REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~NO~~
(3) REVISED.

9/12/2016
DATE

SIGNATURE

CASE NO: 16/14155

In the matter between

SIGNAL HILL PROPERTIES (PTY) LTD
(Registration No. 1999/21986/07) Applicant

And

3PE SCRATCH REPAIR (PTY) LTD
(Registration No. 1998/023268/23) First Respondent

SOLOMON LETSOALO Second Respondent

JUDGMENT

EPSTEIN AJ:

1. It is common cause that in August 2013 the first respondent, represented by the second respondent, entered into an agreement of lease in respect of certain premises described as Shop 1 Bordeaux Drive, Cnr Bordeaux and Paris Roads. The lease was to commence on 1 October 2013 and terminate on 31 September 2016. The applicant contends that it has cancelled the agreement for non-payment of the rental and that it is entitled to an order evicting the first respondent as well as payment of the arrear rental and damages for holding over.

2. The second respondent executed a deed of suretyship on 29 August 2013 in favour of the applicant. In terms of the suretyship, the second respondent bound himself as surety and co-principal debtor in favour of the applicant for the payment on demand of all sums of money which the first respondent may then or from time-to-time thereafter owe or be indebted to the applicant, together with costs on the attorney and client scale.

3. Relevant provisions of the lease agreement are the following:

    3.1. Clause 46 provides that should any dispute (including non-payment of any amount due in terms of the lease) arise between the applicant and the first respondent, and should the latter remain in occupation of the premises during such dispute then, while the first respondent remains in occupation of the premises, it shall continue to pay all amounts due to the

applicant in terms of the lease agreement.

3.2. Clause 4.6.4 provides for the payment of legal costs on the attorney and client basis in the event of the applicant instructing its attorneys to take measures for the enforcement of any of the applicant's rights under the lease.

3.3. Clause 57.3 provides that no relaxation of indulgence which the applicant may show to the first respondent shall in any way prejudice the applicant's rights under the lease.

3.4. Clause 57.8 provides that the lease incorporates the entire agreement between the applicant and the first respondent and an alteration, consensual cancellation or variation of the lease shall be of any force or effect unless it is in writing and signed by both the applicant and the first respondent who acknowledges that no representations or warranties have been made by either the applicant or the first respondent, nor are there understandings or terms of lease, other than those set out in the lease agreement.

4. The cause of action is based on the failure of the first respondent to pay rental. The following chronology is relevant:

4.1. On 11 April 2014, the applicant sent a letter to Global Autobody Parts &

Paint ("**Global**") demanding payment of arrears of R25,334.31. The significance of this demand being sent to Global will become apparent later in this Judgment.

4.2. On 10 March 2015 the applicant's attorneys, Waks Attorneys, sent a demand to "3PE Scratch Repair CC and/or Global Auto Parts (Pty) Ltd". On this occasion demand was made for payment of R152,809.97 to be made within seven days.

4.3. On 20 March 2015, the second respondent sent an email enclosing a proposal for rent repayment. The proposal, for the full amount demanded in the letter of 10 March 2015 was sent on the letterhead of Global.

4.4. On 19 October 2015 the applicant's attorneys again addressed a demand to "3PE Scratch Repair CC and/or Global Auto Parts (Pty) Ltd", this time demanding the amount of R289,054.88.

4.5. On 3 November 2015 the applicant's attorneys wrote to "3PE Scratch Repair CC and/or Global Auto Parts (Pty) Ltd" cancelling the agreement and demanding that the premises vacated by 10 November 2015.

5. Although the lease agreement was entered into on 29 October 2013, occupation was taken on 1 October 2013.

6. Global is a company which was registered on 10 October 2013.

7. The respondents' defence is to be found in paragraphs 3 to 11 of the answering affidavit. These paragraphs read as follows:

> 3. I am engaged in the panel-beating and spray-painting industry.
>
> 4. I recognised the business opportunity to open a retail business specialising in the supply of autobody parts and paint and sought a premises for the operation of that business (sic).
>
> 5. It was at all times my intention that the new business would not be operated by first respondent but rather through the medium of a separate company which would be formed and managed by me. As with first respondent I would be the sole shareholder.
>
> 6. During or about August 2013 I approached applicant's Pat Sasman (hereinafter referred to as "Sasman") to negotiate a lease of the relevant premises from which the new company would trade.
>
> 7. I discussed the intended business project with Sasman who suggested that as the new company had not yet been registered that a lease would be signed between the applicant and first respondent and that when the new company was registered it would be the tenant of the relevant premises.
>
> 8. I accepted Sasman suggestion and on 15 August 2013 signed a lease between applicant and first respondent a copy whereof is annexed to the founding affidavit marked "RW4". Simultaneously I signed a deed of suretyship

whereby I bound myself with first respondent in favour of the applicant a copy whereof is annexed to the founding affidavit marked "RW5".

9. In terms of that lease same commenced on 1 October 2013.

10. On the commencement date I took occupation of the premises on behalf of the company to be formed which was registered on 10 October 2013 in the name of Global Autobody Parts & Paint (Pty) Ltd (hereinafter referred to as "Global").

10.1 A copy of the confirming certificate issued by the Companies & Intellectual Property Commission is annexed hereto marked "AA1".

11. After Global was registered I informed Sasman thereof and requested that applicants' records be marked to the effect that the tenant of the premises is Global. Sasman assured me that the necessary would be done. However a monthly statements in respect of rent were rendered in the name of first respondent.

8. The respondents' defences is articulated as follows in the heads of argument filed on their behalf:

1.1 The Applicant released the first respondent from the written lease agreement and entered into a new oral alternatively tacit lease agreement with Global;

1.2 Alternatively the Applicant waived its right to enforce the terms of the lease against the first respondent;

1.3 Furthermore, the Applicant by its representation that Global would become the tenant and its unambiguous acceptance by its conduct of Global as its tenant lead the first respondent not to fulfil its obligations if any in terms of the written lease. The Applicant is therefore stopped from claiming performance against the first respondent.

1.4 As the Applicant denies that Global is in fact the party against who it should seek relief then its conduct is:

1.4.1 unconscionable;

1.4.2 a manifestation of bad faith;

1.4.3 inequitable; and

1.4.4 contrary to public policy.

1.5 Further/alternatively, the parties tacitly revoked the non-variation clause and consensually cancel the lease between the Applicant and First Respondent.

9. The respondents' defence is without merit and is clearly contrived to avoid payment. In this regard –

9.1. The respondents admit that the lease was signed. It is not alleged that they were misled.

9.2. The respondents are precluded by the parol evidence rule from raising the

"ancillary agreement" referred to in paragraph 7 of the answering affidavit which I have quoted above.

9.3. The first respondent, represented by the second respondent, acknowledged in paragraph 57.8 of the lease agreement, which I have referred to above, that there are no understandings or terms of the lease other than those set out therein.

9.4. The applicant had earlier instituted action against Global and the second respondent under Case No. 15/41134 in this Court. In an application in which condonation was sought for the late filing of the notice of intention to oppose, the second respondent stated that the applicant had no cause of action against Global. Counsel on behalf of the respondents in the matter before me, sought to explain this by stating that there was no cause of action based on the written lease agreement because Global did not have a written lease agreement. Significantly, Global did not say in its condonation application that it occupied the premises in terms of another agreement but clearly led the applicant to believe that it was not the contracting party. When counsel for the respondents was asked by me as to what the terms were of the lease agreement pursuant to which Global occupied the premises as the tenant after it was registered, she was unable to tell me what they were and simply stated that this does not appear on the papers.

9.5. In their last gasp efforts to make Global the tenant, the respondents rely upon the fact that the accounts for rental were made out to Global; a letter of demand was sent to Global on 11 April 2014; and the proposal for rent repayment was submitted on a Global letterhead. In its replying affidavit, the applicant states that the rent statement was submitted to Global because the second respondent informed Sasfin that it would pay the rental on behalf of the first respondent. It is further stated that the submission of a rent statement to another legal entity does not mean that that legal entity perforce become substituted for the first respondent.

9.6. The second respondent stated in its answering affidavit that he is engaged in the panel-beating and spray-painting industry. Further that he recognised a business opportunity and that it was at all times his intention that the new business would not be operated by the first respondent but rather through the medium of a separate company which would be formed. It is not unusual for one entity within a group to operate the business whilst the rental agreement is held by another entity.

10. Counsel referred to the well-known cases which state the principle that where there is a dispute of fact, the case must be decided on the respondents' version. This is trite. But where the version is so far-fetched and untenable that it can be rejected on the papers, this can be done. This is such a case (**National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA)**).

11. The lease was cancelled on 3 November 2015. It is up to that date that the applicant is entitled to payment of arrear rentals. The remaining claim is for holding over. The amount claimed from the date of cancellation until 1 April 2016 is not arrear rental but damages for holding over. Mr Berlowitz, who appeared for the applicant, referred me to the Full Bench decision in **Hyprop Investments Ltd & Another v NCS Carriers & Forwarding CC & Another 2013 (4) SA 607 (GSJ)** at paragraphs [21] and [23].

12. The quantum is not being challenged in the present matter. For determination of damages, the last prevailing rental is regarded as the market rental and is a liquid claim.

13. I am informed that the reason for the cut-off at 1 April 2016 is the certificate of indebtedness which was provided in respect of the second respondent in terms of the suretyship. Insofar as any further claims are concerned, Mr Berlowitz stated that the applicant would institute a separate action for this.

14. Finally, I was told during argument that the premises had been "abandoned". However, the keys for the premises, despite demand had not been returned to the applicant. During the proceedings, the keys were handed over.

15. The eviction of the first respondent is sought, in the notice of motion. It is not clear if anything has been left on the premises. If the premises have been vacated and no goods belonging to the first respondent, or over which the applicant has a

hypothec, have been left on the premises, then an eviction order, sought, will not be prejudicial to the first respondent.

16. I am satisfied that the applicant is entitled to the relief that it seeks.

17. I make the following Order:

As against the first respondent:

1. The first respondent is to make payment to the applicant of the amount of R534,305.09 (five hundred and thirty-four thousand, three hundred and five rand and nine cents) owing as at 1 April 2016.

2. The first respondent shall pay interest on the aforesaid amount from 1 April 2016 at the rate of 10,25% per annum *tempore more* to date of payment thereof.

3. It is directed that the first respondent and any person or entity claiming title through or under the first respondent be evicted from the premises.

4. The Sheriff or his lawful deputy is authorised and directed to:

   4.1 take such steps as are required in order to give effect to the Order in terms of paragraph 3 above; and

   4.2 attach and remove so much of the first respondent's movable

property as may be situated on the premises, to satisfy the applicant's claim against the first respondent for arrear rental, ancillary charges and interest due, owing and payable by the first respondent in the amount of R534,305.09 (five hundred and thirty four thousand, three hundred and five rand and nine cents) as at 1 April 2016.

5. Costs of the application on the attorney and client scale.

As against the second respondent jointly and severally with the first respondent, the one paying the other to be absolved from payment as follows:

1. The second respondent is directed to pay to the applicant the amount of R534,305.09 (five hundred and thirty four thousand, three hundred and five rand and nine cents).

2. The second respondent is directed to pay interest on the aforesaid amount from 1 April 2016 at the rate of 10,25% per annum *a tempore morae* to date of payment thereof.

3. Costs of suit on the attorney and client scale.

H. EPSTEIN

ACTING JUDGE OF THE GAUTENG LOCAL DIVISION

HIGH COURT, JOHANNESBURG

Appearances

For the Applicant: Adv J K Berlowitz

Instructed by: Waks Attorneys

For the Respondents: Advocate A.R Scott

Instructed by: Stabin Gross and Shull Attorneys

Date of hearing: 06 December 2016

Date of Judgment: 09 December 2016