

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Case No: 2662/2008
Date: 29/05/2008

UNREPORTABLE

In the matter between:

STEINWAY TRUSTEES (PTY) LTD

APPLICANT

And

BOSTON TEA PARTY (PTY) LTD
BERGH ADRIAAN
BERGH OELOF

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT

JUDGMENT

PHATUDI (AJ)

[1] This is an application for summary judgment instituted by the Applicant\Plaintiff seeking an order as claimed in the summons for;

1. Payment of the sum of R192 628.03
2. Interest thereon at the rate of 2% above the prime bank overdraft rate from time to time charged by Nedbank, Kruis Street, alternatively at the rate of 15,5% per annum *a tempore morae* to date of final payment;
3. Cancellation of the Agreement of lease
4. An order evicting the First Defendant, and all persons who occupies through or under the First Defendant from the leased

premises;

5. Costs of suit on attorney and own client scale;

[2] The Respondents / Defendants opposed the Application on the basis that they have a *bona fide* defence to the Plaintiff's claim and that they did not enter appearance to defend solely to delay the proceedings;

[3] The parties entered into a written agreement of lease [lease agreement] in terms whereof the Plaintiff let to the First Defendant certain premises situated at shop 2A, Menlyn, Piazza.

[4] At the commencement of the hearing, Mr Wanderberg, Counsel for the Plaintiff, stated that the Plaintiff withdrew the prayers 1 to 3 due to proper compliance by Defendants thereto. He further stated that the matter in respect of those prayers be regarded as *pro non scripta* as same has been settled. The Plaintiff now seeks relief in terms of prayers 4 and 5 thereof.

[5] Mr Wanderberg submitted that the area let was initially recorded as 455m² as per lease agreement dated 1 March 2004. He said that the new area, as recorded in terms of the "new" lease agreement entered into by the parties on the 5 October 2006 was 578m² and effected from 1 November 2006. He then referred to both annexure "A" and "B" respectively in support thereto.

[6] He further submitted that clause 13 of the lease agreement, provides that "the area of the leased premises is an approximate measurements which the tenant hereby accepts". He submitted further that the Respondents\Defendants accepted the said measurements by appending their signatures on the agreement.

[7] He, Mr Wanderberg, lastly submitted that the Plaintiff is entitled to retake possession of the lease property as provided in terms of the agreement. He referred to clause 36.2.1 of the lease agreement that provided that the landlord shall be entitled to either;

"cancel this lease, claim damages and retake possession of the lease premises"

[8] He in conclusion, submitted that the Plaintiff is so entitled to retake possession and submitted that this Court should grant prayers 3 as claimed together with costs thereto.

[9] I enquired from Counsel as to why is the Plaintiff claiming costs on that harsh and punitive scale (ie. Attorney and own client scale.) He, in response thereto, conceded that the Attorney and own client is too harsh in the circumstances. He however, submitted that Attorney and client scale is appropriate as it is as well, being agreed thereto in term of the lease agreement.

[10] Mr Hursherson, Counsel for the Respondents, conceded that the lease

agreement was renewed and remeasured as provided in clause 10.2.1 that stipulated;

"10.2.1. It is recorded that the lease premises was remeasured during November 2005 and the new measured area, according to SAPOA method of measuring, is 578m²."

[11] He however, submitted that the Respondents\Defendants have been disputing the lease agreement from then. He further submitted that the appearance to defend was not entered solely for the purpose of delay but that the Respondents\ Defendants have a *bona fide* defence.

[12] He referred to Superior Court Practice by Erasmus at page B1-223 that;

"All that the court enquires, in deciding whether the defendant has set out a bona fide defence is;

(a) Whether the defendant has disclosed the nature and grounds of his or her defence, and

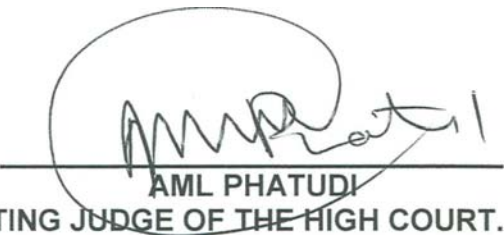
(b) Whether on the facts so disclosed the defendants appears to have, as to either the whole or part of the claim, a defence which is bona fide and good in law."

- [13] Mr Hurherson submitted that the Respondents\ Defendants dispute the amount claimed and indicated that the Defendants do in fact have a counterclaim to the amount claimed. He on those grounds. submitted that the counterclaim is more than sufficient in determining the bona fide defence. He lastly submitted that it will be appropriate for Defendant to be granted leave to defend and that costs be reserved.
- [14] In reply, Mr Wanderberg submitted that a counterclaim is not a good defence in law and thus, the Defendants do not have a *bona fide* defence to the claim. In my evaluation of the evidence and submissions tendered, I find that the parties entered into the lease agreement that was renewed and the premises remeasured. The remeasured area is explicitly set out in the agreement to be 578m².
- [15] The enquiry to be considered is whether the Defendants do have a *bona fide* defence. The Defendants, as per Mr Hurscherson's submissions, have disputed the agreement since. The Defendants, however, failed to legally contest the validity of the said agreement. They, in fact, proceeded to occupy the premises. They even went further by paying or settling the rental amount in arrears as Mr Wanderberg stated at the commencement of the hearing.
- [16] As the lease agreement provides for cancellation and repossession of the leased premises in the event of breach, it is appropriate for the Plaintiff Applicant to apply the said provisions.

[17] In my view, a counterclaim is not a good defence in law but a claim the Defendants may have against the Plaintiff which may not necessarily be arising out of the Plaintiff's cause of action. In my view of the above findings, I find the Plaintiff being entitled to the relief sought and thus make the following order;

[17.1] An order evicting the First Defendant and all persons who occupy through or under the First Defendant from the leased premises;

[17.2] Costs of suit on Attorney and client scale.



AML PHATUDI
ACTING JUDGE OF THE HIGH COURT.

Date of hearing: 9 May 2008
For the Plaintiff: Adv Wannenberg W
Attorneys for Plaintiff: Gideon Pretorius Inc
For the Defendant: Adv Hershensohn J
Attorneys for Defendant: Moniea Koekemoer Attorneys
Date of Judgment: 29 May 2008