

SOUTH AFRICA / JUDGMENT

Rebosis Properties Fund Ltd v Guoping Wu t/a Lee Fashion (3790/2016) [2016] ZAECGHC 76 (23 August 2016) [2016] ZAECGHC 76

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Pickering

CASE / FILE NUMBER

3790/2016

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO.: 3790/2016

In the matter:

REBOSIS PROPERTY FUND LTD

AND

GUOPING WU t/a LEE FASHION

EX TEMPORE JUDGMENT

DATE: 23 AUGUST 2016

PICKERING J:

[1] On 24 October 2014 applicant and respondent concluded a lease agreement in respect of Shop 20, Mdantsane City, commencing on 1 September 2014 and terminating on 31 August 2017. On 21 July 2014 applicant cancelled the agreement alleging that respondent had breached the terms thereof in that, inter alia, he had failed to pay his monthly rental together with related water, electricity charges

timeously or at all and was accordingly, on the date of cancellation, in arrears with rental and charges in the sum of R255 361-17.

Applicant alleged further that respondent had traded in breach of Clause 9.1 of the Offer to Lease, which Offer to Lease is annexed to papers duly filed, which provides that the premises shall be use solely for the purpose of unisex fashion and

[2] Respondent, however, refuses to vacate the premises and disputes that applicant was entitled to cancel the agreement. Respondent alleges, inter alia, that in consequence of certain unspecified breaches of the lease agreement by applicant he withheld his rental in the belief, which he now admits was mistaken, that he was entitled to do so. He has, since the cancellation of the agreement by applicant, paid the arrear amount of rental in full.

[3] Because of respondent's refusal to vacate applicant has now launched the present application as a matter of urgency seeking, inter alia, the following relief:

"2. Evicting the respondent and all those occupying by, through or under the respondent from the commercial premises situated in Shop 20, Mdantsane City, corner of Billy and Kumza Highway, Mdantsane, Eastern Cape, and to give applicant undisturbed possession thereof.

3. Authorising the Sheriff of the Mdantsane Court, or the Deputy with the assistance of the South African Police Services, if necessary, to execute and give effect to the Order in terms of paragraph 2 above.

4. Ordering the respondent to pay the costs of this application on a scale as between attorney and client."

[4] In response the respondent has raised a number of grounds in opposition to the application including that of lack of urgency.

[5] With regard to urgency applicant avers that it has subsequent to the cancellation of the agreement concluded a replacement lease with a new tenant with the somewhat quirky name, Fashion Freak, on 27 July 2016 and that it did so in order to mitigate its damages. Applicant avers that in terms of the new lease agreement it is obliged to give the new tenant occupation of the premises by 1 September 2016 in order for that tenant to commence trading on 1 October 2016. It avers that respondent is interfering with its contractual rights by persisting with its unlawful occupation of the premises thus placing applicant in a breach position with its new tenant.

[6] For its part respondent avers that such urgency as there is is of the applicant's own making inasmuch as the agreement of lease provided applicant with alternative remedies including a provision for applicant to relocate respondent and, in the event of respondent refusing to relocate, entitling the applicant to cancel the lease on one calendar month's notice, Ms Malony, who appears for respondent today, has pointed out also that in terms of paragraph 23.6 of Annexure DD6 to the lease agreement, the respondent was obliged to continue to pay rental should he continue to occupy the property in the face of applicant's

cancellation of the lease. Furthermore, so she submitted, paragraph 2.4 of the new lease agreement, which is annexed to the papers as DD12, makes provision for circumstances where the applicant cannot make the property available to the new tenant in that it does not allow for the new tenant to cancel the agreement or to claim damages. Ms Malony submits further in the circumstances that the respondent has suffered severe prejudice in that had he been given appropriate time frames he may well have been able to better address the factual disputes, such as applicant's averment that respondent has not disclosed examples of how applicant had allegedly itself failed to comply with its obligations in terms of the lease thereby causing respondent to withhold its rental.

- [7] In my view, however, these submissions cannot be upheld. The application was served on respondent on 8 August 2016. Respondent's affidavit was attested to on 17 August 2016. It is 25 pages long and it deals in considerable detail with the allegations which are contained in the founding affidavit, in my view the time afforded to the applicant gave respondent sufficient time in which to canvas the various issues, as was submitted by Mr Jonker who appears for the applicant. The respondent at no stage took the position in his answering affidavit that he was unable to file a full answer to the allegations because of the time constraints.
- [8] As Mr Jonker further points out respondent in fact dealt with the averments made by the applicant concerning the usage clause in very considerable detail. It would, in my view, have been a simple matter for the respondent to have included details of the applicant's alleged breaches of the agreement such as would have justified his withholding of the rental. He chose not to do so and contented himself with what in effect amounts to a bald allegation that the applicant had breached the agreement in certain unspecified ways.
- [9] I am accordingly satisfied that respondent has not suffered any prejudice in this regard in consequence of the truncated time periods afforded to him for the filing of his answering affidavit.
- [10] Mr Jonker submitted with reference to *Park Town Quarter v Jones CC* unreported WLD case no. 19998/06, that applicant is entitled to arrange its commercial life according to its own pressures and dictates without unlawful interference therewith.

I agree. In my view applicant was entitled to bring this application as a matter of urgency on the basis that it had legitimately cancelled the lease with respondent who was unlawfully refusing to vacate the premises.

- [11] In these circumstances the merits of the matter are tied up with the issue of urgency and I turn to consider those merits. In the view that I take of the matter it is not necessary to deal in great detail with the various arguments that were presented to me.
- [12] The lease agreement, DD5, provides, inter alia, in paragraph 25.2 thereof:

“Upon acceptance signified by signature hereof by the lessor this offer will become a binding agreement of lease upon the terms and

conditions contained herein read mutatis mutandis with the lessor’s standard terms and conditions of lease for the Centre referred to in clause 25.3 below.”

Clause 25.3 provides inter alia that:

“The parties agree that after acceptance hereof they will sign the lessor’s standard Centre lease agreement for the leased

premises and the Lessor’s/Lessee desired criteria document. Any failure by the lessee to sign the standard lease shall not ipso facto affect the validity of this agreement, which constitutes a valid binding agreement between the parties.”

[13] The standard terms and conditions are contained in Annexure DD6 which is headed “General Conditions of Lease”. Applicant contends therefore that the standard terms and conditions were incorporated into the agreement by reference in Annexure DD5 and

that as a result a valid and binding agreement of lease came into existence between the parties on the terms as set out in the offer of lease DD5 read together with applicant’s standard terms and conditions of lease as set out in Annexure DD6. DD6 contains the clauses which relate to breach and remedies therefor.

[14] Respondent, however, contends that although he has been leasing the property from applicant since 2008 he was throughout this period unable to read the lease agreements in question because, being Chinese, he could not understand English. He contends further that

none of the terms and conditions contained in Annexures DD5 and DD6 were ever explained to him. He avers that he accordingly did not understand the contents of the offer to lease signed by him and avers that applicant was under an obligation to have explained those conditions to him.

[15] In my view these contentions cannot be upheld. As was stated in *George v Fairmead (Ptv) Ltd* 1958(2) SA 465 (A) a person who signs a contract is taken to be bound by the ordinary meaning and effect of the words which appear over his signature. That principle

has indeed become trite.

[16] As was also submitted by Mr Jonker it is not a defence in law that a person can escape the consequences of his signature on the basis that he did not read or understand the document before signing. Mr Jonker refers in this regard to the case of *Blue Chip Consultants (Ptv) Ltd v Shamrock* 2002(3) SA 231 (W) at 239F-G where the following is stated:

“Secondly, I do not understand our case law to hold that a person will escape the consequences of his signature if it can be shown that he had not read the document in question. That would be a startling proposition. One is expected to read what one signs. The law goes no further than to recognise that the other party by words, by conduct or by the form the document takes may mislead or lull the signatory into believing that he need not go through every clause or he may ensure that the signatory does not go

through the document carefully but only skims through it before signing, whether by induced time constraints or other devices. The furthest Courts will go on a principle approach is to identify the issue as one of iustus error. See Sonap Petroleum (SA) (Pty) Ltd (formally known as Sonarep (SA) (Pty) Ltd v Pappadoqianis 1992(3) SA 234 (A) at 239A-240B and the cases cited.”

- [17] I agree with the submission by Mr Jonker that any mistake that respondent may have laboured under was in all the circumstances a unilateral one. Respondent in my view cannot rely on iustus error in the absence of any allegation by him whatsoever to the effect that he was misled or induced in any way into signing Annexure DD5 in consequence of a misrepresentation made to him by the applicant.
- [18] In any event, as was submitted by Mr Jonker, if there was in fact a iustus error then it would follow that that there was in fact no contract and respondent therefore would have no
- [19] I am also persuaded that there is no merit in respondent’s complaint that the terms and conditions of the offer to lease DD5 were not explained to him by applicant. There was no obligation on applicant to do so, more especially in circumstances where all the terms relating to respondent’s obligation to pay without deduction were also incorporated into the previous lease agreement concluded in 2008 and could therefore reasonably have been expected to be found in the new lease agreement. This is not a case where there were any new or novel clauses inserted in the lease agreement which applicant signed in 2014.
- [20] I agree further with the submission that respondent’s contention that, despite having signed three lease agreements with applicant and having been in occupation of the leased premises for at least 8 years he never understood the terms and conditions of the agreement is so far-fetched that this court is justified in rejecting that contention on the papers. I am therefore satisfied that in that

regard there is no bona fide dispute of fact.

- [21] As set out above the standard terms and conditions were expressly incorporated into the agreement of lease. In these circumstances it is quite clear in my view that it was the intention of the parties to incorporate those terms into the agreement of lease and there is accordingly in my view again no merit in respondent’s averments to the contrary.
- [22] The main breach alleged by applicant relates to the non-payment by respondent of rentals. In this regard respondent avers, baldly as I have stated above, that applicant has not ‘complied with all its obligations in terms of the lease agreement and that:

“Once the agreement was interpreted and explained to me by my legal representative I immediately effected payment of all the arrear

rentals as I was not aware that I was not entitled to withhold payment in lieu of applicant’s breach of the agreement. Had I been aware of same I would not have withheld payment.”

[23] These averments of course run entirely counter, not only to applicant's subsequent actions in paying all the arrear amounts, which actions constitute an acknowledgement of his indebtedness, but also to his contention that he is not bound by the terms and condition contained in DD6 which provide, inter alia, that the respondent shall not have the right to

[24] In all the circumstances respondent's withholding not only of the rent but also of the ancillary amounts in respect of water and electricity constitutes a material breach of the lease agreement which entitles the applicant to cancel the agreement. This

conclusion renders it unnecessary to deal in any detail with the further alleged breach by respondent of the usage clause. Suffice to say that I am satisfied that respondent's contention that the usage clause was amended in terms of an express or tacit agreement cannot be sustained in the light of the non-variation clause which is contained in clause 36.2 of DD6 read together with the non-waiver clauses in clauses 36.2 and 36.3. It is clear from the authorities referred to by Mr Jonker that such non-variation clauses are not per se against public policy and respondent has not advanced any reason at all as to why in the present circumstances the clause should not be enforced.

[25] In all the circumstances the application for eviction must succeed.

[26] The remaining issue concerns how much time should be afforded to the respondent to vacate the premises. Ms Molony has submitted that respondent should be afforded at least a calendar month to do so, whereas Mr Jonker has submitted that respondent should be afforded only to the 31st of August to vacate the premises. It is so that, as was stressed by Ms Molony, the respondent, who has been in occupation of the premises for some considerable time, now has to vacate the premises and relocate elsewhere. Unfortunately there is nothing on the papers which in any way enlightens me as to what difficulties the respondent may experience in this regard. I am of the view that if respondent is afforded to Friday 2nd September, that will afford him ample time within which to vacate the premises.

[27] As to costs, Mr Jonker seeks costs on the attorney and client scale in terms of the agreement of lease. In the exercise of my discretion it seems to me that would be unduly punitive of the respondent I am of the view that costs should be awarded on the ordinary scale.

[28] Accordingly, I am amending paragraph 2 in the following respects: By adding in the following words after 'to give applicant undisturbed possession thereof on or before Friday, 2nd September 2016.' Paragraph 4 is also amended by the deletion of the reference to attorney and client costs.

[29] There will then be an Order in terms of Prayer 2 as amended, prayer 3 and prayer 4 as amended

JD PICKERING

JUDGE OF THE HIGH COURT

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