2/6/2010

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

NOT REPORTABLE **CASE NO: 17748/2010**

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
3/06/2010
DATE
SIGNATURE

THE JOHANNESBURG LAND COMPANY (PTY) LTD Applicant

and

BUBESI INVESTMENTS 209 (PTY) LTD First Respondent

NINO GROUP CC Second Respondent

JUDGMENT

MURPHY J

1. The applicant seeks as a matter of urgency an order evicting the first respondent from certain leased premises in central Johannesburg.

2. On 18 September 2004 the applicant concluded a written lease with LMO Consulting CC ("LMO") in terms of which it leased the premises which are

the subject of this application for the purpose of operating a café as a franchisee of the second respondent, Nino's Group CC ("Ninos").

3. The lease contained the usual clauses regarding rental, occupation and the like. As the dispute between the parties relates to the termination of the lease, only the clauses governing termination are relevant. Clause 22.1 provides:

> "Subject to the Renewal Option contained in clause 25, the lease shall terminate on the Termination Date. The Lessee shall vacate the Leased Premises on the Termination Date and shall return the Leased Premises to the Lessor in the same good order and condition as the Leased Premises were received by the Lessee on the Commencement Date, fair wear and tear excluded."

Clause 25 is not strictly speaking a renewal option, but in fact provides that where the Lessor evicts the Lessee or terminates the lease then Nino's will become the new Lessee on the same terms and conditions until the termination date. "Termination date" is defined in clause 1.1.31 to mean 31 October 2009. Clause 4 provides that subject to clause 25, this lease shall commence on the commencement date (defined as 1 November 2004), and shall, unless terminated earlier in terms of 17.1, 19.1.10, 19.2 and 22.2 endure until the termination date. The last mentioned clauses are not relevant to the dispute between the parties, referring as they do respectively to termination on the grounds of

destruction or damages, breach of contract and the Lessor's reserved rights to terminate in order to renovate, demolish or re-develop the building in which the premises are located.

4. The substantive clauses of the written lease between the applicant and LMO (Annexure RK2) do not appear to include an express term and/or procedure for renewal upon termination on the Termination Date. As mentioned, although clause 22.1 subjects termination to a renewal option, the reference to clause 25 is meaningless because that clause relates only to Nino's status as franchisor under the lease and its continuing obligation under the lease in the event of termination *prior* to the termination date. However, clause 1.1.28 defines the "renewal period" to mean "a period of 5 years commencing on the first day following the termination date". That clause might perhaps have been relied upon to support a claim on the part of LMO that the actual intention of the parties was to allow for renewal for a further period of 5 years beyond the termination date.

5. On 4 June 2007, the applicant and LMO entered into an addendum to the written lease agreement in terms of which the lease was amended to substitute the first respondent as the lessee in stead of LMO. The written addendum (Annexure RK4) dealt with various issues but only the

substitution and the termination term are relevant. Clauses 4 and 11 of the Preamble to the Addendum read:

> "And whereas the parties now wish to:
>
> ....
>
> 4. to substitute the Lessee, LMO Consulting CC, with Babesi Investments 209 (Proprietary) Limited (Registration No. 2003/016456/07); and .....
>
> 11. for the avoidance of any doubt delete Clause 1.1.28."

Clause 8 of the Addendum then effectively substituted the first respondent as lessee and clause 13 reads: "Clause 1.1.28 is deleted". The applicant avers that the reason for this deletion, as stated in the preamble, was to avoid any doubt between the parties as to the remainder of the initial lease period. Therefore, according to the applicant, the first respondent was entitled to occupation of the premises up to 31 October 2009, being the agreed termination date; and the deletion of clause 1.1.28 removed any doubt or ambiguity about whether there was an option to renew the lease. The intention of the deletion, the applicant contends, was to make it plain that the first respondent did not enjoy an option to renew.

8. The Addendum was signed on behalf of the applicant and by directors of the first and second respondents, as well as the managing member of LMO

7. On 6 August 2009, shortly before the agreed termination date, the director of the second respondent (Ninos) addressed a letter to the applicant recording that the second respondent and the applicant were in discussion about refurbishing the premises. The letter commences with the statement:

> "Our meeting to be held today refers and we wish to confirm that we intend to refurbish the outlet for the new lease period as follows...."

After setting out the proposed refurbishment, the letter ends as follows:

> "The lease renewal needs to be finalized in order that the process can proceed."

8. During August 2009 a meeting took place between the representatives of the applicant and the second respondent during which "the situation regarding the tenancy of the first respondent in close proximity to the termination date was discussed". The first respondent denies that the second respondent represented it during the meeting.

9. On 27 August 2009, the director of the second respondent, Mr John Philippou addressed an email to Mr Roger Koevort of the applicant detailing the content of their discussions in the meeting. It reads:

"1. My meeting with Roger on the 26th instant refers and I confirm.

2. You are unhappy with the approach and operations of the current lessee especially in view of:-

2.1 The erratic payment of rental and the need to continuously follow up on this matter, although there has been an improvement in meeting these commitments over the past two (2) months.

2.1.1. In the past there has been a record of unfulfilled commitments and a "take-it-or-leave it" approach from the tenants.

2.1.2 The rentals and allied charges are up to date at this point.

2.2. The tenant needs to be monitored with regards the usage of the extraction system and you has had to appoint someone to monitor that this is in use.

2.3. The health standards in the shop especially since members of your management team and John have witnessed unsavoury handling of food.

3. Furthermore you are considering the addition to the facilities that offers more than sit-down meals to the clientele in the area, such as a bakery element etc.

4. Nonetheless whilst you are considering the following -

4.1 The type of concept that will meet with your requirements;

4.2 The proposals that Nino's will submit;

You have agreed to -

4.3 Extend the lease period to 31 January 2009;

4.4 Will retain rentals at the current rate for this short term period.

5. In this period you will furthermore -

5.1 Be monitoring any improvements to be made to the current operations;

5.2 Consider our proposals.

6. You have also made it clear that in the event that you will continue with a Nino's concept, the lease will be signed directly between yourselves and Nino's Head Office, who will then sublet the premises to the franchisee and will be responsible for the maintenance of the terms and conditions of the lease agreement.

7. We agreed to keep you informed of our progress and action plan for this outlet."

10. It is common cause that the date 31 January 2009 was a mistake. The Applicant agreed to extend the lease period beyond the termination date to the end of February 2010.

11. The position of the applicant regarding the extension of the period was further stated in an email to Mr Barry Nyabonda, the director of the first respondent, dated 9 December 2009, which reads:

"We are interested in pursuing a different concept for the premises at 70 Fox Street and the principle (sic) shareholders are in agreement that it is the correct option for

us to pursue. Consequently we will not be in a position to extend your tenure at 70 Fox Street beyond the agreed date of 28 February 2010.

Tomorrow is my last official day in the office until 11 January 2010, I suggest we meet after my return to make the necessary arrangements pending the termination of the lease on 28 February 2010."

12. The first respondent did not reply to this email. Nor did it claim any different entitlement until two months later shortly before the termination of the extended period.

13. On the basis of these facts and circumstances the applicant contends that prior to the termination date of the lease, the applicant agreed with the first respondent (who had no option to renew by virtue of the deletion of clause 1.1.28) to extend the lease to 28 February 2010 or alternatively granted the first respondent an indulgence in terms of which it could remain in occupation on a monthly basis. In this latter regard clause 24.11 of the lease is relevant. It provides:

"Relaxation

No latitude, extension of time or other indulgence which may be given or allowed by any Party to any other Party in respect of the performance of any obligation hereunder or enforcement of any right arising from this Lease and no single or partial exercise of any right by any Party shall, under any circumstances, be construed to be an implied consent by such Party or operate as a waiver or a novation of, or otherwise effect any of that Party's rights in terms of or arising from this Lease or

estop such Party from enforcing, at any time and without notice, strict and punctual compliance with each and every provision or term hereof."

14. On 8 February 2010 the attorneys of the first respondent addressed a letter to the applicant raising its defence in the following terms:

> "RE: TENURE AT 70 FOX STREET: OUR CLIENT - BUBESI INVESTMENTS 209 (PTY) LIMITED
>
> We address this letter to you on the instructions of the above tenant.
>
> According to our instructions, you are of the view that our client is to vacate the particular premises on 28 February 2010.
>
> It is our instructions that the agreement and its various addenda incorrectly reflect the agreement between the parties in that it was at all times the agreement between the parties that the lease would endure for five years from the date of signature of the addendum substituting our client for the previous tenant.
>
> We are accordingly instructed to advise you as we hereby do that our client does not intend to vacate the premises after 28 February 2010 and that it will continue to make monthly payments to you in terms of the true agreement between the parties."

15. In its answering affidavit the first respondent elaborates on the circumstances surrounding its substitution as lessee. The first respondent purchased the business of LMO and entered into a franchise agreement

with the second respondent around about the same time. The franchise agreement was concluded on 27 April 2007, while the addendum was concluded more than a month later on 4 June 2007. According to the respondent the purpose of the addendum was to facilitate the first respondent's purchase of the business and the taking over of the leased premises as well as entering into the franchise agreement. The first respondent draws attention to clause 4 of the Franchise Agreement which states:

> "It is recorded that the Franchisee entered into a written agreement of lease in respect of the Approved Premises with the landlord, for a period of at least 5 years."

The Approved Premises are described in the agreement as those which are the subject of dispute.

16. Accordingly, the first respondent contends that the agreement reached with the applicant was that the lease between them would endure for 5 years and insofar as the addendum does not reflect this fact, it incorrectly reflects the intention of the parties at the time and "this was either as a result of a *bona fide* mutual error of the parties or intentionally by the Applicant". It also maintains that it should be clear from the franchise agreement that the respondents believed that a 5 year lease agreement had been entered into. It therefore contended that the addendum did not

correctly reflect the intention of the parties and thus falls to be rectified "to include a termination date 5 years from the date of signature thereof".

17. The applicant's rebuttal of these contentions is predicated principally upon the clear wording of the addendum in relation to the deletion of clause 1.1.28 of the lease. Clause 11 of the preamble to the addendum is unequivocal in its pronouncement that the purpose of the deletion was "for the avoidance of any doubt". The only doubt conceivably to be avoided was the ambiguity in relation to the existence of a renewal period of 5 years. Logically the deletion of the clause could only be intended to result in there being no renewal period and hence no renewal option. This position is reinforced by the fact that we do not find in the list of various amendments effected by the addendum any amendment to the termination date. The absence of any such amendment, taken with the deletion of clause 1.1.28, the applicant submitted, is a clear indication that the parties agreed that the agreement would terminate on 31 October 2009 and there would be no option to renew the agreement by the first respondent.

18. I agree with the applicant that *ex facie* the addendum and the written lease the intention was for the lease to terminate on 31 October 2009. Moreover, because the franchise agreement (to which the applicant was not a party) was signed more than a month before the addendum, the

recordal in the franchise agreement that the first respondent had entered into a lease agreement for a period of 5 years was premature and in any event did not bind the applicant. The best evidence of the intention of the parties is that which is recorded in the addendum which includes a conscious and deliberate decision to delete clause 1.1.28. The probabilities are strong that had the parties intended to lease the premises to the first respondent for 5 years, they would have included an amendment to the termination date along with all the other amendments meticulously included in the addendum.

19. Counsel for the first respondent submitted in argument that there is a dispute of fact on the papers and that the evidential substratum to determine the issue requires the defence of rectification to be referred to oral evidence. Rectification is only available as a remedy where a contract has been affected by a common mistake resulting in the misrecording of the contract due to the common mistake of both parties. The first respondent adduces no facts in support of a common mistake. On the contrary the events of August and December 2007, reflected in the emails of those dates, and the failure to raise the defence of rectification until mid February 2010, point inescapably to the fact that the writing (in both the lease and the addendum) was indeed a true memorial of the intended agreement. As I have said, had the true intention been a 5 year lease, that key term would have been provided for together with the other

amendments meticulously recorded in the addendum. The addendum deals *inter alia* with adjustments to the square meterage, rental and uses of part of the premises. It is inconceivable that had the intention been a 5 year lease that such would not have been recorded. Indeed the deletion of any possible renewal was plainly and unequivocally dealt with. The contemporaneous actions of the parties recorded in the addendum, as captured in their signing of a document twice recording an intention to delete the reference to a renewal period, with the express purpose of avoiding any doubt, supports an inference, as the most legitimate inference, that the common intention was that the lease to the first respondent would terminate on the termination date.

20. To the extent that it has been suggested that I am obliged to resolve the dispute of fact on the papers in accordance with the well known principle enunciated in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) by accepting the version of the respondent, I need hardly say that I am not required to do so where I consider the denials of the respondent to be untenable or uncreditworthy, which I do in this case for the reasons already advanced.

21. Accepting then that the applicant is the owner of the premises, and that the first respondent is in unlawful occupation since the termination of the grace period, the applicant is entitled to the relief it seeks.

22. The first respondent also challenged the application for want of urgency. The applicant says it has secured a better, new tenant. There is a contradiction on the papers about whether the new tenant has signed a lease or not. I do not consider it to be material. That prospective tenant has expended money in anticipation of taking over the premises. The applicant sets out the prospective tenant's plans in some detail. I do not consider it necessary to canvass all the facts alleged. There are significant commercial interests at stake here and in appropriate cases the court should act quickly and decisively to afford relief to deserving applicants; if only because it is in the interests of the administration of justice not to allow the advancement of legitimate commercial interests to be thwarted by the unlawful occupation of premises needed for that end. The first respondent is unlawfully infringing the applicant's property rights and I prefer to exercise my discretion to vindicate those rights urgently rather that to permit a situation of unlawful occupation to endure longer on a foundation which rightly may be considered to be specious.

23. Clause 24.12.3 of the lease provides for legal costs to be payable as between attorney and own client. No reason has been advanced why the costs of this application should not be awarded in accordance with that clause.

24. In the premises I make the following orders:

i) The applicant's non-compliance with the rules relating to forms and service is condoned and the application is considered to be urgent.

ii) The first respondent, or anyone claiming occupation through the first respondent, is hereby evicted from the premises it occupies at SA Eagle House, Fox Street, Johannesburg, more fully described in paragraph 2 of the applicant's notice of motion.

iii) The first respondent is ordered to pay the costs of this application on a scale as between attorney and own client.

JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard: 28 May 2010
For the Applicant: Adv J Roux, Pretoria
Instructed By: Reaan Swanepoel Attorneys, Pretoria
For the Respondent: Adv EL Theron, Johannesburg
Instructed By: Kobus Rossouw, Johannesburg