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

Case Number: A847/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED. ✓

4/3/15
DATE

SIGNATURE

In the matter between:

MOOIRIVIER MALL (PTY) LTD	**APPELLANT**
And	
ROWMOOR INVESTMENTS 804 (PTY) LTD t/a CAPE TOWN FISH MARKET POTCHEFSTROOM	**FIRST RESPONDENT**
NITA PIENAAR	**SECOND RESPONDENT**
ETIENNE KINLOCH PIENAAR	**THIRD RESPONDENT**
LLEWELLYN ADRIAAN BAKKER	**FOURTH RESPONDENT**
JASHMIR RANGE SINGH	**FIFTH RESPONDENT**
JESSICA RANGE SINGH	**SIXTH RESPONDENT**

JUDGMENT

Fabricius J,

1.

The Appellant was the Plaintiff in the Court a quo and instituted action against the Respondents in terms of which he sought a rent interdict, an order confirming the cancellation of the agreement of lease between them, ejectment of the First Defendant from the Mooirivier Mall, payment of an amount R 770 262.33, interest on that amount and costs on an Attorney and client scale.

I will deal with the pleadings before I turn to the order that the learned Magistrate made after a very lengthy trial. Plaintiffs in that action entered into a written agreement of lease in terms of which the First Defendant leased certain premises at which he conducted a restaurant as franchisee of the Cape Town Fish Market chain of restaurants. This lease was to run for a period of five years commencing on 1

October 2008 and terminating 30 September 2013 with an option to renew under certain circumstances. Plaintiff alleged that rentals and other amounts payable by the First Defendant would have to be paid monthly in advance on the first day of every month. They alleged that Plaintiff complied with all the terms of the agreement, that First Defendant was still in occupation of the premises, but that it did not trade at the time (the Particulars of Claim are not dated). Plaintiff alleged that First Defendant refused to make payment of the amount payable and due, and that in that context an amount of some R 770 000 was owing. The other Defendants had bound themselves as sureties and co-principal debtors, but it is clear that default judgment had been taken against Fourth Defendant prior to the trial. At some stage an action had been instituted against the First Defendant for arrear rentals, but this was settled by way of a written agreement which was made an order of Court during October 2011. This agreement of settlement was an annexure to the Particulars of Claim, and stipulates by way of summary only that Plaintiff in that action would write off 50% of the capital amount owing to it on certain terms. One of the terms contained in this agreement was that the rent

payable would be reduced to R45 000 a month with effect from 1 August 2011, where it had previously been some R 75 000. At the same time the relevant agreement of lease was reinstated and applied between the parties thereto.

2.

In terms of the agreement of lease the lessee paid a deposit of R 180 000. In addition to the rent payable by the lessee, it was also responsible for other items such as electricity, water and gas supplied to the premises and used by it. These amounts, together with the rent, had to be paid monthly in advance before the first day of each month. Amounts other than the rent and costs mentioned had to be paid within 14 days "as directed by the lessor from time to time". Clause 35 of this lease contained the provisions that would be applicable in case of breach of its terms. Clause 35.4 provided that in the event of the lessor cancelling the lease and the lessee disputing the right to cancel and remaining in occupation of the premises, the lessee would be obliged, pending the determination of such dispute, to continue to pay to the lessor an amount equivalent to the monthly rent and other sums payable.

The agreement also contained a non-variation clause with its usual terms, but it is clear that this clause itself was not entrenched. I will deal with the significance of that observation also.

3.

In its plea Defendants raised the following defences, and I will only refer to the material terms:

3.1

It was admitted that First Defendant had a franchise agreement with the Cape Town Fish Market which was cancelled by the latter during October 2011;

3.2

As a result thereof Plaintiff cancelled the lease agreement on 13 October 2011;

3.3

First Defendant did not dispute this cancellation although it was wrongful, and therefor accepted it;

3.4

At the time of the cancellation of the agreement, rent had been paid in advance up to and including end of October 2011;

3.5

At the same time Plaintiff was still in possession of the deposit of R 180 000;

3.6

Accordingly, First Defendant denied that any amount was due to Plaintiff either in regard of the rent or other costs or on the basis of a so-called "holding-over";

3.7

As a result of previous litigation a settlement agreement had indeed been entered into which had reduced the monthly rental to R 45 000 per month;

3.8

After the cancellation of the written agreement as the result of the termination of its franchise with the Cape Town Fish Market Organization, First Defendant made a presentation to Plaintiff on 6 October 2011 in terms of which it would continue as a restaurant under the name and style of "Fusion";

3.9

It was agreed that First Defendant would continue with that business until the end of February 2012, whereupon it would be decided whether or not this period would be extended on the same terms as the previous agreement of lease;

3.10

In the meantime the terms of the lease and the terms of the settlement agreement would still be of application;

3.11

Plaintiff had communicated to First Defendant that the cancellation letter had been sent only as a matter of formality, and that the agreement relating to the "Fusion" concept could continue;

3.12

As a result before, a new oral agreement existed between the parties in this particular context;

3.13

Despite that agreement Plaintiff repeatedly repudiated it by sending a written e-mail to First Defendant on 23 November 2011 in terms of which it purported to cancel this agreement with effect from the end of January 2012;

3.14

At the same time and by way of an e-mail dated 22 November 2011 Plaintiff purported to cancel the oral agreement or to vary it, by stating that it would only run from month to month;

3.15

These repudiations were accepted by Defendant and it therefor refused to make any further payments to Plaintiff except by paying an amount of R 45 000 in January 2012 as an attempt to bring Plaintiff to the negotiating table;

3.16

On 29 February 2012 Plaintiff locked out the First Defendant from the premises and it could not and did not do any business thereafter.

At the same time the First Defendant instituted a counter-claim against Plaintiff for the repayment of an amount of some R 96 000 which it alleged had been overpaid as rent as well as an order that it was entitled to the delivery of its assets which had remained in the premises. In its plea to the counter-claims Plaintiff admitted that payments were made from 1 August 2011 to 30 November 2011 in terms of the settlement agreement referred to, but denied that these payments were made timeously. Further, it was pleaded that in December 2011 only a partial payment in the amount of some R 20 000 was made.

4.

The trial proceeded on these issues and others and during the trial the parties agreed that the question of merits and quantum ought to be separated by the Court. Whereas I could not find any order made in this regard by the learned Magistrate in the record, it does appear that the trial proceeded on that basis or at least partially so. I say partially so because despite that agreement, and the Magistrate's understanding thereof, witnesses were examined and cross-examined in great detail

as to the accuracy or otherwise of certain statements and/or invoices. These invoices are not contained in the record of the proceedings before us, and it is thus impossible to understand the evidence of these witnesses, or to determine whether or not any of those particular invoices were accurate or not. In any event, the proceedings must be looked at from the point of view that the quantum aspect of the action had not been decided by the Court a quo, and for obvious reasons cannot be decided by us. The Magistrate made a number of findings in his judgment of some 30 pages and in additional written reasons of some 20 pages, after a very lengthy and in my view improper interrogatory. It is not necessary to deal with all of these findings for purposes of this appeal. The material findings made by him and which I deem necessary to deal with are the following:

4.1

Cancellation of the lease agreement took place on 13 October 2011;

4.2

There was no legal basis thereafter for a claim based on "holding-over", more particularly in light of the fact that First Defendant was not in occupation of the premises as a restaurateur in terms of the lease after February 2012;

4.3

As far as First Defendant's first counter-claim for the over-payment of rent was concerned, this would be dealt with during the trial on quantum;

4.4

The rent payable by First Defendant was in fact R 45 000 per month plus other costs due to Plaintiff as per the cancelled agreement of lease. I have referred to these;

4.5

The deposit of R 180 000 had to be taken into account when any determination of quantum was made;

4.6

As far as the second part of the counter-claim was concerned, this claim succeeded, but the quantum of that claim would be dealt with at a later stage.

5.

As I have said, after the Magistrate gave his written reasons a request was made for further reasons in terms of the provisions of ***Rule 51 (1) of the Rules of the Magistrates' Courts***. In this document the learned Magistrate was asked 49 questions which he answered by way of a 20 page document. There after a Notice of Appeal was filed and this notice contains 37 grounds of appeal. It ought to be clear at this stage that issues before the Court a quo were rather narrow, and in many instances closely related to facts which were indeed common cause between the parties. I must therefore express my distinct disapproval of the manner in which Plaintiff handled this case in the Court a quo, and also in the manner in which the record was prepared for purposes of this appeal. As I have said, it contains very lengthy debates before the learned Magistrate which were not necessary for

purposes of this appeal, inasmuch as they wholly and solely related to the quantum of any particular claim or counter-claim. In the same vein, Plaintiff's Counsel (the Appellant herein) drafted Heads of Argument of some 64 paragraphs which deal with all types of collateral issues and disputes which are not relevant to the determination of the actual dispute between the parties.

6.

Having read the whole record of some 12 volumes I am of the view that the determination between the parties and this appeal can in essence be decided on the evidence of the Plaintiff's witnesses themselves. They gave evidence and/or made concessions during cross-examination which in my view were wholly destructive of Plaintiff's claim, and which indeed supported the Defendants' version that I referred to when I dealt with its plea. I will therefore only deal with those allegations made by Plaintiff's witnesses which I have in mind in this context, and I will ignore all other collateral issues that were raised, and dealt with in the greatest possible detail, and wholly unnecessarily so. On 13 October 2011 Plaintiff's Attorneys wrote to First

Defendant, and referred to the cancellation of the Cape Town Fish Market franchise, and said that they had been instructed to cancel the agreement of lease with immediate effect. First Defendant was asked to vacate the premises forthwith. On 7 February 2012 Plaintiff's Attorney again wrote saying that the settlement agreement that I had referred to had been made an order of Court and alleged that First Defendant was again in arrears with rentals and related charges in an amount of some R 266 000. It also said that a payment of some R 40 000 had been made on 16 January 2012. It again confirmed that the relevant agreement of lease had already been cancelled and that First Defendant had been given one month's notice to vacate the lease premises by no later than 29 February 2012. As a result of the breach, and in terms of the settlement agreement, and amount of some R 448 000 remained outstanding due to the fact that none of the rentals from August to November 2011 were paid timeously. Apart from that it was alleged that First Defendant had to pay the rentals for the period of 1 December 2011 to February 2012. On 23 February 2012 a further letter followed in terms of which Plaintiff said that if the amount of some R 266 000 was paid by 24 February 2012, his client

would be willing to extend the lease on a month to month basis with a mutual notice period of 30 days. On 17 April 2012 First Defendant was told that an amount of some R 492 000 was due on that day, and that this would be reflected on a warrant of execution. He also annexed a so-called reconciliation as at 17 April 2012 in terms of which an amount of some R 800 000 was now due. I must add that I referred to these e-mails in this order because they appear in the record in that order. The next relevant letter in the record is dated 4 October 2012. It is stated herein that First Defendant's Attorneys are aware that it was contended that all agreements had been validly cancelled, and it was pointed out that First Defendant was in unlawful occupation of the leased premises. The most significant letter is however dated 22 November 2011 and it emanates from Ms H. van Niekerk (not all the e-mails that are referred to in the evidence and in the Notice of Appeal are in fact contained in the record). This letter says that with regard to a meeting held on 21 November it was agreed that "We would extend your temporary tenancy until the end of February 2012 to allow you the opportunity to prove/convince the landlord of a permanent tenancy/extended lease agreement as an independent operation". It is

said that this decision by the landlord will be assessed on the performance of the restaurant and more specifically on the year on year growth amongst others. A final decision would be made by the landlord in early February 2012. It is also said then that "until you are notified otherwise you will continue trading on a month to month basis". This was said despite an earlier e-mail of 3 November 2011 in which the same Ms Van Niekerk said that "unfortunately we are not able to commit to any further tenancy beyond January 2012 at this stage".

7.

On 2 March 2012 Plaintiff's Attorneys wrote and said that in context of the goods on the leased premises they held instructions to instruct the sheriff to proceed with the sale and execution.

8.

Mr A. Louw gave evidence and he was the Senior Asset Manager of Plaintiff. He confirmed the back-ground evidence that i have referred to and also stated (Volume

3 page 266) that Defendants could continue with the "Fusion" –concept, and that they were given until the end of February to establish themselves in this context. At the same time however he said that after 13 October 2011, despite the cancellation of the lease agreement, there was a month-to-month agreement on the same terms and conditions as contained in the original agreement of lease. He however also admitted that Ms Van Niekerk had said with reference to the e-mail that I have mentioned, that the temporary tenancy would continue until February 2012 inasmuch as he had been present at the relevant meeting. He was asked about the agreement between the parties relating to the duration of the oral lease after 13 October 2011 and again confirmed (page 278) that it was until the end of February 2012. Despite that he added that the agreement was in fact on a month-to-month basis. On the face of it, these two statements do not make sense as they appear to contradict each other but it is clear from his evidence as a whole, and the undisputed evidence on behalf of First Defendant, that substantial investments were made, that all parties were *ad idem* that the minimum period of the lease under the "Fusion" -concept would be until the end of February 2012. He also admitted that

First Defendant did not do any business on the particular premises after February 2012.

9.

Mr Louw could also not dispute that on 29 February 2012 the Deputy Sheriff arrived at the relevant premises, locked them, confiscated the keys, and admitted that First Defendant could not do any business thereafter.

Having regard to his evidence under cross-examination there can be no doubt about that: First Defendant did not do any business as a restaurateur after 29 February 2012 and that the Deputy Sheriff had taken possession of the keys, and it was prevented access to the premises by amongst others security guards. Plaintiff also had decided that there would be no removal of the First Defendant's assets from the premises. (page 416) Mr Louw also conceded that after 13 October 2011 an oral agreement had come into existence. It is strange that Appellant's Counsel now disputes the correctness of his own witness' evidence and he apparently does so (but is not entitled to do so) on the basis of the judgment of ***SA Sentrale Co-Op***

Graanmaatskappy Bpk vs Shifren 1964 (4) SA 760 (A). This decision relates to the effect of a non-variation clause that is contained in the agreement of lease between the parties. It is however clear from all relevant authorities including the ***Law of Contract, Fourth Edition, R. H. Christie, Butterworth, at 520***, that where a non-variation clause does not entrench itself against variation, the agreement between the parties may be cancelled or varied by them. This in any event also appears from the Shifren-decision at 766 par. E and also from ***Impala Distributors vs Taunus Chemical Manafacturing Company (Pty) Ltd 1975 (3) SA 73 (T) at 278.*** I am not suggesting that Counsel is entitled to ignore the evidence of his own witness, or to make submissions that directly contradict such evidence, but in any event the reliance by Appellant's Counsel on the ***Shifren***-decision is misplaced in law, quite apart from the fact that it is not supported by his own evidence. The learned Magistrate was therefore quite correct in holding that after 13 October 2011 an oral agreement between the parties had come into existence, and that the period of until the end of February 2012 had been agreed upon. Mr Louw at the same time purported to rely on a month-to-month agreement whatever that may have meant in

the context, but at the same time repeatedly agreed that it had been expressly decided that First Defendant would be given the opportunity to test the "Fusion" - concept until at least the end of February 2012. (page 433)

10.

The next witness was Ms E. van Niekerk. She was the Centre Manager at the time and wrote the e-mails that I have referred to amongst others. She also said that the lease agreement was cancelled on 13 October 2011, and I fail to understand how it could be contended otherwise by anyone. They then agreed that First Defendant could continue with the "Fusion" –concept until the end of February 2012, although she thought it had initially been until the end of January 2012. Despite this clear evidence she then continued to vacillate by saying that there was no agreement on those terms, but it was only a concession that been made. I cannot accept that, because it is clear from the evidence that Plaintiff knew that First Defendant had made substantial investments, and it is quite clear from the evidence as a whole that Plaintiff's own witnesses had the end of February 2012 in mind at the very least. It

is also clear from the evidence that Ms Van Niekerk that on numerous occasions she could not remember what had in fact been said and by whom, and that she was often uncertain that had been intended. It is however clear that the end of February 2012 had been in their minds, and one can accept that this was the agreement between the parties. She admitted writing the contradictory e-mails but did not find this strange for a reason that was not explained to the Court a quo. It is also clear from her evidence that the invoices that were rendered to First Defendant after August 2011 were in a state of chaos, on her own version.

11.

Ms M. Wiggel gave evidence and did so in the context of the lot of documentation of invoices and statements that are not contained in the record. For that reason her evidence cannot be sensibly dealt with, but she did make a number of material concessions. The first one is that she admitted that the First Defendant had been locked out of the premises at the end of February 2012. (page 723) This had been the effect of the Deputy Sheriff confiscating the keys and the inability of First

Defendant to have access to the premises. The other material concession is that at the end of October 2011 the rent had been fully paid, and Plaintiff had in its possession a deposit of R 180 000. I cannot discern why Appellant's Counsel deems to contend otherwise during the trial and before us. Again, he cannot ignore the very clear evidence of his own witness. Quite apart from that it is clear from her evidence that invoices sent to First Defendant for items apart from the rent often made no sense, were contradictory and had to be questioned. It is clear from her evidence read together with testimony from other witnesses that the defences relied upon by First Defendant in its plea are of merit, and are in fact supported by the evidence of Plaintiff's own witnesses. The learned Magistrate in the Court a quo in my view correctly found this to be so and, as I have said, I fail to see any merit of the dozens of grounds of appeal that were raised subsequent to the judgment.

12.

In my opinion the conclusion arrived at by the learned Magistrate in the Court a quo on the material issues were quite correct. It does not behove the Appellant to contend otherwise especially not in the light of the evidence of his own witnesses.

13.

Two further submissions were made by First Defendant's Counsel with which I agree. Plaintiff had launched summary judgment proceedings on a basis substantially different to the allegations made in the trial action. Costs of this application were reserved, but First Defendant is entitled to an order in its favour. I agree, and must add that the lodging of that application was particularly ill-advised.

14.

The other submission relates to the liability of the sureties after the cancellation of the lease agreement. Plaintiff's own witnesses testified that their liability was not

debated. They can therefore not be liable in terms of the oral agreement. Again, I agree.

Accordingly the following order is made:

The appeal is dismissed with costs.

JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA

I Agree

JUDGE M. ISMAIL

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA

3 MARCH 2015