✓✓ 13/02/2018

REPUBLIC OF SOUTH AFRICA

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

CASE NO: 38854/2013

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

PP 13/2/18 PP LEOWABA DJP

DATE SIGNATURE

In the matter between:-

IDL TRANSPORT CC t/a OLD FASHIONED FISH AND CHIPS First Applicant
ROSE THOKO MAHLANGU Second Applicant
ISAAC NSEBENZI MAHLANGU Third Applicant

and

SOLEPROPS 39 (PTY) LTD Respondent

JUDGMENT

CRUTCHFIELD AJ:

[1] The applicants claimed the rescission and setting aside of a judgment granted by default on 4 June 2015, in the absence of the applicants.

[2] The judgment was for payment of R182 099.30 together with interest and costs.

[3] The applicants contended that they were not in wilful default as they were under the impression that the trial was set down on 5 June 2015, not 4 June 2015 when the matter was called for hearing. The respondent opposed the application on the basis that the applicants were in wilful default, in that:

3.1 The notice of set down in respect of 4 June 2015 was served on the applicants on 13 May 2015; and

3.2 The applicants had no defence on the merits.

[4] The applicants entered into a written lease agreement with the respondent on 27 January 2012, in respect of premises situated at 34 Willowbrook Square, corner Samuel and Van der Walt Streets in Delmas ('the premises'). The lease provided for payment by the applicants of rental in an amount of R19 152.00 per month subject to an annual increase of 10% ('the lease').

[5] The applicants' defence was to the effect that the respondent was obliged to repair certain damage to the premises. Failure by the respondent to do so resulted in a breach by the respondent of the lease and the deemed cancellation thereof.

[6] Broadly stated, the ceiling of the premises collapsed during September 2012 resulting in the first applicant being unable to trade. Thereafter, on 14 September 2012, the local municipality declared the building unsafe for occupation and use by members of the public.

[7] The first applicant called upon the respondent to rectify the defects failing which it intended cancelling the lease. In the interim, the first applicant withheld the rentals pending the respondent repairing the building. The respondent declined to repair the defects.

[8] The respondent was of the view that the first applicant's contractors were responsible for the collapse and the respondent was absolved of responsibility. The contractors had allegedly installed an extractor and failed to seal it properly resulting in the collapse of the ceiling.

[9] The applicants relied in their founding affidavit (in the rescission application), and their plea, on the collapsed ceiling as the reason for their inability to trade and enjoy beneficial occupation of the premises.

[10] This was reflected in correspondence dated 11 October 2012, addressed by the applicants' attorneys to the respondent, in which the applicants relied upon clause 17(c)(iv) of the lease as the alleged basis for the respondent's liability to repair the damage ('the attorney's correspondence').

[11] Attached to the attorney's correspondence was correspondence from the local municipality ('the municipality's correspondence'), that stated that upon inspection of the premises, the municipality found:

11.1 Structural cracks on the external load bearing wall (east side of the building), the internal walls dividing the floor space between the office and the cooking area had minor cracks, and the ceiling had lost its grip to the walls and had fallen down. Thus the building was not fit or competent for occupation and use by the public.

[12] The first applicant cancelled the lease pursuant to the respondent's failure to rectify the defects.

[13] The respondent averred that the first applicant was incorrect in contending that it could, or did, validly cancel the lease. The respondent relied upon the fact that the collapse of the ceiling was caused by the first applicant's defective tenant installation, for which the first applicant was itself responsible. .

[14] The relevant provisions of the lease agreement were the following:

14.1 The rentals and monthly operating expenditure contributions were payable monthly in advance, on or before the first day of every month, free of exchange or deductions, retention, remission or set off on any grounds;

14.2 The respondent did not warrant or represent that the premises were fit for the purpose of the business to be conducted in terms of the lease or any other purpose and the lease was not made conditional thereon;

14.3 The first applicant would not make any alterations or additions to the premises without the written consent of the respondent first having been obtained and which consent would not be unreasonably withheld, and, unless otherwise agreed upon in writing, any alterations or additions made would be the property of the respondent and the first applicant would not be entitled to any compensation in respect thereof. In addition, the first applicant would be responsible for compliance with all lawful aspects required by the local authority and all costs incidental thereto;

14.4 The first applicant undertook, at its own cost, to care for and maintain the interior of the premises and all installations, air conditioning, fittings and appurtenances therein generally, including but not limited to keys, locks, glass windows (including shop fronts), sewerage and sanitary installations and electrical fittings during the term of the lease, or any renewal thereof, and at the termination of the lease, whether by effluxion of time or otherwise, to return and redeliver the premises to the respondent in like good order and condition. Throughout the lease or any renewal thereof, the first applicant would immediately make good and repair at its own expense, all damages, all breakages to the premises and would be responsible for all replacements to the premises;

14.5 The first applicant would not, except for normal fixturing purposes, drive into the walls or ceiling of the premises any nails, screws or other instruments or articles, nor in any manner whatsoever do or permit anything to be done that might damage the walls or ceilings or any other portion of the leased premises and/or the building;

14.6 The first applicant was precluded from effecting any structural alterations and/or additions to the premises, including the erection or installation of any fixtures unless:

14.6.1 The respondent's prior written consent, which would not be unreasonably withheld, was obtained;

14.6.2 All such alterations and/or additions and/or work accorded with plans and specifications as approved by the respondent;

14.6.3 All such costs incurred were for the account of the first applicant;

14.7 On termination of the lease for any reason whatsoever, including expiration by effluxion of time, if the respondent so elected, the relevant alterations and/or additions and/or work, including any fixtures, would remain, and the first applicant would not be entitled to any compensation in respect thereof.

[15] Clause 17(c) of the lease provided that should any part of the premises, but not the whole of the premises, be destroyed or damaged by fire or any other cause, then:

15.1 The lease would not be cancelled;

15.2 The rental then payable by the first applicant would be reduced *pro rata* having regard to the extent to which, and the period for which the first applicant was deprived of beneficial occupation of the premises;

15.3 The agreement period would be extended by the period during which the first applicant was deprived of beneficial occupation of the whole of the leased premises;

15.4 The respondent would repair the damaged or destroyed portion of the premises as expeditiously as was reasonably possible in the circumstances;

15.5 The first applicant would have no claim of any nature whatsoever against the respondent as a result of the destruction or damage from whatsoever cause;

15.6 Any dispute between the first applicant and the respondent in respect of the amount of remission of rental and the date on which, or the period for which the premises were available or unavailable for occupation by the first applicant would be decided by the respondent's auditors who would consult the respondent's architect thereon and whose decision would be final and binding.

[16] Clause 17(c)(iv) of the lease provided that:

16.1 Should the building be destroyed or substantially damaged by fire or any other cause or should the premises be destroyed or damaged (to an extent) which prevented the lessee from having beneficial occupation of the premises, then;

16.1.1 The lessor would notify the lessee as to whether or not it cancelled the agreement within one (1) month after the

destruction or damage to the premises. In the event of no notification being given by the lessor, the lease agreement would be deemed to have been cancelled.

16.1.2 The lessee would not be liable for any rental for as long as it was deprived of beneficial occupation of the premises.

[17] The applicants were obliged to show good cause in order to succeed in the rescission application.

[18] It is well established that good cause requires, firstly, a reasonable explanation such that the court is able to truly understand how the default occurred. Secondly, the application must be made *bona fide* and not merely with the intention of delaying the plaintiff in its claim, and finally, the existence of a *bona fide* defence to the claim in respect of which the applicants, *prima facie*, have some prospect of success. A probability of success is not required, a triable issue will suffice. [1]

[19] Notwithstanding compliance with all three requirements, a court retains a discretion to rescind the judgment or not, but that discretion must be exercised judicially in the light of the facts and circumstances of the matter in their entirety.[2]

[20] The applicants became aware of the default judgment on 5 June 2015, when their legal representatives appeared at the trial roll call of that day, being the date upon which both parties originally understood the matter to have been set down.

---

1 *Hassim Hardware v Fab Tanks* (1129/2016) [2017] ZASCA 145 (13 October 2017) at [12] ('*Hassim Hardware*').

2 *Hassim Hardware* above n 1 at [13].

[21] I would have accepted the applicants appearance on 5 June 2015 as sufficient indication of the applicants' bona fides, that there was no wilfulness on their part and that a *bona fide* error had occurred, but for the applicants' failure to disclose that the respondent had served the notice of set down in respect of 4 June 2015, on 13 May 2015 on all three applicants personally, during the period of their attorney's withdrawal.

[22] Nor did the applicants proffer an explanation of their failure to disclose the service of the corrected set down in reply, the applicants having declined to deliver a replying affidavit.

[23] The applicants failed to prosecute the rescission application subsequent to the respondent having served its answering papers on the on 23 October 2015. The respondent furnished its heads of argument and set the application down for hearing, delivering the notice of set down on 21 July 2017. The applicants' heads of argument were made available at the hearing.

[24] At the hearing, the applicants argued that the premises was uninhabitable not only because of the collapsed ceiling but also due to the structural cracks and the walls having caved in as stated in the municipality's correspondence.

[25] In terms of clause 17(c)(iv) of the lease, the first applicant argued that it notified the respondent of the damage to the premises, and that the respondent was obliged to elect within thirty days whether to rectify the damage, failing which the contract was deemed to be cancelled. Given that the respondent refused to make good the damage, the lease was deemed to be cancelled and the first applicant was entitled to withhold the rental.

[26] The respondent argued that the ceiling collapsed due to the failure of the first applicant's contractor to properly effect certain work and that the respondent was not the cause of the first applicant's inability to enjoy beneficial occupation of the premises. Accordingly, the respondent was not liable to compensate the first applicant for the damage. The first applicant remained liable to pay the monthly rental and to comply with the terms of the lease in all other respects.

[27] The respondent argued with reference to the provisions of the lease, that:

27.1 The lease prohibited the first applicant from withholding the rental under any circumstances;

27.2 The lease was not conditional upon the premises being fit for purpose;

27.3 The first applicant was responsible for compliance with all requirements of the local authority as regards any alterations or additions made to the premises by the first applicant (the first applicant was not entitled to make alterations or additions without the written consent of the respondent first being obtained);

27.4 The first applicant was obliged to maintain the interior of the premises including all installations, air-conditioning, fittings and the like and was obliged upon termination of the lease, to redeliver the premises to the respondent in the same good order and condition that the premises were initially received by the first applicant;

27.5 The first applicant was obliged to repair all damage, breakages to the premises and replacement at its own cost;

27.6 The first applicant was not entitled to take any step that might damage the walls or ceiling or any other portion of the leased premises or the building;

27.7 In the event of the first applicant wishing to perform any installation, the respondent's prior written consent had to be obtained, the work was to be in accordance with the plans and specifications approved by the respondent, and the costs were for the account of the first applicant; and

27.8 In the event of destruction or damage to the premises, the lease would not be cancelled but the rental would be reduced *pro rata* regard being had to the extent to which, and the period for which the first applicant was deprived of beneficial occupation of the premises, any dispute as to the remission of rental would be decided by the respondent's auditors.

[28] Thus, the respondent argued that the first applicant ought to have requested a remission of the rental but incorrectly elected to cancel / terminate the lease, which the first applicant was not entitled to do.

[29] The applicants failure to file a replying affidavit resulted in the respondent's averments being unchallenged.

[30] The respondent denied that the applicants were *bona fide, and* referred to the history of the matter as well as the applicants' alleged dilatory conduct above-mentioned. In the light thereof, the applicants' alleged purpose was not to prosecute the trial but to delay the respondent in executing upon its judgment.

[31] The ground of *lis pendens* relied upon by the applicants was not relevant as the magistrates' court proceedings referred to deal with a different time period under the lease.

[32] In argument before me, the applicants attempted to place reliance upon the defects referred to in the municipality's correspondence, rather than upon the collapse of the ceiling as the reason for the first applicant's inability to trade.

[33] The municipality's correspondence, however, referred to the cracks on the internal walls as 'minor', noted the structural cracks on the external wall, whilst the ceiling was described as having 'lost its grip on the walls and fallen down'.

[34] The applicants' response to the respondent's averment that the collapse of the ceiling was caused by the applicants' own contractors, was to argue that the issue ought to be tested by way of trial. However, no alternate reason for the collapsed ceiling was advanced by the applicants.

[35] The applicants correctly pointed out that the respondent did not deny the existence of structural cracks and nor did the respondent allege that the cracks had been repaired. That, however, did not assist the first applicant whose defence of the action was based squarely upon the collapse of the ceiling, maintenance of which was for the first applicant.

[36] Hence, the probabilities pointed to the collapsed ceiling as the reason for the first applicant's inability to trade and enjoy beneficial occupation of the premises.

[37] Furthermore, clause 17(c)(iv) of the lease did not assist the applicants as it referred to the structure of the premises. The balance of subparagraph (c) referred to

damage to 'any part' of the premises, in which event the lease would not be cancelled but a reduction of the rental would apply, Even if a part, but not the whole of the premises was destroyed or damaged, a remission of rental was the prescribed remedy.

[38] The applicants are bound by the terms of the lease, which obliged them inter alia, to maintain the interior and any installations effected by the tenant. Thus, responsibility for the collapse of the ceiling rested with the first applicant and not with the respondent.

[39] *Pacta sunt servanda* remains a cornerstone of our law of contract. Public policy requires that parties should in general comply with contractual obligations that were freely and voluntarily undertaken.[3] The fact that a provision in a contract, willingly undertaken, may operate 'harshly' does not mean that it is unenforceable.[4]

[40] The collapse of the ceiling was the only possible cause placed before me, for the first applicant's inability to trade. The only reason alleged for the collapse was the failure of the first applicant's contractors to seal the extractor properly. Hence, in terms of the lease, responsibility for the collapsed ceiling rested with the first applicant who was obliged to effect the necessary repairs at its own cost.

[41] Additionally, in the light of the applicability of clause 17(c) of the lease in respect of damage or destruction to a portion of the premises, the appropriate remedy was a remission of the rent and not termination of the lease as claimed by the applicants.

[42] In the circumstances, I cannot find that the applicants have demonstrated good cause. They have not established a *bona fide* defence, which, if established at trial, would entitle them to the relief sought.

---

3 *Botha & Another v Rich NO & Others* 2014 (4) SA 121 (CC) ('Botha') at para 23.
4 *Bock & Others v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA).

[43] As regards the costs of the application, the parties agreed that the costs should follow the merits of the application. As to the scale of costs, whilst the lease provided for costs on the attorney and client scale, the court retains a discretion in respect of the scale upon which costs are ordered.

[44] An award for costs on the scale as between attorney and client is not lightly granted, and, is ordered only in instances of special circumstances. Whilst the applicants ought to have disclosed the service of the corrected set down referred to afore, that failure alone, in my view, does not serve to justify a punitive costs order. An award of costs on a party and party scale is appropriate.

[45] Accordingly, the following order is granted:

45.1 The application for rescission is dismissed with costs on a party and party scale.

PP LEDWABA DJP

A A CRUTCHFIELD
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

COUNSEL FOR APPLICANTS	Letwaba Attorneys.
INSTRUCTED BY	Letwaba Attorneys.
COUNSEL FOR RESPONDENT	Mr W F Wannenburg.

INSTRUCTED BY	Brits Muller Attorneys.
DATE OF HEARING	11 October 2017.
DATE OF JUDGMENT	13/2/18