REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 09/50779
09/30950

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

1 MARCH 2013 **FHD VAN OOSTEN**

In the matter between

SOLEPROPS 39 (PTY) LTD **PLAINTIFF**

and

MILTIADES KORSKETIDES T/A PRIME GRILL BOKSBURG **DEFENDANT**

Lease - written agreement - 4 claims arising from agreement.
Costs of reinstatement of leased premises – damages.
Lease – wrongful holding over – damages - measure of – rent normally payable permissible yardstick to prove the reasonable market-related rental value for period of holding over.
Things – ownership - of wooden shop front installed by lessee at commencement of lease - whether permanent fixture by accession conferring ownership on owner of building - considerations applicable - nature of shop front, intention of lessee in installing shop front, ease of removal and restoration of damages caused by removal - general considerations - shell of shop offered to lessee had to be fitted out by lessee - fixtures and fittings normally not permanent but subject to future alteration to suit tenant's requirements - held that lessee the owner of shop front.

Costs of suit - amount of successful claims falling within jurisdiction of Magistrate's Court - scale of costs to be allowed - considerations arising - costs allowed on High Court scale.

J U D G M E N T

VAN OOSTEN J:

[1] This is a consolidated action in which the plaintiff's claims arise from a written agreement of lease concluded on 16 April 2003 between the plaintiff, as lessor, and the defendant as lessee, in respect of certain business premises for the purpose of operating a family restaurant and steak house (the agreement). The period of the lease was for 5 years terminating on 31 May 2008. After termination of the lease the defendant remained in occupation of the leased premises (the premises) on the basis of a tacit lease agreement on a month-to-month basis, on the same terms and conditions as contained in the agreement. On 27 May 2009 the plaintiff by notice duly canceled the lease agreement with effect 30 June 2009. The defendant vacated the premises although the date thereof is in dispute, to which I shall revert.

[2] The plaintiff preferred 4 claims against the defendant. Claim A is for payment of the amount of R33 552.75 being in respect of rental and other charges for the month of July 2009, it being alleged that the defendant failed to vacate the premises on 30 June 2009 and that he remained in occupation thereof for a portion of July. Claim B is for payment of the amount of R179 849.25 being the reasonable costs of the replacement of pine ceilings, the inside and outside wooden seating and the wooden shop front in and at the premises, which were removed by the defendant on vacating the premises. I should add that the claim in respect of the pine ceilings and wooden seating was neither referred to in the evidence nor persisted with in argument. In claim C the plaintiff claims the reasonable costs of restoring the premises to its original condition which the defendant had failed to do after termination of the lease as he was, in terms of the agreement, obliged to do. The amount of such costs has been agreed upon, and is R23 209.00. Finally, claim D which is for payment of certain arrear rentals. In this regard a joint pre-

trial statement and debatement of account was undertaken resulting in an agreement between the parties that the defendant is liable to pay to the plaintiff the sum of R42 431.75. The defendant instituted six counterclaims against the plaintiff but all those were withdrawn prior to the hearing of this matter.

[3] Three witnesses testified: Ms Prioste, the portfolio manageress, in the employ of the plaintiff and Mr Murray, a building surveyor as an expert witness in regard to the costs of re-instatement of the premises, for the plaintiff and the defendant, the only witness for the defendant. Mr Murray's evidence, in view of the agreement reached between the parties as to the reasonable amount in regard to the costs of re-instatement, was not challenged. As for the remaining two witnesses, I do not consider it necessary to traverse their evidence in any detail and I shall refer thereto where relevant to the disputes between the parties. I turn now to consider the plaintiff's three claims that are in dispute.

PLAINTIFF'S CLAIM A

[4] The amount claimed by the plaintiff, as explained and dealt with by Ms Prioste in her evidence, was neither challenged nor refuted and must accordingly be accepted as the normal rental and related charges that the defendant would have paid for the month of July had he remained in occupation of the premises.

[5] The real issue between the parties concerns the date on which the defendant finally vacated the premises. It is common cause that the defendant started vacating the premises during mid-June 2009. According to Ms Prioste, who on behalf of the plaintiff was involved in the management of the lease, the keys of the premises were returned to her by Mr Costa, who was the defendant's project manager, at the end of July or early August 2009. The defendant on the other hand testified that he was last on the premises on 26 June 2009. He was in the process of dismantling the wooden shop front, which he regarded as his property and in respect of which a dispute had arisen, when the police arrived to hand him a letter addressed to him by the plaintiff's then attorneys. The letter is of even date and contains a demand for the defendant to

immediately cease removing the shop front, which it is stated is the property of the plaintiff, failing which a criminal charge of theft and criminal prosecution would follow. The defendant was told by the police officer to "move out now or else we are going to lock you up". He obliged and never returned to the premises. The defendant, I should add, was unable to comment on or deny Ms Prioste's version concerning Costa's return of the keys, as he has since died.

[6] The defendant's version, in my view, falls to be rejected. In a letter in response to the letter handed to him by the police, the defendant expresses his utter dismay at the allegations of theft made against him and, quite correctly, reminds the attorneys that this was a civil matter arising from written and oral agreements. But, what is manifestly absent is any reference to the order of the police to leave the premises. There it does not end: the letter written on his behalf by his attorneys a few days later, although dealing in detail with the dispute between the parties, similarly makes no mention thereof. I shall revert to this letter in my consideration of the plaintiff's claim C. As against this there is no good reason for disbelieving the evidence of Ms Prioste concerning the return of the keys. I accordingly accept her evidence and it follows that the plaintiff has succeeded in proving that the defendant remained in occupation of the premises for the month of July 2009.

[7] Counsel for the defendant submitted that the normal rental and related charges in respect of the premises would not be the correct yardstick for assessing damages in the event of the plaintiff being successful with this claim. In my view, where, as is the case here, damages for holding over are claimed, the normal measure of damages claimable by a lessor for wrongfully holding over, namely the market rental value of the leased premises, by invoking the normal rental that would have been payable for the month of July, suffices (see *Sapro v Schlinkman* 1948 (2) SA 637 (AD), *Nedcor Bank Ltd v Withinshaw Properties (Pty) Ltd* 2002 (6) SA 236 (C) para [50]). The plaintiff and the defendant were both closely involved in the rental of commercial premises and the agreement they concluded concerning the amount of the rental, can and in my view should, on the facts of this matter, be accepted as a fair and reasonable assessment of

the market rental value of the premises. It follows that the defendant on this claim is liable for payment of the amount of R33 552.75.

PLAINTIFF'S CLAIM B

[8] The crucial issue concerning this claim consists of the competing claims regarding the ownership of the shop front. Both parties claim ownership thereof. The plaintiff claims ownership based on an interpretation of the clauses contained in Annexure C to the agreement, which read as follows:

'**1. FITTING OUT**

The Landlord will contribute towards the Tenant's fitting out of the Leased Premises as follows:

1.1 A three phase DB board at 200 amps.

1.2 The Landlord will build, at his cost, the toilets and storeroom, as indicated in the plan.

1.3 In addition to the above the Landlord will contribute towards the Tenant's fitting-out of the Leased Premises as follows:

1.3.1 The amount of R120 000-00 (exclusive of VAT) will be the Tenant's fitting-out allowance towards electrical, plumbing, ceiling, flooring and wall and floor finishings. The Landlord will be responsible for the building of toilets and storerooms as per the layout plan, at his cost. Should this amount not be spent on the fitting-out, the Tenant will not be credited with the difference. If the allowance is not sufficient to cover the expenses for the previously mentioned, the Tenant will pay the difference.

2. RESTORATION OF THE PREMISES

2.1 On the termination of this Lease for any reason whatsoever, all fixtures and fittings installed in the Leased Premises as previously mentioned, will be removed from the Leased Premises by the Tenant at its own expense. Any damage or unsightliness caused by such removal will be restored to its original condition at the Tenant's own expense.

2.2 If the Tenant fails to comply herewith then the Landlord will be entitled (without prejudice to any other rights and remedies which he may have) to give the Tenant notice advising the Tenant that he does not require the Tenant to remove such fixtures and fittings from the Leased Premises, in which event such fixtures and fittings will become the property of the Landlord without any compensation payable to the Tenant thereof.

2.3 The Tenant warrants that it will be the owner of such fixtures and fittings.'

It is clear from these clauses that the defendant bears the obligation, on termination of the lease, to remove "all fixtures and fittings installed in the leased premises *as previously mentioned*" [emphasis added]. Those are "electrical, plumbing, ceiling, flooring and wall and floor finishings" and therefore exclude the shop front. Based on this interpretation of the clauses, counsel for the plaintiff submitted that the absence of an obligation on the defendant to remove the shop front on termination of the lease and further that it had become a permanent fixture to the building, all point to the plaintiff being the owner thereof. I do not agree. Clause 2.1 provides for the restoration of the premises on termination of the lease. It does not deal with nor can it be used to infer or confer ownership of the shop front on either party. The agreement is silent on the question of ownership of the shop front. At best for the plaintiff the agreement contains an ambiguity in this regard. On both scenarios evidence *aliunde* is admissible to prove ownership. The defendant's evidence is to the effect that he was the owner of the shop front, which he had paid R103 297.90 for and which he jealously protected and reserved as the particular design of the shop front formed part of his trade mark in the group of restaurants operated by him. As much, he testified, was made clear to and accepted by the landlord's representative at the time of concluding the agreement in 2003. Ms Prioste was appointed long after that and she obviously was unable to deny the correctness of these allegations. The shop front in any event, in my view, did not become a permanent fixture and therefore the ownership of the plaintiff by accession: it was not fitted with the intention of permanently remaining on the premises and it could be, and part of it was in fact, removed without causing such damage to the building structure that could not be properly restored (*see* Joubert (Ed) *LAWSA* Vol 27 (First Re-issue) para 337/8). In this regard it is interesting and of relevance to note that firstly, premises such as these are to a large extent constructed, altered and furbished in accordance with the particular tenant's unique requirements and secondly, that the subsequent tenant of the premises, Wimpy, preferred a different shop front which consisted of aluminum and glass. All that can accordingly be considered to be permanent in nature is the shell of the building which always remains subject to future alteration. This indeed was exactly what the defendant was offered when the agreement

was concluded in 2003. The building, he testified, was still new and he was presented with a shell which required fitting out as is confirmed by and can be gleaned from the provisions of the agreement.

[9] The plaintiff has accordingly failed to prove its ownership of the shop front and I accordingly do not consider it necessary to deal with the quantum of this claim.

PLAINTIFF'S CLAIM C

[10] The plaintiff as I have mentioned, claims damages, the amount of which has been agreed, resulting from the defendant's failure to re-instate the premises on termination of the lease. It is common cause between the parties that the premises in fact were not re-instated in its original condition. On the contrary the premises were left in an appalling state of disrepair and disorder as depicted on the photographs.

[11] In the determination of this claim it is only necessary to consider the explanation advanced by the defendant for failing to re-install the premises. I have already referred to the defendant's version concerning his 'eviction' from the premises by the police. Any reference thereto as a reason for not attending to the re-installation of the premises is glaringly absent from the letters I have referred to as well as the defendant's plea and counterclaims. Neither was a tender to perform his obligation made at any time either by the defendant or his attorneys. Counsel for the defendant contended, assuming the correctness of the defendant's version in this regard, that the 'eviction' constituted a breach or repudiation of the agreement by the plaintiff. The contention is untenable. The police for one, at the time certainly did not act as the plaintiff's representatives nor can such conduct in any way be classified as a breach or repudiation of the agreement.

[12] It follows that this claim must succeed.

COSTS

[13] The aggregate of the amounts of the claims on which the plaintiff is successful (Claims A, C and D) is R99 193.50 (R33 552.75 plus R23 209.00 plus R42 431.75) and therefore falls within the jurisdiction of the Magistrate's Court. The plaintiff is

substantially successful and therefore entitled to costs. The question arises however whether costs should be allowed on the Magistrate's Court scale which counsel for the defendant submitted would be the proper order. In the consideration of the scale of costs and in the exercise of my discretion I have taken the following considerations onto account: The proceedings were initiated by the plaintiff in this Court, the defendant instituted six counterclaims for payment of amounts far in excess of the jurisdictional limits of the Magistrate's Court, the defendant withdrew the counterclaims shortly before the hearing of this matter, after it had already been enrolled for hearing and at the pre-trial conference the parties agreed that the matter should not be referred for hearing to another court. I have also had regard to the complexity of the issues raised in this matter in particular the large number of documents bound in the court files. The pre-trial procedures provided for in the rules of this Court further resulted in a substantial shortening of the duration of the trial with the resultant saving in costs. I am satisfied that this matter, had the trial proceeded in the Magistrate's Court, would have lasted much longer and probably over a prolonged period of time. I have accordingly come to the conclusion that it would not be fair and equitable to deprive the plaintiff of costs on the High Court scale. Finally, counsel are in agreement that costs should be awarded on the attorney and client scale as provided for in the agreement.

[14] In the result judgment is granted in favour of the plaintiff against the defendant for:

1. Payment of the amount of R99 193.50.
2. Interest at the rate of 15,5% pa as follows:`
    2.1 on the amount of R33 552.75 from 31 July 2009 to date of payment;
    2.2 on the amount of R23 209.00 from date of judgment to date of payment, and
    2.3 on the amount of R42 431.75 from the date of service of summons on the defendant in case no 30950/2009, being 31 July 2009, to date of payment.
3. Costs of suit on the scale as between attorney and client, such costs to include the qualifying and attendance fees of the plaintiff's expert witness, Mr Murray.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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PLAINTIFF'S ATTORNEYS	*BRITS VAN RHEEDE MULLER*
COUNSEL FOR THE DEFENDANT	*ADV FA SAINT*
DEFENDANT'S ATTORNEYS	*MORRIS POKROY*
DATES OF HEARING	*27 & 28 FEBRUARY 2013*
DATE OF JUDGMENT	*1 MARCH 2013*