iAfrica Transcriptions (Pty) Ltd

REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 23649/2011

DATE: 2011-09-02

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
.....
DATE SIGNATURE

In the matter between:

HYPROP INVESTMENT LIMITED Applicant

And

SOPHIA'S RESTAURANT CC First Respondent

NICKOLAS GEORGE PROXEMOS Second Respondent

J U D G M E N T

Landlord and tenant – reduced rent during renovations of premises – common law principle that remission of rent available to lessee if profitable use of premises reduced – common law principle only applicable in the absence of agreement to the contrary

WEPENER J:

[1] The applicant is the owner of commercial property leased to the first respondent. The second respondent is a surety for the obligations of the first respondent and no argument regarding the validity of the suretyship or its enforceability was submitted. The applicant seeks summary judgment for arrear rentals and the ejectment of the first respondent from the property leased to it pursuant to the applicant having cancelled the lease agreement due to non-payment of rental. It is common cause that the first respondent is substantially in arrears with rent payments.

[2] The defence raised by the first respondent regarding the arrear rental is this: It is not disputed that the full monthly rental amount was not paid for a considerable period of time, but it is alleged that the first respondent is entitled to a remission of rent by virtue of the fact that it does not have full use and enjoyment - *commodus usus* - of the premises due to renovations and or alterations which the applicant intends to embark upon. Hereinafter I refer to the renovations and alterations as either renovations or alterations, each reference thereto having the same meaning.

[3] The affidavit of the first respondent alleges that there was a duty on the representative of the applicant to disclose facts regarding the intended renovations at the time when the lease was negotiated, that he did not do so and fraudulently withheld the information from the first respondent. It continues to state that had the first respondent known of the intended renovations it would not have entered into the lease on the terms and for the rent which were agreed to in writing.

[4] The major portion of the argument advanced by Mr Pincus, on behalf

of the first respondent, revolved around the first respondent's right to pay reduced rent in circumstances where renovations of the leased premises occur. Assuming that a tenant would be entitled to a reduction of rent in such circumstances it is necessary to determine whether the first respondent can rely on the alleged failure to disclose and the alleged fraudulent withholding of information regarding the intended renovations, which would result in reduced trade and profitability for the first respondent.

[5] In my view the first respondent has an insurmountable obstacle. Clause 25 of the lease agreement provides as follows:

> "*25.1 The landlord shall be entitled at any and all times during the currency of this lease to effect any such repairs, alterations, improvements and/or additions to the premises or the buildings and/or erect such further buildings on the property as the landlord in its discretion may decide to carry out or erect and for any such purpose erect or cause to be erected scaffolding, hoardings and/or building equipment and also such devises as may be required by law or which the architects may certified to be reasonably necessary for the protection of any person against injury arising out of the building operations in such manner as may be reasonably necessary for the purpose of any of the works aforesaid, in, at, near or in front of the premises.*
>
> *25.2 The landlord shall further be entitled by itself, its contractors and sub-contractors, its architects, its quantity surveyors, its engineers and all artisans and all other workman engaged on the works to such rights of access to the premises as maybe reasonably necessary for the purposes aforesaid.*
>
> *(3) The landlord shall be further be entitled to lead pipes and other services through the premises should it be necessary to link such pipes or other services with any other premises provided that in doing so that the landlord does not*

> *unduly interfere with the tenants beneficial occupation of the premises. In exercising its above rights landlord shall use its best endeavours to cause as little interference with the tenant's beneficial occupation of the premises.*
> *(4) The tenant shall have no claim against the landlord for compensation, damages or otherwise, nor shall the tenant have any right to remission or withholding of any amounts payable in terms of this agreement, by reason of any interference with its tenancy of its beneficial occupation of the premises occasioned by any such repairs or building works as are herein before contemplated or arising from any failure or interruption in the supply of water and/or electricity and/or heating and/or gas and/or any other amenities to the premises for the temporary sesation or interruption of the operation of any lifts, elevators and hoists in the building*."

[6] If, as Mr Pincus argued, there was a duty to disclose, the landlord, in my view, did disclose by inserting the term in the agreement contracting for the right to do renovations without a remission of rent. It told the first respondent in no uncertain terms that it could embark upon a project to repair, alter and improve the building. The first respondent accepted that this could happen and, that if the applicant did embark on effecting renovations, the first respondent would have no right to remission of rent.

[7] The allegation of fraud is refuted by the terms of the contract itself. The first respondent unequivocally contracted on the basis that renovations or alterations could take place without an entitlement to a remission of rent. The reliance by Mr Pincus on the cases which decided that a tenant may be entitled to a remission of rent in certain circumstances, are all distinguishable as in none of those cases did the agreements contain a similar clause to the one that govern the contractual relationship between the parties in this

matter.

[8] The first respondent relied on *Sishen Hotel v SA Yster en Staal Industriële Korporasie* 1987(2) SA 932(A). In that matter there was no clause in the contract comparable with clause 25 contained in the agreement between the applicant and the first respondent. The *Sishen* matter found the landlord to be in breach of the contract (at page 959 B to C). In the matter before me there is no such breach, it is a contractual right to do the renovations.

[9] The first respondent relied further on *Fourie NO v Potgietersrusse Stadsraad* 1987 (2) SA 921 (A). Also in that matter there was no clause such as clause 25 contained in the present agreement. Indeed at page 931 D, Joubert JA said:

> "Die huurkontrak het nie hierdie gemeenregtelike verpligting van die stadsraad as verhuurder beperk of uitgesluit nie."

It implies that the obligation to allow *commodus usus* can be excluded.

[10] The manner in which liability by a lessor to a lessee for reduced beneficial use of premises can be excluded in the event of the premises having to be renovated is by way of agreement. In the case before me the common law obligation to give the first respondent *commodus usus* of the premises is indeed limited and excluded by agreement between the parties. Malan J, as he then was, in *Sweets From Heaven Pty Ltd v Ster Kinekor Films Pty Ltd* 1999 (1) SA 796 (w) said at paragraph 9:

> "*The rules relating to the impairment of the commodus usus of a lessee and the consequent reduction of rent and the remedies of the lessee are based on ordinary contractual principles (Sishen at 955 I - J, De Wet and Yeats Die Suid*

> *Afrikaanse Kontrakte en Handelsreg (1978) fouth ed at 323). It follows that where the lessee expressly or tacitly accepts the risk or where the lease is concluded on the supposition that the lessee may be deprived of the beneficial use of the property, he cannot rely on any breach by the lessor in that regard. Cooper Landlord and Tenant (1994) 2nd ed at 126 says:*
>
> *'It is self - evident that the lessee of a business premises may claim damages from a lessor who causes the profitability of the premises to be reduced. This accords with a lessor's obligation to afford the lessee commodus usus. At the same time the lessor's obligations to abstain from conduct which affects the lessee's profitable use of business is not absolute. A myriad of examples may be cited to illustrate this. For a lessee of business premises to succeed in a claim against the lessor for reduced profitability caused by the lessor's conduct the lessee must prove that the parties either explicitly or tacitly agreed that they would abstain from such conduct.'"*

[11] It follows that the first respondent can only succeed if it can show that the right to *commodus usus* was not limited by agreement.

[12] The applicant contracted for the right to effect alterations to the building without the first respondent being entitled to any remission of rental should it do so and the first respondent accepted that contract. Its reliance on the common law principle can therefor not be sustained.

[13] A further argument advanced by Mr Pincus is that the applicant waited for three months after its notice of demand to cancel the lease. It was argued that by continuing the lease, after the demand, the applicant elected to keep the lease *in esse* and that it cannot now elect to cancel the agreement.

[14] There are no facts to show that the period of three months between

the date of demand and the date of cancellation is unreasonable and I was not able to find any facts on the papers before me. Save for the perceived delay to effect cancellation of the lease, no other defence regarding the cancellation has been raised. In my view the cancellation was properly effected and it is valid and enforceable.

[15] Having reached this conclusion, the applicant is entitled to summary judgment. I consequently grant an order in terms of prayers 1, 2, 3 and 4 of the notice of application for summary judgment dated 20 July 2011. The date from which interest is to run in paragraph 2 is the date of service of summons being 24 June 2011.

_____

W L Wepener

Judge of the High Court

Counsel for applicant: G Dobie

Attorney for applicant: Rooseboom Attorneys

Counsel for respondents: S P Pincus

Attorney for respondents: Biccari Bollo Mariano Inc

Date of hearing: 01/9/2011

Date of judgment: 02/9/2011