THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 798/2010

In the matter between:

TRANSNET LIMITED	**Appellant**
and	
ERF 152927 CAPE TOWN (PTY) LTD	**First Respondent**
JOHAN LOMBARD	**Second Respondent**
CROSS COUNTRY CONTAINERS (PTY) LTD	**Third Respondent**
VINTAGE AFRICA INVESTMENTS 706 (PTY) (LTD)	**Fourth Respondent**
VONPROP ONE (PTY) LTD	**Fifth Respondent**
SMOKEY MOUNTAIN TRADING 151 (PTY) LTD	**Sixth Respondent**
SOUTHERN CARGO (PTY) LTD	**Seventh Respondent**
ROMAN EMPEROR INVESTMENTS 7 (PTY) LTD	**Eighth Respondent**
PEARL ISLE TRADING (PTY) LTD	**Ninth Respondent**
NICOLHEATH PROPERTIES (PTY) LTD	**Tenth Respondent**
LORCOM SIX (PTY) LTD	**Eleventh Respondent**
MALKEN CC	**Twelth Respondent**

CMC GRINROD (PTY) LTD **Thirteenth Respondent**

(SUCH OTHER PERSONS AS MAY BE FOUND TO BE IN OCCUPATION OF THE PROPERTY) **Fourteenth Respondent**

SOUTH CAPE CONTAINERS (PTY) LTD **Fifteenth Respondent**

Neutral Citation: *Transnet Limited v Erf 152927 Cape Town (Pty) Ltd & others* (798/2010) [2011] ZASCA 148 (26 September 2011)

Coram: NAVSA, VAN HEERDEN, MHLANTLA, THERON & WALLIS JJA

Heard: 1 September 2011

Delivered: 26 September 2011

Summary*:* *Eviction sought by way of motion proceedings – foreseeable bona fide dispute of fact raised – high court correctly refusing to refer to oral evidence and dismissing application.*

ORDER

On appeal from: Western Cape High Court, Cape Town (Koen AJ sitting as a court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

VAN HEERDEN JA (NAVSA, MHLANTLA, THERON AND WALLIS JJA concurring):

[1] If a valuation report which forms part of the record is to be believed, Transnet Limited (Transnet) is the owner of most of the vacant or undeveloped properties within a five kilometre radius of the harbour in Cape Town. As a result of industrial expansion in the Cape Peninsula, there is a strong demand for such properties, inter alia for the purpose of storing containers. Transnet currently have in place a moratorium on the disposal of properties owned by it. This greatly affects the demand and supply situation in the area.

[2] One such property (the property), situated only 3.6 kilometres from the harbour entrance and served by railway sidings, forms the subject of the present appeal. In February 2007, Transnet applied for the eviction of the respondents from the property. It asserted simply that it was the owner of the property and that the respondents were in occupation. After the institution of

the application, Transnet concluded that a number of the respondents were not in occupation of the property. It therefore confined the relief sought by it to the first, third, fifth, tenth, eleventh, thirteenth, fourteenth and fifteenth respondents.

[3] The eleventh respondent, Lorcom Six (Pty) Ltd (Lorcom), in its affidavit filed in opposition to the eviction application, contended that it was entitled to occupy the property in terms of an oral lease agreement concluded between itself and Transnet. It stated that, while Lorcom occupied a small portion of the property, it had sublet the remainder to the first respondent, Erf 152927 Cape Town (Pty) Ltd, which had in turn sublet portions of the remainder to the other respondents against whom Transnet sought an eviction order. In its replying affidavit, Transnet denied the existence of a lease with Lorcom.

[4] It is common cause that the first respondent purchased the property from Transnet on 18 February 1998, pursuant to the exercise of the option dealt with below. Lorcom claims that it is in occupation of the property by virtue of the oral lease referred to in the preceding paragraph, pending the transfer of the property to the first respondent. The transfer has been beset by technical difficulties which, it is alleged, are currently being addressed. It appears that at least part of the delay in the transfer has been caused by obstructiveness on the part of Transnet flowing from the abovementioned moratorium and consequent attempts by Transnet not to comply with its legal obligations. The second respondent, Mr Lombard (Lombard), is a director of both Lorcom and the first respondent and is also Lorcom’s representative.

[5] Transnet's application was dismissed with costs by Koen AJ in the court below. The learned acting judge did so on the basis that there had been a foreseeable bona fide dispute of fact on the question of the existence of an oral lease and that the defence based on the lease could not be rejected on the affidavits alone. Koen AJ also rejected Transnet's submission that, if a dispute of fact was found to exist with regard to the conclusion of an oral lease, the court should refer the matter for the hearing of oral evidence. The consequent appeal by Transnet serves before us with the leave of the court below.

[6] There are only two issues to be decided in this appeal. First, whether the court below was correct in concluding that the defence contended for by Lorcom, namely the oral lease, created a bona fide dispute of fact and was not so far-fetched or clearly untenable that the court was justified in rejecting it merely on the papers.[1] Second, whether the court below was correct in exercising its discretion to dismiss Transnet's application, instead of referring the matter to trial or for oral evidence, on the basis that Transnet ought reasonably to have foreseen a dispute of fact in regard to the conclusion of an oral lease with Lorcom.

[7] Because of the nature of the proceedings and the dispute which has arisen, it is necessary to set out the contents of the affidavits in some detail.

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[1] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 55.

[8] For many years, Transnet and its predecessor, the South African Transport Services (SATS), had leased the property to a range of occupiers. The relevant agreements which form the background to the alleged oral lease agreement relied on by the respondents are: a) a written lease agreement for a period of thirty years concluded between SATS and Coalcor Cape (Pty) Ltd (Coalcor) on 11 December 1987; and b) a written option agreement, also for a period of thirty years, and also concluded on 11 December 1987, whereby Coalcor, as tenant, was given the option to purchase the property from SATS (the option).

[9] As the property was then (and remains) an unregistered erf, Clause 5 of the option provided that 'in anticipation of the exercise of this Option, it shall be incumbent on TRANSPORT SERVICES to procure the subdivision, including the survey, preparation and approval of Subdivisional Diagrams as may be necessary in order to enable this transaction to be implemented forthwith upon exercise thereof'.

[10] The rights of the lessee and option holder were over the years ceded and assigned to various entities. However, by February 1998, Macphail (Pty) Ltd (Macphail) was both the lessee and the option holder. On 18 February 1998, Macphail exercised the option to purchase the property. As it was entitled to do, Macphail nominated the first respondent as the purchaser of the property in respect of the sale agreement resulting from the exercise of the option.

[11] Despite an attempt by Transnet to repudiate its obligations under the option agreement, the first respondent obtained an order in the Johannesburg High Court on 29 October 1998, confirming that the first respondent was

entitled to enforce the agreement of sale resulting from the exercise of the option and directing Transnet to take all such steps as may be required and necessary to transfer the property to the first respondent. The judge (Schabort J) recorded that the property was at that time an unregistered consolidated erf. It remains such.

[12] That order notwithstanding, the first respondent has still not received transfer of the property, largely due to delays in obtaining the necessary regulatory approvals required to register the property as a consolidated erf. Moreover, since early 2007, and despite the court order, Transnet has once again adopted the stance that, on various grounds (including prescription), it is not obliged to transfer the property.

[13] Counsel for the respondents contended that Transnet's executory obligation to transfer the property formed the basis of the conclusion of the oral lease agreement upon which the respondents rely. It is certainly so that the parties approached the matter, at the time the oral lease agreement is said to have been concluded, on the basis that transfer of ownership of the property to the first respondent was expected to occur in the near future.

[14] It is apparent that by late 2000, Transnet and Lorcom knew that Maphail was going to terminate its lease of the property. On 22 August 2000, Lombard sent an email to Mr Bhoola (the acting senior property manager for Transnet's Spoornet division) (Bhoola), requesting Transnet to consent to Macphail subletting the property to Lorcom for the period 1 September 2000 to 28 February 2001. Bhoola responded by email on 28 August 2000, indicating that Transnet was awaiting Macphail's six months' notice to terminate the lease, but that, assuming such notice was received, Transnet

would in principle be prepared to allow Macphail to sublet the property to Lorcom for the six month period.

[15] On 31 August 2000, Macphail gave six months' notice of the termination of its lease. Lorcom then occupied the property. It asserted that it had the right to do so with effect from 31 August as Macphail's subtenant, with Transnet's consent. On 1 September 2000, a meeting was held between Bhoola and Mr Vilakazi (Transnet's executive: property and asset management) (Vilakazi), on the one hand, and Lombard, Mr Cohen (the respondents' attorney) and the latter's clerk, on the other. According to Lombard, the purpose of the meeting was to discuss whether, on the termination of Macphail's tenancy and assuming that transfer of the property had not yet taken place, Transnet would be willing to permit Lorcom to enter into a lease agreement for the period between the termination of the Macphail lease and the transfer of property to the first respondent. Bhoola followed up this meeting with an email on that same day, advising that Transnet consented to Lorcom subletting from Macphail for a three month period, effective from 31 August 2000. However, it is important to note that it was clear from this email that Transnet was hoping to conclude a new lease agreement with Lorcom during this three month period.

[16] After the three months had expired at the end of November 2000, Lorcom remained in occupation of the property for the remainder of the Macphail lease agreement without any objection from Transnet. On 26 February 2001, just two days before the termination of the Macphail lease, Lombard commenced negotiations with Transnet's representatives, Bhoola and Vilakazi, in regard to the conclusion of an interim lease agreement, which agreement would authorise Lorcom's occupancy of the property pending what

all parties then perceived to be the imminent transfer of the property to the first respondent.

[17] From 1 March 2001, Lorcom remained in occupation of the property without any objection from Transnet. Between this date and March/April 2002, there were ongoing written and oral negotiations between Lombard, Bhoola and Vilakazi concerning the period of the abovementioned lease agreement and the rental payable. These negotiations are set out in some detail in the judgment of the court a quo and I do not consider it necessary to repeat this exercise. Suffice it to say that, according to Lombard, by March 2002 an oral lease agreement was in place which would endure until transfer of the property to the first respondent. The rental was R50 000 per month, subject to an agreed annual escalation of between eight and ten per cent.

[18] For nearly two years after this, nothing happened, and Lorcom and the respondents who occupied the property through it remained in occupation. On 27 September 2004, Bhoola sent an email to Lombard requesting a meeting to finalise ‘the matter of the sale/lease of the premises’ which was ‘long outstanding’. This email evoked no response from Lombard and another two years went by. Then, in August 2006, an attorney engaged by Transnet attended at the property in order to ascertain who was occupying it. Pursuant to his enquiries and on 25 August 2006, letters were addressed by Transnet’s attorneys to the entities which appeared to be in occupation of the property, including the first respondent and Lorcom. Relying solely on Transnet’s ownership of the property, these occupiers were given ten days ‘to vacate the premises failing which an action will be instituted against you for your eviction’. This was the very first indication that Transnet objected to Lorcom’s occupancy of almost six years.

[19] In response to the letters, the first respondent's attorney stated that its client was entitled to remain on the property, as were the other entities to which eviction letters had been addressed. In a further letter dated 13 September 2006, the first respondent's attorney reiterated that its client and the other entities on the property were in lawful occupation and that Transnet was not entitled to an eviction order. On 21 September 2006, two of the other entities wrote to Transnet's attorneys, advising them that each occupied the property in terms of a lease with the first respondent. In terms of these written lease agreements, the leases were due to terminate on 31 December 2007.

[20] Lombard acknowledged that Lorcom had not paid rental under the lease agreement, but asserted that he had repeatedly requested both VAT invoices and a schedule of arrear rentals from Transnet, which had failed to furnish them. According to Lombard, he had indicated to Bhoola and Vilakazi on several occasions that Lorcom would pay the rent on the provision of these documents and that they had agreed to provide them, but did not do so.

[21] It was submitted on behalf of Transnet that, on a close scrutiny of Lombard's own version, no case had been made out for an oral lease of indefinite duration pending transfer of the property to the first respondent. However, it was unable to procure affidavits from either Bhoola or Vilakazi and thus could not adduce admissible evidence to controvert what Lombard had said about the conclusion of the oral lease. This notwithstanding,

Transnet contended in its replying affidavit that Lombard's version was so far-fetched as to warrant rejection on the papers alone.[2]

[22] Counsel for Transnet analysed Lombard's evidence in considerable detail and highlighted several features of this evidence which, it was argued, showed that no oral lease as contended for by Lombard was ever concluded. Thus, it was submitted that Vilakazi's agreement to accept less rental than had previously been agreed upon (R50 000 per month as opposed to R65 000 per month) was not explained by Lombard and was 'baseless and inexplicable'; that in a letter dated 5 April 2002, Lombard *requests* Bhoola to agree to a minimum lease period of 12 months and there is no allegation that Transnet ever agreed to this request; that Lombard's request to Bhoola in this letter to *draft* a agreement indicated that none had yet been concluded; that Lombard's excuse for not having paid rent, namely that no VAT invoices and no schedule of arrear rentals had been supplied to him, was incredible; that in an email dated September 2004, Bhoola had requested a meeting to finalise 'the matter of the sale/lease of the premises' which was 'long outstanding', and that Lombard's explanation that he understood the reference in this email to refer to a formal written lease agreement was contrary to his own version and unbelievable. Counsel for Transnet also made much of the fact that an oral lease agreement had not been mentioned in the attorneys' letters written during August 2006 in response to the eviction notice, indicating that Lombard's version was a recent fabrication.

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[2] See *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I-635C.

[23] As the court a quo pointed out, what made things difficult for Transnet was that what Lombard had said about the oral lease was not controverted, and the truthfulness of his evidence could only be measured against inherent contradictions therein and against the established facts. I agree with counsel for the respondents that, by poring over the minutiae of the evidence, Transnet impermissibly attempted to evaluate the respondent's version by reference to the probabilities. This is not the function of motion proceedings –

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual disputes because they are not designed to determine probabilities.'[3]

[24] In essence, Lombard's version is summed up in the following paragraph in his answering affidavit –

'31.27. Both Vilakazi and Bhoola accepted that the lease would endure until transfer of the Property was effected. While the above email refers to a twelve month period (this period had been suggested by me for planning purposes only (ie all anticipated that the transfer of the Property should occur within this period), it was at all material times the intention of both Lorcom and the applicant [Transnet] that the whole purpose of the interim lease was to enable Lorcom to remain in occupation of the Property pending transfer to the first respondent of the Property and that the head lease would endure pending the transfer of the Property to the first respondent. As stated above as the term of the head lease was indefinite in the sense that it would endure until the Property had been transferred to the

[3] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26.

first respondent, annual percentages in rental were requested by Bhoola and agreed to by me.'

[25] However robust a court may be, in order to reject Lombard's version, it must be held to be 'so far-fetched or clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence'.[4] I agree with the court below that there are no inherent contradictions in Lombard's version and that his evidence does not conflict to any material degree with the common cause facts. There is nothing about Lombard's version which strikes one as being palpably implausible, far-fetched or clearly untenable. In fact, in the absence of affidavits by Bhoola and Vilakazi, there is simply nothing to gainsay Lombard's version as summarised above.

[26] There is another aspect which was not referred to by counsel, but was raised by this court. As indicated above, Macphail exercised the option to purchase the property on 18 February 1998 and nominated the first respondent as the purchaser of the property in respect of the sale agreement resulting from the exercise of the option. Clause 7 of the option agreement, headed 'Payment of Purchase Price', contains the following words:

'For the avoidance of doubt, it is confirmed that the rental due in terms of the Lease shall remain payable up to the date upon which transfer is actually registered as aforesaid.'

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[4] *Fakie NO v CCII Systems (Pty) Ltd* para 56.

[27] This clause anticipates that there would be continued occupation of the property pending registration of transfer and that rental would remain payable throughout this period. Of course, in terms of this clause, it would be the first respondent who would remain in occupation of the property and pay rent. As stated above, the respondents' case was that there was a head lease for the property between Transnet and Lorcom, that Lorcom occupied a small portion of the property and had sublet the remainder to the first respondent, which had in turn sublet portions of the remainder to some of the other respondents. This notwithstanding, clause 7 lends weight to the contention that Transnet contemplated continued occupation of the property in terms of a lease agreement pending registration of transfer.

[28] If anything is not credible, then it is Transnet's assertion that the relevant respondents have been in occupation of the property for nearly six years without the existence of any kind of agreement to occupy and that Transnet tolerated this state of affairs. In my view, this is a weighty factor to be taken into account in considering whether there was a genuine dispute of fact concerning the existence of an oral lease. As is evident from paragraph 31 below, this was not lost on the court a quo.

[29] As indicated above, the court below exercised its discretion in terms of Uniform rule 6(5)*(g)* by dismissing Transnet's application, instead of referring the matter to oral evidence as had been contended for by Transnet, on the basis that Transnet ought reasonably to have foreseen a dispute of fact in regard to the conclusion of an oral lease with Lorcom. Are there any grounds for interfering with this exercise of the court's discretion?

[30] As was stated in *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (A):[5]

'A litigant is entitled to seek relief by way of notice of motion. If he has reason to believe that facts essential to the success of his claim will probably be disputed he chooses that procedural form at his peril, for the Court in the exercise of its discretion might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application.'[6]

[31] In this regard, Koen AJ pointed out that Lorcom had been in occupation of the property since August 2000. It came into possession of the property lawfully, with Transnet's consent, and remained in undisturbed possession with Transnet's consent until the oral lease about which Lombard testified on affidavit was allegedly concluded. Thereafter, Transnet knew that Lorcom and at least some of the respondents continued to occupy the property, but took no action to evict Lorcom or anyone else. The first respondent was, in terms of the order of Schabort J, entitled to take transfer of the property. Transnet recognised this for years and even if it now holds a different view about the enforceability of the order, it ought reasonably to have foreseen that there would be a dispute about Lorcom's right to occupy. From the correspondence directed by the respondents' attorneys to Transnet following the demand to vacate the property, Transnet had been unequivocally told that Lorcom was in lawful occupation of the property and that any eviction proceedings instituted by Transnet would be resisted. The

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[5] At 430G-H.

[6] See also *Gounder v Top Spec Investments (Pty) Ltd* 2008 (5) SA 151 (SCA) para 10.

tone of the correspondence exchanged between the parties after the demand to vacate had been made during 2006 was confrontational, reinforcing the conclusion that disputes were bound to arise. In September 2006, Transnet's attorneys received letters from two of the respondents, stating that they had rights of occupation in terms of lease agreements which they had concluded with the first respondent. Transnet thus knew that the first respondent held itself out to be entitled to occupy the property. According to the learned acting judge, Transnet or its attorneys must have known that Lorcom asserted, or would assert, that a lease existed, because Lorcom's failure to pay rental was a topic broached in a discussion between Transnet's attorney and the respondents' attorney recorded in a letter dated 13 September 2006, more than five months before the eviction application was launched.[7]

[32] The court a quo did not discount the fact that Lorcom's attorneys were vague about the basis of Lorcom's right to occupy the premises in their letter written in response to the demand to vacate the property. This notwithstanding, the court held that, had any reasonable level of enquiry been made before the application proceedings were instituted, Transnet would have concluded that a serious dispute of fact was likely to arise. This was particularly so, given the long history of the matter and the extent of the correspondence exchanged between Lombard, on the one hand, and Vilakazi and Bhoola, on the other. Transnet's contention that the respondents, despite several opportunities to do so, had not specifically alleged a lease before the

[7] In any event, Transnet is not precluded from proceeding by way of action to recover such arrear rental as, by Lorcom's own admission, is owing.

application was launched, does not really hold water. A party anticipating litigation is under no obligation to disclose in advance the basis of its defence.

[33] In *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T),[8] the court said:

'It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the Court to apply Rule 9 to what is essentially the subject of an ordinary trial action.'

Koen AJ concluded that this was precisely what had happened in this case. In the circumstances, he dismissed the application.

[34] I am in agreement with the approach of the court below as set out in paragraphs 31 and 32 above. It cannot in my view be faulted for having refused the application by Transnet for a referral to oral evidence.

[35] For all the reasons stated above, the following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

B J VAN HEERDEN
JUDGE OF APPEAL

[8] At 1162.

APPEARANCES:

APPELLANT:	F H ODENDAAL SC (with him V P NGUTSHANE)
	Instructed by Cliffe Dekker Hofmeyr Inc, Johannesburg
	Matsepes, Bloemfontein
RESPONDENTS:	J MULLER SC (with him G ROME)
	Instructed by Eversheds, Johannesburg
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