IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO.: 2448/2019

Date heard: 19 September 2019

Date delivered: 22 October 2019

In the matter between:

REBOSIS PROPERTY FUND LIMITED
t/a MDANTSANE SHOPPING CENTRE
(REGISTRATION NO. 20[…]) Applicant

and

MOTION FITNESS (PTY) LTD t/a MOTION FITNESS (REGISTRATION NO. 20[…]) First Respondent

NICOLAAS FERDINAND VAN GASS Second Respondent
(ID 560[…])

JUDGMENT

MFENYANA AJ

[1] This is an application in terms of which the applicant seeks relief for the eviction of the first respondent consequent upon the termination of a lease agreement between the parties.

[2] The application is brought on a semi urgent basis.

[3] The salient facts of the matter are that the applicant and first respondent entered into an agreement of lease in terms of which the applicant leased to the first respondent, business premises for purposes of operating a gym facility. The second respondent is the sole director of the first respondent and is cited in his capacity as surety and co-principal debtor.

[4] It is common cause that the first respondent is in occupation of the business premises situated at Shops M4A, M4B, M4C and M38, Mdantsane City, Cnr Billie & Qumza Highway, Mdantsane, Eastern Cape (the premises). It is also common cause that the first respondent is in arrears with its rental payments to the applicant.

[5] The application is opposed by the respondents, on the basis that the premises were not fit for the purpose intended from inception. The respondents also allege that the application lacks urgency. It is further the respondent's claim that the current lease which forms the subject of the dispute is part of a composite arrangement comprising two other lease agreements in respect of the Mthatha and Hemming ways malls. Albeit half-heartedly, the respondents also rely on a claim to set off certain amounts allegedly expended by the respondents, against the rental owed to the applicant.

Relevant facts

[6] The facts relevant to the present application are that the applicant on 17 August 2017, instituted proceedings against the respondents for payment of an amount of R691 244.26 in respect of arrear rental and associated charges for the period up to and including August 2017. The said action is pending and is defended by the respondents.

[7] On 30 July 2019, the applicants cancelled the lease agreement.

[8] Pursuant to the institution of the[2] proceedings afore stated, the applicant brought the present application on the basis that the respondents' breach and

continued failure to make payment in respect of the lease agreement, is prejudicial to the applicant.

[9] It is not in dispute that to date the respondents have not made any payment in respect of the arrear rental. The applicant further states that it has a potential buyer for the whole of the shopping centre and the presence of a non- paying tenant places the sale at risk. The basis of the respondents' opposition on urgency is that the applicant has contemplated the sale of the shopping centre for some time, contending that the urgency is self-created. I do not agree. In the event that the applicant is able to prove to this court that it continues to suffer prejudice, there would appear to be no reason why the applicant should not be entitled to urgent relief.

Discussion

[10] In *East Rock Trading* 7 *(Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*[1] , Notshe AJ held:

"The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course."[2]

[11] The learned judge went on to state that the applicant may obtain redress in due course, but it may not be substantial. It is in such circumstances that the intervention of the court on an urgent basis, is warranted. 'Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case.'

[12] It was submitted on behalf of the applicant that the applicant would not get substantial redress in due course as the sale stands to be lost or the purchase price reduced. It was further submitted that the applicant holds no security to satisfy a damages claim. Thus, counsel for the applicant argued that the issue of urgency is

[1] *(11/33767) [2011] ZAGPJHC 196 (23 September 2011)*

directly linked to the issue of substantial redress.

[13] In *Parktown Quarter v Joan* CC[3] the court found that the applicant had legitimately cancelled the lease that entitled the respondent to occupancy as the applicant is entitled to arrange its commercial life according to its own pressures and dictates without unlawful interference.[4] It is trite that as the owner of the property, the applicant has the right to deal with its property *' nee vi, nee clam, nee precario'.* It is not even sufficient for the respondents to argue that the real reason for the urgent approach adopted by the applicant is 'simply a financial one'. That is nothing short of a concession. As stated above, the applicant is well within its rights to arrange its financial affairs as it considers fit. It does not avail the respondents to argue that the applicant is trying to rid itself of a shopping centre which is badly managed and in a bad condition. There is no merit in this argument, particularly in relation to the present proceedings.

[14] In their answering affidavit, the respondents raise a number of disputes, key to which is that the premises were not in the condition they were represented to be in, and therefore not fit for the purpose intended. They contend that the applicant failed to remedy the defects and that the respondents are entitled to withhold the rental. They base this on what the respondents call a composite arrangement which presumably entitles them to set off credits on one lease agreement against the other, despite that the lease agreement expressly prohibits set off and deduction. They rely on what can best be described as a conflation of three lease agreements entered into with the applicant, which have no bearing on the current proceedings.

[15] The respondents also allege that the applicant's accounting procedures have been shambolic from inception on the basis of which the respondents dispute the correctness of the reconciliation statement provided by the applicant.

[16] I cannot find any basis in law for the first respondent's proposition that the applicant is not entitled to the relief it seeks, on the basis that the first respondent

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[2] *at para 6*
[3] *Case No.19998/06 WLD*
[4] *at page 4*

itself, suffered damages. The respondents do not gainsay that the applicant is entitled to evict the respondents, having cancelled the agreement, but aver that it should have done so sooner and in the manner stipulated by the respondents. To add insult to injury, the first respondent has not taken any meaningful steps to realise the claim which forms the basis of its defence. There are no mutual obligations between the parties to enable the respondents to rely on the *exceptio non adimpleti contractus* as it does. That claim, in any event, even if it were to be found to exist, does not, and cannot entitle the respondents
to continued occupancy of the applicant's premises under any circumstances. In *Grand Mines (Pty) Ltd v Giddey N.O)*[5]*,* the court held that:

[17] "Interdependence of obligations does not necessarily make them reciprocal. The mere non- performance of an obligation would not *per* se permit of the exception; it is only justified where the obligation is reciprocal to the performance required from the other party. The exception therefore presupposes the existence of mutual obligations which are intended to be performed reciprocally, the one being the intended exchange for the other."

Conclusion

[18] In my view the applicant has, on a balance of probabilities proved that it has suffered prejudice and was thus entitled to approach the court on an urgent basis.

[19] There is also no legal basis whatsoever for the first respondent's continued occupation of the premises. The undisputed facts of this matter are that the first respondent is in arrears with its rental payments which currently stands at an amount of R7 123 457, 71; remains in occupation of the premises despite its failure to pay and despite the cancellation of the lease agreement. On those bases, the respondents' opposition must fail. The stance adopted by the respondents amounts to no less than holding the applicant to ransom.

[20] In the result, I make the following order:

[5] *1999(1) SA 960 (SCA)*

(i) The first respondent and those who occupy by, through or under the first respondent are ordered to vacate the commercial premises situated at Shops M4A, M4B, M4C and M3B, Mdantsane City, Cnr Billie & Qumza Highway, Mdantsane, Eastern Cape within 21 days of this Order, and to give the applicant undisturbed possession thereof.

(ii) The Sheriff of the above Honourable Court or its deputy, with the assistance of the South African Police Service, if necessary, is authorised to execute and give effect to the order in terms of paragraph

(i) above.

(iii) The respondents are ordered to pay the costs of this application on a scale as between attorney and client.

SM MFENYAN
ACTING JUDGE OF THE HIGH COURT

Appearances:

For the applicant: Mr D.H Wijnbeek

Instructed by: Ben Groot Attorneys, Bellville c/o Wheeldon Rushmere & Cole

For the defendant: Mr J. A Knott

Instructed by: Ward Ward & Pienaar Attorneys, Cape Town c/o Netteltons