IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO.:2305/2019

Matter heard on: 6 September 2019

Judgment delivered on: 17 September 2019

In the matter between:

MTHATHA MALL (PTY) LTD **Applicant**

and

MOTION FITNESS (PTY) LTD t/a MOTION FITNESS **First Respondent**

NICOLAAS FERDINAND VAN GASS **Second Respondent**

JUDGMENT

SMITH J:

[1] The applicant brought proceedings on a semi-urgent basis for an order evicting the first respondent from commercial premises situated at BT Ngebs Mall, Mthatha. The first respondent rents the premises from the applicant in terms of a written lease agreement and operates a gym facility from there. The second

respondent has been cited in his capacity as surety and co-principal debtor in terms of the lease agreement.

[2] It is common cause that the first respondent is in arears with its rental and other charges and that the applicant has cancelled the lease on 22 July 2019. The first respondent contends that it is entitled to withhold rental payments since the premises are not suitable for the purposes of the lease agreement.

[3] The lease agreement was concluded on 9 September 2016 and provides, inter alia, that:

(a) the lease would endure for a period of 10 years, commencing on 10 October 2016 and terminating on 30 September 2026;
(b) the first respondent will pay rental in the sum of R 189 000 (excluding VAT), escalated at 7% per annum;
(c) the first respondent is responsible for its share of sewerage and effluent disposal; its pro rata share of rates and taxes; refuse removal and electricity consumption; as well as costs of servicing and maintaining the conditioning units; and
(d) all monies due by the first respondent, including rental and other charges, must be paid monthly in advance “without any deduction or set-off whatsoever”.

[4] As a consequence of the first respondent’s failure to pay, the applicant instituted civil action against the respondents during April 2017 for payment of a sum

in excess of R 1 million, in respect of arrear rentals and other charges for the period up to August 2017. In their plea filed in that matter, the respondents pleaded that "the Plaintiff [applicant] failed to give the First Defendant [first respondent] occupation as envisaged in the agreement, which was that per definition the leased premises would be fit for occupation and in particular for use as a gym facility". The pleadings in that matter have closed and the trial has been set down for 20 April 2020.

[5] During September 2018 the applicant again instituted civil action against the respondents in the Mthatha Magistrate's Court for an order securing its hypothec and claiming payment of arrear rental and other charges due for the period up to September 2018. In their affidavit filed in opposition to a summary judgment application in that matter, the respondents again relied on the same defence and asserted their entitlement to renege from the agreement.

[6] And during November 2018 the applicant instituted urgent proceedings in this court for an order sanctioning the termination of the electricity supply to the leased premises. That matter was struck from the roll for lack of urgency, and on 28 March 2018 an order issued, by agreement between the parties, postponing the matter for the hearing of oral evidence. The parties also agreed that in the meantime the first respondent would make certain payments in respect of arear utility charges and continue to pay further invoices rendered in this regard. First respondent has indeed made payments in accordance with this order.

[7] As I have mentioned above, it is common cause that the first respondent remains in occupation of the leased premises without making any payments in respect of rentals or other charges. According to the applicant the first respondent is currently in arears in an amount exceeding of R8 million. While the first respondent criticises the applicant's bookkeeping and avers that it has made some payments, it has been vague in this regard, and does not deny that it owes the applicant a substantial sum in respect of arrear rental and other charges.

[8] The first respondent nevertheless contends that it is entitled to withhold payment, since the premises were not in the condition "they had been presented to

be" and not fit for the purposes of the lease. In this regard it points to a fire inspection report in respect of the leased premises which details various items which need to be fixed.

[9] In addition, the first respondent relies on what it contends are related leases which it has concluded with companies related to the applicant in respect of gyms which it operates at premises at the Mdantsane And Hemmingways Malls. It claims that credits and damages suffered by the first respondent in respect of those leases must also be taken into account in determining the amount outstanding in respect of the Mthatha Mall premises.

[10] It also describes the applicant's book-keeping as having been "shambolic from inception" and contends that the applicant is unable to show the basis on which it calculates, inter alia, electricity and water consumption charges.

[11] It accordingly asserts that the proper course would be for the applicant to amend its pleadings in the action proceedings in order to include the claim for cancellation and ejectment. Substantial disputes of fact have arisen on the papers and it would accordingly make sense for those disputes to be determined in the aforementioned proceedings, or so the argument went.

[12] The respondents also contend that the applicant failed to set out facts to justify the urgent basis on which it brought the application. In this regard they pointed to the fact that the applicant instituted civil action to recover arrear rental as far back as August 2017, and has elected not to claim eviction in those proceedings. According to them, other than "opportunistic references to a sale of the property" the applicant has not provided any explanation why this matter has now suddenly became urgent.

[13] I do not think that the respondents' contentions regarding the lack of urgency are justified. The applicant has relied on the following facts for its assertion that the matter was urgent. It said that it has a reasonable apprehension that if the first respondent is allowed to remain in the premises, its indebtedness would simply increase and the applicant may not be able to get any satisfaction out of any judgment obtained against it.

[14] In addition, the applicant is in the process of selling the Mall. The fact that there is a tenant who refuses to pay rentals and other charges will negatively impact on the revenue flow of the premises, a factor which plays a role in the determination of its value. The applicant accordingly stands to suffer substantial damages if the first respondent is not evicted from the premises.

[15] It is established law that the extent of the departure from the prescribed rules and time limits must not be greater than the exigencies of the case demands. (*Luna Meubels Vervaardigers (Edms) BPK vs Makin and Another* 1977 (4) SA 135 (WLD)).

[16] The papers in this matter were issued on 5 August 2019 and served on the respondents on 8 August 2019. The notice of motion called upon the respondents to file notice to oppose by 12 August 2019 and answering affidavit by 23 August 2019. The respondents thus had 10 court days within which to file their opposing papers. It is thus manifest, in my view, that the truncation of the prescribed time periods has been reasonable and justified by the exigencies of the matter. I am accordingly satisfied that the matter was sufficiently urgent to be brought on a semi-urgent basis.

[17] The respondents' contention that they are entitled to withhold payment of rental and other charges due because they have suffered damages as a result of the applicant's failure to provide them with functional, suitable and operational premises, is untenable. In effect the respondents are relying on the defence of *exceptio non adimpleti contractus*. That defence is, however, only available to a defendant or respondent where the obligations are reciprocal to the performance required from the other party. It was held in *Grand Mines (PTY) LTD vs Giddey N.O* 1999 (1) SA 960 (SCA), at 965 D-H, that the *exeptio* "presupposes the existence of mutual obligations which are intended to be performed reciprocally, the one being the intended exchange for the other".

[18] While lease agreements usually provide for reciprocal obligations, the parties may decide to contract otherwise. The lease agreement in this matter expressly provides that: all payments to be made by the first respondent in terms of the agreement shall be made "free of any deduction or set-off whatsoever", and

precludes the tenant from deferring, adjusting or withholding any payment due to the applicant "by reason of any set-off or counterclaim of whatsoever nature or howsoever arising".

[19] In *Altech Data (Pty) LTD vs MB Technologies (Pty) LTD* 1998 (3) SA 748 (W), the court, interpreting a similar clause, held that the defendant could not rely on setting off its counter-claim for damages to avoid payment and was accordingly not entitled to raise the defence of the *exceptio non adimpleti contractus*.

[20] Also in *Wynns Car Care Products (PTY) LTD vs First National Industrial Bank LTD* 1991 (2) SA 754 (AD), at 759-A, the court interpreted a similar clause to the effect that the lessee's obligation to pay rental was not reciprocal to the lessor's obligation to perform in terms of a maintenance agreement, and the former was accordingly not entitled to withhold rental.

[21] I am also not convinced by other arguments proffered by Mr *Brown* on behalf of the respondents, namely that the applicant is effectively asking the court to decide issues which have already been referred for oral evidence in a different matter, and that the applicant, having previously elected to keep the contract alive and sue for damages, is precluded from changing its mind and now instead seeks to have the first respondent evicted from the premises.

[22] First, in these proceedings the applicant is not seeking to compel payment of outstanding amounts owing by the first respondent, but solely to evict it from the premises. And second, whatever circumstances had initially motivated the applicant to sue for arear rental and not for eviction, have since changed. The first respondent has continued with its refusal to pay in terms of the lease agreement and the applicant is in the process of selling the property. Whatever commercial rationale had convinced the applicant to pursue different contractual remedies in those matters cannot under these circumstances preclude it from changing its mind and elect to cancel the agreement and seek the eviction of the first respondent.

[23] The respondents' contentions regarding the disputes of fact can also not be upheld. Those disputes essentially relate to the determination of the exact amount

due and payable by the first respondent and its resultant entitlement to withhold payment or counter-claim for damages. However, in the light of the fact that it is common cause that a substantial sum is due, and the explicit contractual prohibition against set-off, those disputes do not constitute real and bona fide disputes of fact for the purposes of the relief sought in these proceedings.

[24] The applicant has thus established: a material breach on the part of the first respondent; that it has properly cancelled the agreement; and that the first respondent has no legal or contractual basis for withholding payment of rental and other charges. In the circumstances it is accordingly entitled to evict the first respondent from the premises.

[25] The application must therefore succeed. Insofar as costs is concerned, the lease agreement provides for costs on an attorney and client scale, and there is no reason why the respondents should not be ordered to pay costs on that scale.

[26] In the result the following order issues:

1. The first respondent, and all those who occupy by, through or under the first respondent, are ordered to vacate the commercial premises situated at shop 157, BT Ngebs Mall, Errol Spring Avenue, Mthatha, Eastern Cape, and to give applicant undisturbed possession thereof, on or before 31 October 2019.

2. Authorising the Sheriff of the above Honourable Court, or its deputy, with the assistance of the South African Police Services, if necessary, to execute and give effect to the order in terms of paragraph 1 above.

3. The respondents are ordered to pay the costs of this application on the scale as between Attorney and client.

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J.E SMITH

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant	:	Adv D.H. Wijnbeek
Attorneys for the Applicant	:	Wheeldon Rushmere and Cole Connaught Chambers 119 High Streeet Grahamstown
Counsel for the Respondents	:	Adv. G. Brown
Attorneys for the Respondents	:	Netteltons Attorneys 118A High Street Grahamstown
Date Heard	:	06/09/2019
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