.
26. The Appellants, rather vaguely, also contended that the Respondent had not complied with the provisions of the Prevention of Illegal Eviction Act, 19 of 1998 ("the PIE Act") and the Rental Housing Act, 50 of 1999. However, the Appellants did not make out a case as to how these Acts were not complied with and which sections thereof were not complied with.
27. Lastly the Appellants also contended that the founding affidavit was hearsay. This is irrelevant considering all the material facts were common cause.
28. In a question posed by this Court, the Second Appellant indicated that the Appellants would be able to vacate the property by 30 September 2018 should the appeal be dismissed and the eviction order upheld. The Appellants did not establish on the basis of justice and equity why the Appellants should not be evicted.
29. On a conspectus of all the facts of the matter, the Magistrate did not err or misdirect herself in any way and the provisions of the PIE Act were complied with.
30. Lastly something must be said of the Appellants conduct in prosecuting this appeal. It is clear that this appeal was struck off by a previous Court because of failures to comply with the Rules and Practice Directives of this Court in relation to the proper prosecution of an appeal and the preparation of an appeal record. Even at the hearing of this appeal, the Appellants had still not complied. As a sign of this Court's displeasure in the conduct of the Appellants it is only fitting that a punitive costs order be made in relation to the costs of reinstatement of the appeal and therefore the costs of reinstatement of the appeal must be borne by the Appellents, jointly and severally, on the attorney and client scale.

31. In the circumstances, the following orders are made:

31.1 The appeal is reinstated;

31.2 The Respondents, jointly and severally, are ordered to pay the Respondent's costs of opposing the reinstatement of the appeal on the scale as between attorney and client.

31.3 The appeal is dismissed with costs.

G Kairinos

Acting Judge of the High Court: Gauteng Local Division

I agree.

PA Meyer

Judge of the High Court: Gauteng Local Division

No appearance for the First and Third Appellants

The Second Appellant in person

For the Respondent:

Adv PJ Kok instructed by SSLR Attorneys

Dates of Hearing: 20 August 2018

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