

SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: A3104/07 and

A3103/07

DATE: 04-08-08

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DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE	<u>YES/NO</u>
(2) OF INTEREST TO OTHER JUDGES	<u>YES/NO</u>
(3) REVISED	
DATE <u>11/5/2009</u>	SIGNATURE <u>[Signature]</u>

In the matter between

CONSTANTINE INVESTMENTS (PTY) LTD

Appellant

Versus

DU PREEZ, MARISKA

Respondent

JUDGEMENT

20 WILLIS J: Constantine Investments is the appellant (plaintiff in the court *a quo*), Mariska du Preez is the respondent (defendant in the court *a quo*).

This is an appeal against the judgment of the learned magistrate, Mr M Croukamp, in the Alberton magistrate's court under case number 1769/01 and case number 2464/01 on 30 October 2007 in which the learned magistrate granted the respondent absolution from the instance in

both actions at the close of the plaintiff's case.

The appellant's claim in both actions is based on a lease agreement concluded between the appellant and the respondent.

In respect of the first action, the claim is for arrear rentals for the period December and January 2001 in an amount of R17 023.00 whilst in the second action there is a claim for damages arising out of the respondent's breach of the agreement in an amount of R33 915.54.

It perhaps should be noted that this matter has a long and protracted history in which there has been rescissions of default judgment
10 granted.

In view of the nature of this particular matter, the judgment must necessarily be cryptic. I wish to place on record that I fully accept the arguments of Mr Redman who appeared for the respondent, that the appellant's case, in both actions, is not without its difficulties.

Be that as it may, I am persuaded that the learned magistrate was incorrect in finding, in effect as he did, that the defendant had no case to answer.

The plaintiff's case, for all its difficulties, is clearly that there was a valid extent lease agreement between the parties in respect of which there
20 were arrear rentals due. That case I believe should be answered. It may well be that at the end of the trial, the defendant successfully resists the plaintiff's claim. It would be quite wrong to express a view one way or the other.

Obviously therefore, having found that the learned magistrate erred in finding that there should be absolution from the instance, the appeal

must be upheld.

Counsel for the appellant requested that the matter be referred back to the learned magistrate to continue as if absolution from the instance had not been granted.

There was no opposition to this suggestion in the event that the appeal was upheld by Mr Redman, and indeed it would seem sensible to me, that the trial should continue before the learned magistrate rather than start *de novo* and put everyone to unnecessary expense and inconvenience.

10 The learned magistrate did not express himself in terms that would suggest that the appellant would not receive fair hearings at the continuation of the matter and this much is obvious by reason of the fact that Mr Bitter, who appears for the appellant, was content that the matter be referred back to him.

Insofar as costs are concerned, Mr Redman put up a good argument in my view, that the costs of the appeal should be costs in the trial action. The reason for this is that, at this stage, we do not know who is "on the side of the angels".

20 That is a matter that the learned magistrate will determine having heard the full conspectus of the evidence and therefore seems right that depending on the outcome in the trial action, the costs of the appeal should follow suit.

Accordingly, I propose that the following order be made:

1. The appeal is upheld;
2. The order of absolution from the instance, with costs in

each case, is set aside;

3. In each case, the matter is referred back to the learned magistrate, Mr Croukamp, to continue as if he had not granted absolution from the instance;

4. The costs of the appeal are to be costs in the respective trial actions.

MALULEKE J: I agree.

WILLIS J: It is so ordered.