REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case Number : 428 / 2003

In the matter between

PLATINUM HOLDINGS (PTY) LIMITED	**1st Appellant**
UNITRADE 1152 CC t/a JENNI BUTTON	**2nd Appellant**
PLATINUM CLOTHING WATERFRONT 267269 CC t/a ACA JOE	**3rd Appellant**
PLATINUM CLOTHING WATERFRONT 229 CC t/a HILTON WEINER	**4th Appellant**

and

VICTORIA AND ALFRED WATERFRONT (PTY) LTD	**1st Respondent**
V & A WATERFRONT PROPERTIES (PTY) LTD	**2nd Respondent**

Coram : **HOWIE P, SCOTT, NUGENT, CONRADIE JJA and PONNAN AJA**

Date of hearing : **7 MAY 2004**

Date of delivery : **28 MAY 2004**

SUMMARY

Respondents obtaining declaratory order that second, third and fourth appellants vacate leased premises – oral agreements concluding new leases alleged – such allegation not sustainable in light of contemporary correspondence – alternative defences based on Competition Act – necessary factual substratum lacking – no relief granted by Competition Tribunal would impact on order given by court *a quo* – refusal to refer matter to Competition Tribunal upheld.

J U D G M E N T

CONRADIE JA

[1] The second respondent owns all the fixed properties at the Victoria and Alfred Waterfront in Cape Town. It took transfer of them from their previous owner, the Transnet Pension Fund, on 7 February 2001. The first respondent manages and develops the Waterfront. Its managing director is Mr J F van der Merwe. One of the properties owned by the second respondent for the letting of which the first respondent is responsible is the Victoria Wharf, a large shopping complex. Lordland Property Developments CC ('Lordland') is the first respondent's sub-contractor for negotiating leases with prospective tenants. Its managing member is Mr Adam Blow. The respondents' separate identities are of no consequence in these proceedings so I do not distinguish between them.

[2] The second, third and fourth appellants (the lessees) sell designer clothes from shops in the Victoria Wharf in terms of leases entered into with the Transnet Pension Fund. Their affairs are conducted by the first appellant whose managing director is Mr Marcel Joubert.

[3] Each lease provided that it commenced on 1 April 1999 and expired four years later on 31 March 2003; there was no right of renewal but generally speaking shop keepers' leases in the Victoria Wharf were renewed if agreement could be reached on the terms of a new lease. The respondents' contention is that no

agreement on new leases could be reached so that the lessees were obliged to vacate the premises on the expiry of their leases. The appellants' principal contention on appeal is that Joubert had, on behalf of each of them, orally agreed an extension of its lease. If this contention fails, its second argument, in reliance upon certain provisions of the Competition Act 89 of 1998, is that the lessees could not be made to give up occupation of their premises pending adjudication by the Competition Tribunal of their claims that the respondents had contravened certain provisions of the Competition Act. These issues are before us with the leave of the court *a quo*.

[4] An evaluation of the cogency of the appellants' contentions regarding the oral leases requires a brief exposition of the history of the litigation. In June 2002 the respondents sounded out the appellants on whether the lessees would wish to conclude new leases to take effect when their existing leases expired in March of the following year. In the course of meetings between the parties thereafter it became apparent, according to the respondents, that the negotiators could not reach agreement on the terms for new leases. For the respondents a troubling feature of the negotiations was that Joubert on several occasions asserted that the lessees enjoyed what he called 'constitutional protection' and could therefore not be made to vacate the premises after the expiration of the leases. There was also an intimation from the appellants' attorney at the time that they might seek to rely on

the provisions of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998. Given what the respondents regarded as the lessees' evident strategy to hold over, they applied for declaratory relief with a view to resolving those issues before the expiry of the leases.

[5] The respondents' application, brought as a semi-urgent matter, was served on 18 December 2002. The first response from the appellants was on the morning of the hearing, six weeks later. They then delivered an affidavit by Joubert setting out certain of the appellants' contentions but also asking for more time. One of these contentions was that the lessees and the respondents had concluded oral leases for the period after 31 March 2004. Supplementary answering affidavits were served a day or two before the date scheduled for the resumed hearing. The defence based on the Competition Act was now also raised. A counter application for an order directing the respondents to negotiate in good faith towards new lease agreements had also seen the light of day. No appeal has been noted against the dismissal of the counter application by the court *a quo*.

[6] In view of its importance not only to this issue but to the next, it is necessary to quote a letter dated 20 November 2001 addressed by Joubert to Van der Merwe and annexed by the former to the appellants' answering affidavit:

> 'I refer to our characteristically enjoyable meeting this morning and further thereto attach copies of the original correspondence from Adam [Blow] that led to our

good faith inclusion of the Jenni Button, Hilton Weiner, and Aca Joe Waterfront stores in our 25 store rollout program. As you can see from the correspondence the 8 week rent-free period and further 50% of refurbishment rental re-scheduling proposed by yourselves at the time differ quite considerably from the zero rent-free period and paltry 15% refurbishment rental rescheduling put forward in our meeting with Adam and Willem [Dreyer - Executive Manager: Property Management] this morning. We are therefore, quite understandably, more than a little dismayed at this sea-change in thinking, particularly in view of the good faith reliance we placed on the initial proposals, including the Waterfront, in our refurbishment program, however misguided that may have been.

Whilst we readily concede that the proposals put forward by Adam in July were never consummated – with us in fact requesting 3 months rent free and further 5 year option periods – we cannot help feeling a little put out that our good faith reliance on these proposals, in including the stores in our refurbishment program, appears to have been so ill-founded.

This is all the more so in [the] light of the excellent relationship enjoyed between our respective companies in the recent past, the stimulating conversations with Adam, yourself and others in regard to exciting new gain-sharing paradigms and, perhaps more importantly, the ultra conservative nature of the July proposals themselves – especially when compared to the numerous far more generous proposals on offer from competing centres, such as for example a full 100% R1 million per store refurbishment costs, plus full five years absolutely rent free, from certain of your very close competitors, in whose centres we are currently enjoying considerably improved trading densities, of a magnitude comparable to that in your own centre.

With all due respect to the total “package” on offer from the Waterfront, we cannot help feeling that same pales in comparison to the “package” on offer from other leading centres and that you may therefore be at some risk of losing prime concepts to competing centres if you do not raise your total offerings to comparable levels. However much we may like the Waterfront, and however much your trading densities may be of the better ones in the country, the

> "package" on offer by yourselves does not come close to those on offer from Mutual, Liberty, Monex and Pareto, making it most difficult for us to include your centre in our refurbishment program, however much we may like to do so.
> I am therefore most concerned that the Waterfront is at risk of missing a golden opportunity to procure world-class, new-generation, cutting-edge, icon flagship concepts, not to mention the vastly improved income stream flowing from these highly successful concepts. We would hate to see this happen through lack of vision, lack of understanding or lack of communication and therefore urge you to apply your mind to finding ways to resurrect the July proposals so that we may all share in the upside of rolling out these world beating concepts to your centre now, while we have the opportunity to do so, thereby continuing an excellent association which we hope will endure for years to come.'
> P S For the avoidance of all doubt, I would stress that the objective is not to decrease the rand value of your income stream over a five year period, but rather to increase same by a significant proportion and we therefore believe there is compelling logic in your initial July proposals, in line with the win-win paradigms discussed so many times between us. We therefore trust that we will be able to resurrect this opportunity for the benefit of all concerned.'

[7] The appellants have not sought to qualify or explain the contents of this letter. It must accordingly be taken as an accurate rendition of what was in Joubert's mind at the time. It relates that the appellants and the respondents had entered into negotiations, that Blow had made certain attractive proposals and that these had subsequently fallen away. The appellants were anxious to persuade the respondents to reinstate them by emphasizing the benefits which would accrue to the respondents from doing so. The respondents were not sorely tempted. On 22 November 2001 Van der Merwe wrote to Joubert reminding him that 'all

discussions were in proposal form made by Adam Blow, subject to ratification by our board' and pointing out that a revamp of the lessees' premises should have been undertaken a long time before, that 'the desperation of other landlords have necessitated very generous installation costs to yourselves' and that 'demand for space at the Victoria Wharf continues to be exceptionally strong'.

The letter ends on what the writer calls 'a positive note':

> '…should you avail yourself of the proposal made to you by Willem [Dreyer] and Adam [Blow] on the 19th instant [the day before Joubert's letter] we would certainly extend the termination date of the current leases and allow the renovations to proceed and therefore give you a longer period to amortize the investment. You would be investing in one of the country's prime locations and I am sure your investment would be greatly worthwhile.'

[8] Each of the writers is attempting to persuade the other that it would be advantageous for those whom they represent to enter into new leases; they are *ad idem* that the negotiations have broken down; they are in agreement on the fact that there have been no renewals. The appellants are angry and disappointed that the July proposals are no longer open for acceptance. The respondents are determined not to go back to the July proposals which in any event were not primarily concerned with a renewal of the leases in due course but rather with a promise of early renewals of the leases (from March 2002 and not from April 2003) provided the shops were refurbished before a certain deadline.

[9] In his first answering affidavit Joubert states that he had on behalf of the lessees 'by our conduct and our actions consummated various verbal and written proposals made by the Applicant, in terms of which the existing leases would each be renewed from 1 April 2003 for a period of 5 years, against which the Second to Fourth Respondents [the lessees] would renovate and upgrade their stores.' The 'consummation' was the approval of plans by the respondents for the refurbishing of the stores (or at any rate of some of them). This ‘consummation’, says Joubert, made him believe that new lease contracts had been concluded. This, as we have seen, is not what emerges from the correspondence the tenor of which remains unchallenged.

[10] In Joubert’s second, main, answering affidavit there emerges for the first time reliance on a second oral agreement, supposedly concluded telephonically between him and Blow some time after negotiations for new leases had been proposed by the respondents in June 2002. It is the respondents' policy to approach sitting tenants well before the expiration of their leases to find out whether and, if so, on what terms, they would wish to enter into new leases. Letters were written to the appellants and several meetings were held from July 2002 onwards at which the question of new leases was discussed. When Joubert finally put pen to paper in a letter to Van der Merwe on 14 October 2002, his recordal of what had transpired up to then was inconsistent with any contention that an agreement had been

reached. Instead, he expressed the hope that 'we will be able to thrash out mutually acceptable parameters for governing our ongoing relationship quickly and amicably.'

Two further meetings were held on 23 October and 8 November 2002 at which no progress towards the new leases was made but at which talk of constitutional protection which the lessees supposedly enjoyed by having built up proprietary interests in their location in the Victoria Wharf made the respondents realise that no agreement was likely, and sufficiently alarmed them to instruct their attorneys to write to the appellants terminating negotiations while at the same time reminding them that the lessees were obliged to vacate their premises on 31 March 2003.

[11] The attorneys' letter provoked a vituperative reply from Joubert to them dated 27 November 2002. In it Joubert speaks of being 'anxious to resolve this matter as quickly as possible', of having 'bent over backwards to finalize these lease renewals', and of wanting to 'far rather finalize mutually acceptable terms on a fair and reasonable basis for all concerned…'. Instead, Joubert maintains, the appellants' efforts at renewal were 'obstructed by an astonishing display of heavy handed, bullying, intimidating, coercive, extortionary tactics from your clients, [which] contrived to extort blatantly unreasonable, inequitable, unfair and iniquitous terms from us by openly manipulating threat of destruction of our

considerable accumulated interest in the sites if we do not accept patently unreasonable terms…'

This is not the language of agreement.

[12] As in the case of the 2001 correspondence, neither the writing of the letters nor their content is in dispute. It is not suggested that anything that was written by the parties misstated anything in their corporate minds. In particular there is no reason to doubt that the letters correctly reflected the state and progress of the negotiations as the parties perceived them at the time.

[13] It is also common cause that the appellants did not in any of the correspondence put forward the contention that the existing leases had been extended or that new leases had been concluded. The obvious response to the attorneys' letter, that the lessees were contractually entitled to remain where they were, was not made. That such a response was not made is common cause; that it was the obvious response and that it would have been made had the appellants believed the lessees to be contractually entitled to remain in their premises, is not common cause. But since they acted in such marked contrast to what the ordinary course of human experience suggests they would have done under the circumstances now stated by Joubert to have existed, they needed to offer an explanation for this strange and unusual omission. Their failure to do so leads one

to strongly suspect that the conclusion of the oral leases was a defence manufactured shortly before the first hearing of the application.

[14] The appellants' case is that there was insufficient evidence for the court *a quo* to have come to a conclusion on whether there had been a renewal of the leases or not and that in the absence of a request by the respondents that the matter be referred to oral evidence the application ought to have been dismissed. I agree with the judge *a quo* that the application was capable of being decided on the papers. No conflict of fact emerges from the correspondence between the parties. There are inconsistencies in the evidential material but they only arise because Joubert's view of the situation at the time he deposed to his affidavits was different to that at the time he wrote the letters referred to above. Inconsistencies on paper between earlier and later versions of the same litigant are not necessarily fatal to his case: An explanation of the discrepancy may or may not prompt a court to order further investigation into the truth of the explanation using the techniques developed in the hearing of oral evidence. In the absence of any explanation by Joubert for the divergence between his statements in the correspondence and in the affidavits, there was nothing to refer for further exploration by cross-examination.

[15] *Peterson v Cuthbert & Co Ltd* 1945 AD 420 is a case in which a tenant wrote a letter promising to vacate premises let to him by the respondent. Later, in

an answering affidavit, he contended that the lessor's agent had given him oral permission to remain in the premises. He was required to offer an acceptable explanation of the discrepancy between what he had promised in his letter and what he averred in his affidavit. Watermeyer CJ at 428 set out the rule that has so frequently been applied:

> 'In every case the Court must examine the alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence;'

Although the tenant alleged that he had been given permission to stay in the premises his earlier promise to vacate, it was held, made the dispute of fact 'immaterial.' The same conclusion must be inevitably drawn here: The unexplained letters written by Joubert undermined his testimony under oath to the point where, in the context of deciding on the advisability of further exploration of the issues, the conflict between that and contrary facts testified to by the respondents became 'immaterial'.

[16] The appellants' next defence, a dilatory one, was also dismissed by the court *a quo*. It refused to refer to the Competition Tribunal in terms of s 65(2) of the Competition Act issues 'concerning conduct that is prohibited in terms of this Act.' Section 62(2) prohibits a civil court from considering the merits of a competition issue; it must refer it to the Competition Tribunal provided that it is satisfied that

the issue has not been raised frivolously or vexatiously and that the outcome of the action depends on the resolution of the competition issue. It is clear that the prohibition against consideration of the merits of a competition issue does not mean that a court can give no consideration to the issue at all. It merely means that it may not attempt to resolve the issue; but the question whether the competition issue is frivolous or vexatious is an issue for the court, not for the Competition Tribunal.

[17] The appellants contend that the respondents are guilty of two restrictive practices outlawed by the Competition Act: In violation of s 9, as a 'dominant firm,' practising price discrimination and, in violation of s 8, abusing their dominance in the market in which they conduct business.

[18] The first contention in this regard is that the respondents' conduct in refusing to renew the lease agreements other than on terms determined by themselves constituted anti-competitive price discrimination (in violation of s 9 of the Act) in that the terms demanded by the respondents as dominant firms for a renewal of the lease agreements were significantly more onerous than the terms provided by the respondents to major retailers in equivalent transactions in respect of retail space at Victoria Wharf.

[19] In prohibiting price discrimination by a dominant firm, s 9 of the Act provides that –

> '(1) An action by a dominant firm, as the seller of goods and services, is prohibited price discrimination, if –
>
> (a) it is likely to have the effect of substantially preventing or lessening competition;
>
> (b) it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and
>
> (c) it involves discriminating between those purchasers in terms of –
>
> (i) the price charged for the goods or services;
>
> (ii) …
>
> (iii) …
>
> (iv) …'

[20] An action by a dominant firm cannot be price discrimination unless it relates to sales in what are called 'equivalent transactions', of goods or services of like grade and involves discriminating between purchasers in terms of price. There is no evidence suggesting that the leases to major retailers at the Victoria Wharf are transactions that could in any relevant way be regarded as equivalent to the leases for the kind of small shops occupied by the appellants.

[21] Moreover, the appellants, in the half-hearted comparison they sought to draw between the rental levels for major tenants and for other, smaller, retailers only brought into the comparison the basic monthly rent per square metre paid by each category of trader without any indication of what a major tenant's turnover rental might be. Even if leases with major stores were to be regarded as equivalent

to leases with shops occupying one hundred square metres or so, there is no evidence of what total rental income per square metre the respondents derive from each and therefore no hope that on these facts any kind of price discrimination might be demonstrated.

[22] The appellants also contend that the lessees were, in defiance of the provisions of s 8(a) of the Competition Act, charged an 'excessive price' to the detriment of consumers by the dominant respondent firms. Section 8(a) prohibits a dominant firm from charging an excessive price to the detriment of consumers.

[23] Assuming the respondents to be dominant firms within the meaning of the Competition Act and assuming the expression ‘excessive price’ in the Act to include an excessive rental, there is no evidence that the rental suggested by the respondents for the new leases fell within the purview of the definition of this expression in the Act. An excessive price is a price for a ‘good or service’ that bears no reasonable relation to its economic value. There is no evidence of what the economic value of the lessees' premises was. It is thus completely unknown what relation the proposed rental bore to such value.

[24] The indications on the papers are that the appellants did very well out of their tenancy of premises in the Victoria Wharf. According to Joubert the Waterfront stores have enjoyed 'spectacular growth in trading results over the last

six years in particular.' They were, again according to Joubert, 'generating significant "turnover rental" for the applicants over and above the considerable base rentals already paid.' The increase in percentage rental proposed by the respondents over the previous lease period was 2%, up from 8% to 10% of turnover, rising to 12% if turnover exceeds R4 500 per square metre per month. There is no evidence on record that an increase of this order would have made the rental excessive in the sense that it failed to bear a reasonable relation to the economic value of the premises.

[25] The appellants' contention that the lessees were (to the detriment of consumers) being charged excessive base rentals is every bit as unsubstantiated. Having regard to the lack any evidence other than that of a dramatic improvement in the lessees' turnover, it is fanciful to suggest that the increased rent bore no reasonable relation to the economic value of the premises. It is no wonder that in the discussions that followed the respondents' proposals for new leases, Joubert did not complain about the rent but complained instead that the lessees would not be able to operate from premises as small as those that the respondents were prepared to let to them.

[26] As would have appeared from the discussion above, the appellants' case on the competition issues is hopeless. There is authority for the proposition, which I

endorse, that one who conducts a hopeless case acts frivolously. In *S v Cooper* 1977 (3) SA 475 (T) at 476D-G Boshoff J remarked in the context of an application for a special entry on the record that –

> ' ... the word "frivolous" in its ordinary and natural meaning connotes an application characterized by lack of seriousness, as in the case of one which is manifestly insufficient, and the word "absurd" connotes an application which is inconsistent with reason or common sense and unworthy of serious consideration. These words have been used according to the decided cases in respect of pleadings and actions which were obviously unsustainable or manifestly groundless, or utterly hopeless and without foundation…. In order to bring an application within this description, there should be present grounds upon which the Court could found an opinion that the application is clearly so groundless that no reasonable person can possibly expect to obtain relief from it. The Court should be slow in coming to such a conclusion, and this quality must therefore appear as a certainty and not merely on a preponderance of probability.'

[27] The court *a quo* found that the late raising of the competition issues did not lead to the inference that they had been raised frivolously or vexatiously. It seems to have overlooked the fact that the test is also objective and that an issue can be said to have been raised in a frivolous and vexatious manner if it is clearly groundless or insufficient. No facts have been alleged by the appellants that might have supported a referral to the Competition Tribunal: In the circumstance no reasonable person could possibly have expected to obtain any relief from that tribunal.

[28] There is another reason for this conclusion, correctly relied upon by the court *a quo*. Prayer 3 of the notice of motion sought a declarator that the lessees 'have no right of continued occupation of the said premises after 31 March 2003.' An order was granted in those terms. Even if the Competition Tribunal could, as submitted, require the parties to negotiate towards leases giving occupation with effect from that date, the appellants would have no right to further occupation until the conclusion of such leases. No order of the Competition Tribunal could undo the effect of the order of the high court. There was accordingly no impediment to the court *a quo* granting the requested declaratory order. To put it differently: No order of the Competition Tribunal was, in the words of s 65(2)(*b*)(ii) of the Competition Act, 'required to determine the final outcome of the action'; the final outcome of the application was and, in the light of the relief sought could only be, determined by the high court.

The appeal is dismissed with costs that include the costs of two counsel.

J H CONRADIE
JUDGE OF APPEAL

CONCURRING:

HOWIE P
SCOTT JA
NUGENT JA
PONNAN AJA