IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 56141/12

In the matter between: 24/2/2016

ULTIMATE SPORTS NUTRITION (PTY) LIMITED Plaintiff

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

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

23/02/16
DATE

SIGNATURE

and

CAPITAL PROPERTY FUND Defendant

JUDGMENT

Tuchten J:

1 This case arises from a written lease concluded between the parties on 30 March 2007. For reasons which will become apparent, I shall call the lease between the parties the old lease. Under the old lease, the plaintiff occupied an entire building and adjacent ground at 311 and 312 15th Road Randjespark Midrand (the premises).

2 The old lease ran for five years and terminated on 30 April 2012, subject to an option on the part of the plaintiff to extend its term. The plaintiff elected not to exercise its option and was obliged to vacate the premises on 30 April 2012.

3 The dispute between the parties relates to the deposit paid under the lease. The deposit was not paid in cash but was secured by a demand guarantee issued by a bank. The defendant called up the guarantee in a sum assessed by the defendant at R449 276,34, all of which the defendant asserted it was entitled to retain. The plaintiff contends that the whole or alternatively a portion of the deposit so paid to the defendant should be refunded to the plaintiff.

4 On 25 April 2012, in anticipation of the departure of the plaintiff from the premises, the defendant entered into a lease over the premises (the new lease) with SA Fence and Gate Investment Holdings (Pty) Limited. Under the new lease, although SA Fence was entitled to occupy the premises from 1 May 2012, the obligation of SA Fence to pay rental to the defendant for the premises only began to run on 1 June 2012. But SA Fence was obliged to pay to the defendant its proportionate share of the rates and taxes levied on the premises from the occupation date, ie 1 May 2012 "or as soon as possible thereafter." The effect of these provisions was that SA Fence was

entitled to a month's rental holiday from 1 to 31 May 2012. The purpose of the rental holiday was to give SA Fence time to settle into the premises.

5 The plaintiff was obliged to reinstate the premises upon the expiry of the old lease. Clause 33.2 deals with this aspect of the relationship:

> At all times during the currency of this lease the TENANT shall care for and maintain in good order and repair the interior of the premises (including adjacent yards), the electrical, gas, drainage and sanitary works, the thermostats and air conditioning appliances and the appurtenances therein, and at the termination or expiry of the lease for whatever reason return and redeliver the same to the LANDLORD in good order and repair at its own cost on demand any damage, breakages or, in the alternative, reimburse the LANDLORD for the cost of replacing, repairing or making good any broken, damaged or missing articles howsoever caused subject to clause 11.2. If the appurtenances and/or electrical, gas, drainage and sanitary works, stoves, thermostats, geysers and air conditioning appliances are or become defective (for any reason including by reason of fair wear and tear), the TENANT shall be obliged to replace them at the TENANT's expense. Without detracting from the generality of the above, the TENANT shall repair any damage caused to the premises, which may be occasioned by any cause, including forcible entry.

6 The defendant's managing agent was JHI. One of JHI's duties to the defendant was to manage the transition as tenant of the premises from the plaintiff to SA Fence. For this purpose, employees of JHI undertook inspections of the premises and compiled reports and snag lists. It became apparent that the plaintiff could not comply with its reinstatement obligations by the date upon which the old lease expired, ie 30 April 2012. The plaintiff needed an extension to enable it to attend to these matters. For this purpose, the plaintiff preferred to remain in the premises. The plaintiff apparently obtained permission from SA Fence to remain in occupation for a short period while it addressed its reinstatement obligations. But the plaintiff did not obtain the permission of the defendant. And ultimately, the plaintiff vacated on 14 May 2012. So the plaintiff remained in occupation for 14 days longer than provided for in the old lease.

7 The evidence shows that the defendant and SA Fence then agreed that the month's rental holiday would begin on 15 May 2012 instead of on 1 May 2012. But for reasons not explained in the evidence, the two transition arrangements, ie the plaintiff's 14 day extended occupation and the deferral for the same period of the start of SA Fence's rental holiday, were bilateral and not tripartite agreements. This meant that the plaintiff could not assert as against the defendant a right to occupy from 1 to 14 May 2012 and could thus in principle not

resist the claim for damages for holding over which was one of the items which the defendant relied upon when it called up the demand guarantee. There was moreover no suggestion in the evidence that the defendant was made aware by the plaintiff or by SA Fence that they had agreed between them that the plaintiff would remain in occupation for the additional 14 days.

8 The evidence further shows that while the plaintiff acted towards compliance of its reinstatement obligations in the period up to 14 May 2012, in several respects the reinstatement was not complete when the plaintiff ultimately vacated. This emerges from the evidence of JHI's operations manager, Ms Bennett, who compiled several reports and a comprehensive snag list in this regard. I found Ms Bennett to be a reliable witness on the matters she noted in her report and snag list which were before me, subject however to the qualification that Ms Bennett in some instances included in her documents a general complaint, on which she was unable to be specific. Miss Bennett was also very vague about the arrangements between the plaintiff and the defendant in regard to the deferred vacation date and the like. This latter is not surprising and is not intended as a criticism because these arrangements were not part of Ms Bennett's field of responsibility.

9 For this reason, I do not think I can attach any weight to Mis Bennett's evidence as to the inwardnesses of these arrangements. They remain obscure because no witness testified directly to the arraignments even though witnesses were available in this regard to both sides. Indeed only Ms Bennett and JHI's portfolio manager, Ms Veldsman, testified for the defendant and the plaintiff closed its case without adducing any evidence.

10 Despite these shortcomings in the evidence, it has in my view been established that on the date the plaintiff ultimately vacated the premises, 14 May 2012, the plaintiff was in a number of respects in breach of its reinstatement obligations.

11 When the plaintiff vacated the premises, the defendant or JHI on its behalf took steps to quantify the plaintiff's breaches, as Ms Bennett saw them. Ms Bennett retained a number of contractors to attend to the reinstatement. In addition SA Fence undertook work on the premises which included both the enclosure within the premises of spaces by the use of dry walling and work which could properly be described as reinstatement.

12 By 30 May 2012, the defendant must have quantified its claim for damages against the plaintiff for holding over and failing fully to reinstate, because on that date the defendant made demand on the plaintiff's banker under the guarantee and the plaintiff's banker paid over to the defendant under the guarantee the sum of R449 276,34. As far as I can gather from the evidence, which was in this respect as in many others less than comprehensive, the defendant made no demand on the plaintiff (as opposed to its banker) for this sum and did not account to the plaintiff for the sum paid to it under the guarantee until it responded to the plaintiff's application for summary judgment against it in this very action.

13 The plaintiff instituted the present action on 27 September 2012. The summons was served on the defendant on 3 October 2012. The sheriff's return shows that the summons was served on a manager of the defendant at its principle place of business in Sandton. I mention this last because of a point taken by the defendant in relation to its citation, with which I shall deal later.

14 Counsel for the defendant laid considerable emphasis in argument on the form of the pleadings. I shall therefore refer to them in some detail.

15 The plaintiff has a main and an alternative claim. In the main claim, the plaintiff alleges a full compliance with the provisions of clause 33.2 of the old lease. On this basis, the plaintiff claims in paragraph 9 of the particulars of claim that because of its full compliance with clause 33.2, the defendant was not entitled to withhold from the plaintiff payment of the amount so paid by its bankers; in other words that the plaintiff is entitled to a full refund of the deposit in effect paid by it to the defendant when the plaintiff's banker paid out under the demand guarantee.

16 The defence raised in paragraph 9 of the plea is that the plaintiff had not complied in full with these provisions. Although paragraph 9 of the plea begins with a general denial, the plea proceeds, in paragraph 9.2 as follows:

> The defendant was entitled in terms of clause 8.2 of the [old lease] to apply and/or to set off the whole or portion of the deposit towards payment of rental, municipal charges, any other liability of the Plaintiff to the Defendant of whatsoever nature including the costs incurred by the Defendant to reinstate the leased premises to the condition in which it was when the Plaintiff took occupation, and damages incurred by the Defendant as a result of the Plaintiff holding over the leased premises.

17 The plea continues, in paragraph 9.3, to allege that the defendant applied alternatively set off the deposit against payment of the Plaintiff's liability to the Defendant as follows: firstly, holding over damages for May 2012 of R266 888,65; secondly, municipal charges for April 2012 of R53 656,56; and thirdly reinstatement of R132 324,05. In all, therefore, the defendant pleaded that it had been entitled to apply or set off from or against the deposit paid by the plaintiff when the plaintiff's banker paid out under the guarantee a sum slightly in excess of that actually paid. There was no counterclaim for that small excess.

18 Counsel for the defendant submitted that the main claim could not succeed because the main claim was based on a full compliance by the plaintiff with the provisions of clause 33.2 of the old lease and the evidence showed that the plaintiff had not fully complied with its obligations under clause 33.2. The evidence demonstrates that this submission is correct.

19 The plaintiff's alternative claim, however, is prefaced by a statement that the alternative claim was brought on the assumption that the court might find that the plaintiff was liable upon vacation of the premises for payment of an amount in respect of damages which the defendant

might lawfully have set off against the amount paid under the guarantee.

20 On this assumption, the plaintiff alleged that such damages did not exceed R50 000. The plaintiff then claimed in the alternative the amount paid under the guarantee less this sum of R50 000.

21 The defence to the alternative claim, pleaded in paragraph 12 of the plea was, after a general denial amplified by a complaint that the plaintiff had not "properly set out" the allegation that the defendant's damages did not exceed R50 000, an express repetition of paragraph 9.3 of the plea, the contents of which I summarised in paragraph 17 above of this judgment.

22 On these pleadings, to my mind, the issues raised by the alternative claim and the plea to that claim are in effect the quantification of the defendant's damages claim against the plaintiff arising from the plaintiff's assumed breaches of clause 33.2 of the plea. The plaintiff's case was that damages for these breaches, properly quantified, amounted to R50 000 or less, while the defendant said that its damages amounted to an amount in excess of that paid out under the guarantee.

23 I should mention that although the pleadings limited the defendant's case as to the damages it had suffered through breaches of the provisions of clause 33.2, the defendant sought to lead evidence of additional, unpleaded breaches. I ruled that the defendant was not entitled on the pleadings as they stood to lead this evidence. No application was made by the defendant to amend its plea.

24 Although the defendant assumed the burden of first adducing evidence, the incidence of the onus was in dispute. I hold that the onus was on the plaintiff to prove the facts alleged by it in its alternative claim. Plainly the plaintiff was required to prove, on these pleadings, the quantum of the damages it alleges the defendant suffered by virtue of the plaintiff's breaches of clause 33.2. This conclusion is also consistent with the rule laid down in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 A that a plaintiff who claims a reduced contract price must prove the amount of the reduction.

25 Counsel for the defendant submitted that this onus required actual proof by the plaintiff of the reduction. On these pleadings, I do not think that this is correct. The issue raised by the particulars of claim read with the plea in this regard was circumscribed: the upper limit of the potential reduction was that pleaded by the defendant. This

means, in my view, firstly that the breaches pleaded by the defendant unless demonstrated by the evidence to be without substance should for present purposes be taken as justifying in principle a deduction from the deposit. And secondly, the amounts claimed by the defendant as damages for such breaches must, unless proved to be lesser amounts, be taken as the amounts the defendant was entitled to allocate or set off against the deposit.

26 The defendant particularised its damages as alleged by it in the plea in a schedule to an affidavit submitted on its behalf resisting an application by the plaintiff for summary judgment. During the course of the trial, several of those claims as particularised were abandoned by the defendant or modified. At the conclusion of oral evidence, counsel jointly submitted a minute of matters agreed upon by the parties. The minute recorded agreement that an amount of R50 000 should be applied from the deposit toward payment of municipal charges for the month of April 2012 and that a further amount of R50 000 should be similarly applied toward the payment for certain electrical work. Both these items featured in the quantification by the defendant of its damages in its plea as read with the schedule to the summary judgment affidavit.

27 The minute proceeds to record that the remaining items contended for by the defendant as legitimately having been appropriated by the defendant from the deposit were certain items on the schedule totalling in all R34 574,75 plus the quantum of the defendant's claim for holding over.

28 I concluded that the plaintiff bore the onus of showing that it was not liable for the claims totalling R34 574,75. The plaintiff adduced no evidence in this regard but counsel submitted that the fact that most if not all the invoices supporting these claims were dated some months after the plaintiff ultimately vacated the premises proved that the work evidenced by the invoices had not been carried out as part of the reinstatement of the premises but because of defects which arose after the plaintiff vacated.

29 I do not agree with this submission. The evidence of Ms Bennett, which I found reliable, was that she had identified the defects in question during inspections she carried out before the plaintiff vacated. I therefore hold that the plaintiff has failed to prove that the amount of R34 574,75 did not fall to be appropriated from the deposit.

30 Counsel for the defendant submitted that the defence of *exceptio non adimpleti contractus* was available to the defendant. With reference to *BK Tooling*, counsel argued that the defendant was not obliged to refund the balance of the deposit while the plaintiff remained in breach of its clause 33.2 obligations under the old lease. I agree that the present case is analogous to that which arose for decision in *BK Tooling*. The defendant could, if it had taken a cash deposit have said, in effect, that while the plaintiff remained in breach of these obligations, the defendant would not allocate any of the deposit toward remedying the alleged breaches and would thus hold the plaintiff to its obligation to remedy.

31 But that is not what happened in this case. The defendant cashed in the guarantee and *allocated* the deposit so paid toward remedying the alleged breaches. One the defendant did this, the breaches were remedied. No performance was thereafter required from the plaintiff and the defendant could not withhold counter-performance. I therefore conclude that the *exceptio* is not available to the defendant.

32 The remaining item for consideration is the defendant's claim for damages for holding over. I find that the plaintiff did indeed hold over for the period 1 to 14 May 2012. The fact that the plaintiff occupied by agreement with SA Fence does not render the plaintiff's occupation

for this period lawful as against the defendant, which was not a party to the agreement in question.

33 It remains to quantify those damages. The contention on behalf of the defendant was that the measure of damages was the rental which the defendant would have earned for rental during the holding over period but for the holding over. *Hyprop Investments Ltd and Another v NCS Carriers and Forwarding CC and Another* 2013 SA 607 GSJ. The defendant then used as a measure in this regard the rental paid by the plaintiff during the last month of the old lease, ie R224 638,17, adjusted for the fact that the plaintiff only held over for 14 days.

34 In my view, however, the quantum of the defendant's damages in this regard is regulated by clause 27 of the old lease:

> While for any reason or on any grounds the TENANT occupies the leased premises and the LANDLORD disputes its right to do so, then until the dispute is resolved whether by settlement or litigation, the TENANT shall (notwithstanding that, without prejudice to its rights the LANDLORD may contend that this lease is of no force) continue to pay an *amount equivalent to the total rent provided for in this lease* monthly in advance on the first day of each month, and the LANDLORD shall be entitled, notwithstanding that the TENANT may categorise such payment as rental, to accept and recover such payments, and such payments and the acceptance thereof shall be without prejudice to and shall not

> in any way whatsoever affect the LANDLORD's claim then in dispute. If the dispute is resolved in favour of the LANDLORD, the payments made and received in terms of this lease shall be *deemed to be amounts paid by the TENANT on account of damages suffered by the LANDLORD by reason of the unlawful occupation or holding over by the TENANT.* [own emphasis]

35 There was indeed a dispute as contemplated in clause 27. This dispute has been resolved in favour of the defendant in this litigation. The amount of the deposit received by the defendant, to the extent that I find its retention to be justified, is an payment made and received under the old lease. Clause 27 prescribes that such an amount is deemed to have been paid on account of the defendant's damages for holding over. It follows then, in my view, that the damages to be awarded to the defendant in this regard for loss of rental must be calculated in accordance with the following formula:

> Total rent provided for in old lease ÷ number of days of old lease x 14

36 So quantified, the damages to be awarded under this head, I was told in argument, amount to R89 898,67. In addition, the evidence established that the plaintiff is liable to the defendant for municipal charges incurred by the defendant during the holding over period in the sum of R20 435,79. Counsel for the plaintiff suggested that SA

Fence might have paid these charges. My finding on the onus disposes of this submission. It is highly unlikely that SA Fence would have paid charges relating to a period in which it did not have occupation.

37 It was submitted on behalf of the plaintiff that the defendant was required to show actual damages suffered by it as a result of the holding over. In my view the evidence shows that the defendant suffered actual damages. The defendant could not fulfil its obligation to give SA Fence vacant possession of the premises on 1 May 2012. The defendant was therefore obliged to concede to SA Fence that its rental holiday would begin 14 days later, ie on the day the plaintiff vacated the premises. The defendant therefore lost the rental which it would have been entitled to receive from SA Fence for the period of 14 days beginning on 1 June 2012 and the contribution to its expenses from SA Fence in the form of rates and taxes for the holding over period. Had I quantified the defendant's damages on the basis contended for by the plaintiff, I would have awarded an amount slightly in excess of R89 898,67, based on the first month's rental under the new lease.

38 In the result, the amounts legitimately appropriated by the plaintiff from the deposit are as follows:

38.1	Loss of rent (holding over period)	88 898,67
38.2	Municipal charges (holding over period)	20 435,79
38.3	Municipal charges for April 2012 (agreed)	50 000,00
38.4	Electrical reinstatement items (agreed)	50 000,00
38.5	Sundry reinstatement items	34 574,75
38.6	**TOTAL**	**R243 909,21**

39 Subject to the question with which I shall immediately proceed to deal, then, the plaintiff is entitled to succeed for the refund of the deposit paid, ie R449 276,30, less R243 909,21 = R205 367,09. Counsel were agreed that this amount should carry interest at the then applicable *mora* rate, 15,5%, from date of service of the plaintiff's summons, ie 3 October 2012.

40 Counsel for the defendant submitted that the plaintiff had not proved an entitlement to sue the defendant. The plaintiff cited the defendant in paragraph 2 of its particulars of claim as

> ... a firm and/or partnership and/or unincorporated syndicate of which the full and further particulars are to the Plaintiff unknown.

41 To this allegation, the defendant in paragraph 2 of the plea pleaded a denial, adding the allegation that the defendant was not a firm, partnership or unincorporated syndicate. This prompted a notice in terms of rule 14(5) on the part of the plaintiff, calling for the names of the "co-partners in the Defendant firm" at the time of the accrual of the plaintiff's cause of action.

42 The defendant responded that it was not a firm

> ... but a portfolio within the Capital Property trust scheme, a collective investment scheme in property in terms of the Collective Investment Schemes Control Act No. 45 of 2002. It therefore does not have partners.

43 As defined in s 1 of the Collective Investment Schemes Control Act, "portfolio" means

> a group of assets including any amount of cash in which members of the public are invited or permitted by a manager to acquire, pursuant to a collective investment scheme, a participatory interest or a participatory interest of a specific class which as a result of its specific characteristics differs from another class of participatory interests.

44 Although under s 102 of the Act certain portfolios may be wound up, I find nothing in the Act that bears upon the question of juristic personality. For purposes of litigation, therefore, such a portfolio is nothing more than a division of its owner or owners. The identity or identities of the owner or owners of the defendant was not addressed in evidence.

45 Under rule 14(1), "firm" means a business, including a business carried on by a body corporate, carried on by the sole proprietor thereof under a name other than his own. Under rule 14(2), a firm may sue or be sued in its name. Under rule 14(3), a plaintiff suing a partnership need not allege the names of the partners. Rule 14(4) provides that the provisions of rule 14(3) shall apply *mutatis mutandis* to a plaintiff suing a firm.

46 There is no doubt that the defendant is a business. The facts of this case show that it is a rental enterprise, renting out the premises to tenants. It appointed agents, JHI, to administer this rental enterprise. The defendant has according to the sheriff's return of service on the summons a principal place of business. The summons was served there on a manager of the defendant. Because the defendant is a business, it is a firm as contemplated in rule 14(1). It may therefore

under rule 14(2) be sued in its name. The plaintiff has therefore established an entitlement to sue the defendant as so cited.

47 I turn to the question of costs. Counsel for the plaintiff sought costs on the high court scale including the costs consequent upon the employment of senior counsel, together with the qualifying fees of its expert witness, Mr Cruickshank, and a declaration that a certain Mr Tyrannis was a necessary witness. Neither of these prospective witnesses ultimately testified. Counsel for the defendant submitted that any order against the defendant should carry costs on the appropriate magistrate's court scale.

48 In my view, the matter was sufficiently complex to justify both high court costs and the employment of senior counsel. A summary of the proposed evidence of Mr Cruickshank was submitted under rule 36. However, very little indication was given of the evidence which it was contemplated Mr Tyrannis could give. I therefore propose to allow the qualifying fees of the expert but I shall not declare the lay witness necessary.

49 Finally, I think that it is possible that I have patently erred in my arithmetical calculations of the damages I have awarded to the defendant. I shall provide in the order for these arithmetical

calculations to be revisited in chambers, should either party feel aggrieved in this regard.

50 I make the following order:

1 There will be judgment for the plaintiff against the defendant for payment of the sum of R243 909,21.

2 The judgment debt will carry interest at the rate of 15,5% from 3 October 2012 to date of payment.

3 The defendant must pay the plaintiff's costs, including the costs consequent upon the employment of senior counsel and the qualifying fees of Mr Cruickshank.

4 The monetary amount of the order in 1 above will be provisional for a period of ten days. During that period, either party may, without prejudice to its other rights, apply informally on notice to the other party to a judge in chambers to vary that monetary amount to correct any error arising from an incorrect arithmetical calculation. After the expiry of that period and subject to any such application, the order in 1 will become final.

NB Tuchten
Judge of the High Court
23 February 2016