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

DATE: 07/03/2005
CASE NO: 43659/2007

UNREPORTABLE

In the matter between:

NEW HEIGHTS 326 (PTY) LTD APPLICANT

And

GEORGE BOUSENTRUM (PTY) LTD RESPONDENT

JUDGMENT

MAKGOBA, J

[1] The applicant is the owner of a building known as Mineralia Centre situated at 228 Visagie Street in the Central Business District of Pretoria. The said building has been leased to the respondent for purposes of conducting a business of a restaurant/cafeteria and conference facilities.

[2] The applicant seeks a order to evict the respondent from the leased premises. The respondent opposes the application and requests the court to dismiss the application in view of the factual disputes that exist between the parties alternatively to stay the application pending a

referral to Arbitration of the issue regarding the monthly rentals.

[3] The grounds upon which the applicant seeks the respondent's eviction from the premises are the following:

3.1 Firstly the applicant avers that the lease agreement in terms of which the respondent presently occupies the premises has been validly cancelled by the applicant as a result of the respondent's breach of the provisions of clause 31 of the lease agreement and the respondent's failure to cure the said breach.

3.2 Secondly the applicant avers that the lease expired by effluxion of time on 30 June 2007 and that no valid lease agreement came into existence to extend the period of lease notwithstanding the respondent's exercise of its option to extend the lease for a further two-year period.

[4] It is common cause between the parties that the written lease agreement between the parties was concluded on 19 February 2002. It is further common cause that the initial lease period expired on 30 June 2007.

[5] Clause 31 of the lease agreement specifically provides that:

> "Die huurder, indien hy 'n maatskappy sou wees, verbind homself en direkteure hiermee om nie in te stem tot die oordrag van sulke aandele as wat 'n verandering in die voordelige eienskap van die maatskappy sou behels nie, sonder die voorafgaande goedkeuring van die verhuurder en toegestaan mag word op sodanige voorwaardes as wat die verhuurder redelik mag ag."

[6] It is the applicant's case that the respondent is in breach of clause 31 of the lease agreement in that the respondent's shareholding was changed without the knowledge and consent of the applicant. The applicant was first alerted to the fact that the deponent to the answering affidavit and his wife had acquired the shares in the respondent at the end of 2003 in a letter written by respondent's attorney of record dated 22 November 2006. The applicant then gave the respondent notice in terms of clause 33 of the lease to cure its breach of the provisions of clause 31 of the lease within seven days. The respondent failed to remedy the breach and this caused the applicant to terminate the lease agreement and embark upon the present proceedings to evict the respondent from the premises.

[7] In its answering affidavit the respondent alleges that there is a real

dispute of fact. For the first time in its answering affidavit the respondent alleges that there was a "formal meeting" (the date, time and place is unknown to the respondent) at which it was allegedly "formally minuted" that the deponent to the answering affidavit and his wife had acquired the controlling shareholding in the respondent. The respondent claims to be in possession of such minute but does not produce same, let alone even take the court into its confidence as to who supposedly recorded this minute.

[8] In my view there is a mere bald allegation in the answering affidavit that there is a dispute of fact in these proceedings. The authorities are clear that the determination of the question whether a real and genuine dispute of fact exists is a question of fact for the court to decide. The respondent's allegation of the existence of such a dispute is not conclusive.

See – *Peterson v Cuthbert & Co Limited* 1945 AD 420 at 428; Herbstein & Van Winsen: *The Civil Practice of the Supreme Court of South Africa* 4th ed, page 235.

In determining whether a real, genuine or *bona fide* dispute of fact exists the court must be satisfied that the respondent is not simply conjuring up such a dispute in order to delay proceedings.

See: Herbstein & Van Winsen at pages 238-240; *Room Hire Co (Pty) Limited v Jeppe Street Mansions (Pty) Limited* 1949 3 SA 1155 (T) 1165; *Soffiantini v Mould* 1956 4 SA 150 (E).

[9] In the light of the abovementioned authorities and the facts of this case I make a finding that the respondent is simply conjuring up such a dispute of fact in order to delay the present eviction proceedings.

[10] The next issue to be decided upon in this matter is whether the lease had terminated by effluxion of time. The lease agreement provides that the term of the lease is five years and three months commencing on 1 April 2002 and terminating on 30 June 2007 with an option to extend the period of the lease by a further two years. There is a further provision in the lease agreement which allows for a period of sixty days after the written notice to exercise the option for the negotiation of rental for the option period and if consensus is not achieved then the President of the South African Institute of Estate Agents shall be requested to appoint an arbitrator to achieve finality on that issue.

[11] It is clear from the papers that the following aspects are common cause:

11.1 the respondent gave notice of its intention to exercise the option to extend the period of the lease by two years;

11.2 the parties failed to agree on the rental for the option period within the stipulated sixty days;

11.3 the rental issue was never submitted to the arbitrator for determination.

[12] In law, no lease agreement was concluded because an agreement on rent is an essential element of a lease and until agreement has been reached on it, no lease is concluded.

See: Landlord and Tenant: *W. E. Cooper* 2nd ed, page 346-347; *South African Reserve Bank v Photocraft (Pty) Limited* 1969 1 SA 610 (C) 612-613; *Aris Enterprises Finance (Pty) Limited v Waterberg Koelkamers (Pty) Limited* 1977 2 SA 425 (AD) 434A-F.

[13] I therefore find that the lease terminated by the effluxion of time on 30 June 2007. On this ground too the applicant is entitled to an eviction order.

[14] I accordingly make the following order:

1. That the respondent be evicted from the premises known as the ground and first floors comprising *inter alia* a restaurant, auditorium and certain conference rooms from a building known as Mineralia Centre situated at 228 Visagie Street in the Central Business District of Pretoria, Province of Gauteng including all persons claiming or holding occupation of the aforesaid premises through or under the respondent.

2. The respondent pays the costs of this application on the attorney and client scale as provided for in the lease agreement.

E M MAKGOBA
JUDGE OF THE HIGH COURT

43659/2007

Heard on: 29/02/2008
For the Appellant: Adv
Instructed by: Messrs
For the Respondent: Adv
Instructed by: Messrs
Date of Judgment: