IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A5034/2015

DELETE WHICHEVER IS NOT APPLICABLE

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

ABSA TECHNOLOGY FINANCE SOLUTIONS (PTY) LIMITED Appellant

And

THE MERRY PEASANT PROPERTIES First Respondent

TREVOR VINCENT SHAW Second Respondent

Coram: WEPENER ET WEINER ET MODIBA JJJ

Heard: 14 September 2016

Delivered: 16 September 2016

Summary:

JUDGMENT

WEPENER J:

[1] This is an appeal with leave of the Supreme Court of Appeal, against a judgment of a judge of this court, (Kathree-Setloane J). The court a quo dismissed the claim of the appellant against the first and second respondents. The second respondent's liability arises as a surety for the first respondent but nothing needs to be said about that as the surety's liability, being dependant on the liability of the first respondent, is not in issue.

[2] The dispute between the parties was narrowly defined. The appellant relied on a master rental agreement and sought payment of arrear and future rentals and ancillary relief from the first respondent. The first respondent denied liability to the appellant and pleaded that the master rental agreement, relied upon by the appellant, was not the document which was signed by the second respondent on behalf of the first respondent. In essence, the respondents' version was that the master rental agreement signed on behalf of the first respondent did not contain certain of the matter inserted in the master rental agreement relied upon by the appellant and that that the first respondent never intended to enter into an agreement for a period of 60 months but only on a month to month basis, as is evident form the master rental agreement produced by the respondents.

[3] That there are differences between the documents provided by the appellant and the respondent, brooks no doubt. It is also not in dispute that the document produced by the appellant would bind the first respondent to a rental period of 60 months. So is it also in dispute that the document produced by the respondents would bind the first respondent on a month to month basis only.

[4] The issue on appeal as formulated by the appellants is

‘whether the original master rental agreement is valid in circumstances where the respondents allege that the specific rental period was not inserted at the time of the signature thereof by the second respondent’

As a result of the uncontroverted evidence of the second respondent, Mr Shaw, the court a quo found that the rental period of 60 months was indeed not inserted in the written agreement at the time of signature thereof. The appellants formulation of the issue on appeal seems to accept the correctness of that finding despite the word ‘allege’ utilised by it.

[5] The court’s finding that the 60 months period was not inserted at the time of signing is, in my view, unassailable. The only witness who was present at the time of signing and who gave evidence, Mr Shaw, testified that the 60 month period was not inserted and that it accorded with his intention to enter into a monthly rental agreement. A copy of the document so signed was filed by his secretary and retrieved when proceedings against the respondent commenced. There was no evidence to contradict the evidence of Mr Shaw. Indeed, his reasoning regarding the fact that he would not have signed the master rental agreement if a 60 month period was inserted is plausible and the expectance of his evidence, both in regard to its own trustworthiness and the probabilities, cannot be faulted. The appellant attempted to show that Mr Shaw signed other documents where a period of 60 months was inserted but he convincingly showed that in that case the right to cancel the agreement, on 30 days notice, was retained, such right having been specifically inserted at Mr Shaw’s request. The conduct of Mr Shaw by not entering into 60 month rental agreements, is consequently borne out and is consistent with his evidence.

[6] The witnesses called on behalf of the appellant could make no contribution as to whether the 60 month period had been inserted at the time of the signature of the agreement. Indeed, Miss Kasselman, who testified on behalf of the appellant, had to concede that the material term of 60 months had been omitted from the document at the time of signature. Neither Miss Kasselman not Miss Packery had any knowledge as to the state of the master rental agreement on the date of signature thereof. What is clear from the evidence on any party’s version, is that the document which Mr Shaw signed

was altered after the date of him affixing his signature thereto. The 60 month period as well as a serial number were later inserted in unknown circumstances. The only witness who could give first-hand evidence on behalf of the appellant, a Mr Capper, was not called in order to elucidate as to what the master rental agreement contained on the date of signature. This failure led the court a quo to conclude that a negative inference should be drawn against the appellant. That inference is that Mr Capper would not have contradicted the evidence of Mr Shaw. The inference is justified and piles the evidence against the appellant to an overwhelming probability that the 60 months period was not inserted in the master rental agreement, a fact which the appellant could not seriously dispute.

[7] This brings one to the issue which the appellant raises on appeal – whether the master rental agreement is nonetheless valid in that it is a master rental agreement for a period of 60 months. I am of the view, that the master rental agreement cannot be valid for a period of 60 months. Mr Shaw never intended to sign an agreement for a period of 60 months resulting in the fact that there was no meeting of the minds of the contracting parties if the appellant's predecessor (the seller of the goods, CentraFin) intended a period of 60 months to govern the agreement. The appellant submitted that if it is held, as I do, that the period of 60 months was not inserted, the respondent accepted the risks that any person could insert such a period. This is a rather alarming submission. On the assumption that the appellant submitted that the words 'any person' should be read as the other contracting party, it could only be someone from CentraFin, the party to the agreement prior to its cession. The witness from CentraFin, Miss Packery, testified that she had no knowledge of when the 60 months rental period was inserted or by whom. Even if CentraFin would have had the right to insert such a period, contrary to the intention of the Shaw, there is no evidence that it did so. The court a quo also indicated, correctly so, that after the cession of the agreement by CentraFin and in November 2006 the master rental agreement, retained by Miss Packery, differed in material respects from the master rental agreement relied upon by the plaintiff at the trial.

[8] It is abundantly clear that someone, somewhere, inserted the period of 60 months into the agreement. It was not there when Mr Shaw signed it. There was no evidence that CentraFin inserted it. This is clearly the basis for the appellant's argument that 'any person' could then fill in the 60 months period. This cannot be so. A contracting party may elect not to complete a clause which is to his benefit in a written contract, whereupon the common law rules provide for a substituted term[1]. In such a case the only inference is that the contracting party, CentraFin, intended to

'abandon reliance on a specific period and that the common law rules are to apply namely that it is a monthly lease[2].'

[9] There is no room for the argument that any person whomsoever could have been authorised to insert a period of 60 months contrary to the intention of Mr Shaw.

[10] There is no dispute that the first respondent terminated the agreement by giving a month's notice.

[11] In the circumstances, whether it is found that there was not a meeting of minds and therefore no valid contract or that there was indeed a valid agreement on a month to month basis, the plaintiff's claim based on rentals subsequent to the cancellation of the agreement by the first respondent, fell to be dismissed as was done by the court a quo.

[12] In all the circumstances, the appeal falls to be dismissed with costs.

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Wepener J

[1] *Miller and Miller v Dickinson* 1971 (3) SA 581 (A) at 589G; *Regering van RSA v SGC Elektriese Kontrakteurs* 1977 (4) SA 652 (T) at 658C-D.
[2] *Inrybelange (Eiendoms) Bpk v Pretorius en 'n Ander* 1966 (2) SA 416 (A) at 425F.

I agree.

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Weiner J

I agree.

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Modiba J

Counsel for Appellant: J.J. Durandt

Attorneys for Appellant: Jay Mothobi Incorporated

Counsel for Respondents: G. Goedhart

Attorneys for Respondents: Cowan-Harper Attorneys