

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO. ☒ YES ☐ NO

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

(3) REVISED. ☒

DATE: 6/7/10

SIGNATURE: [Signature]

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

CASE No. 8337A/2010

In the matter between:-

7/7/2010

MOHAMED MINTY N.O

First Plaintiff

RASHIDA MINTY N.O

Second Plaintiff

and

EXCLUSIVE MARBLE MERCHANTS

First Defendant

CARLOS ALBERTO ANCARNACAO MARTINS

Second Defendant

R McKECHNIE

Third Defendant

M J OELOFSEN

Fourth Defendant

JACO SWART

Fifth Defendant

JUDGMENT

Van der Byl, AJ:-

[1] This is an application for summary judgment in terms of Rule 32 of the Uniform Rules of Court for an amount due in terms of a written agreement of lease.

[2] As is apparent from the pleadings, it is common cause that the Plaintiffs, two trustees of a Trust, and the First Defendant, a close corporation, entered into a written agreement of lease on 18 August 2008.

[3] In terms of the agreement the First Defendant rented a business premises from the Plaintiffs for a period of three years with effect from 1 July 2008 at a monthly rental specified in the agreement.

(4) The Second, Third, Fourth and Fifth Defendants bound themselves as sureties and co-principal debtors jointly and severally *in solidum* to the Plaintiffs on behalf of the First Defendant in terms of a deed of suretyship.

[5] It is common cause that the First Defendant failed to make payment of the agreed rental, electricity charges and operating costs as from June 2009.

[6] The Plaintiffs issued summons on 10 February 2010.

[7] On the Third, Fourth and Fifth Defendants having entered an appearance to defend, the Plaintiffs filed an application for summary judgment against the Defendants jointly and severally, the one paying the other to be absolved, for -

- (a) payment of the sum of R92 575,94
- (b) interest at the rate of 15,5 percent per annum *a tempore morae*; and
- (c) costs of suit.

[8] The Fifth Defendant, thereupon, filed, in opposition to the application for summary judgment, on behalf of himself and the Third and Fourth Defendants, an opposing affidavit in which it is stated -

- (a) that on 5 August 2009 the Plaintiffs were advised that the First Defendant was experiencing "*serious cash flow problems*", intended to vacate the leased premises, would endeavour to sub-let the premises and sought the Plaintiffs' permission to do so (**paragraph 8 of opposing affidavit, record p. 56**);
- (b) that, although the Plaintiffs refused to assist the First Defendant in sub-letting the premises or to renegotiate the monthly rental, the parties eventually met and orally reached a "*compromise*" during August 2009 in terms of which -
 - (i) the First Defendant would vacate the premises and the parties agreed that the agreement would be cancelled with effect from 1 September 2009 (**paragraph 8.1 of the opposing affidavit, record p. 56 and paragraph 15.1 of the opposing affidavit, record p. 60**);
 - (iii) the Plaintiffs would utilize "*the deposit paid by the First Defendant in the amount of R25 575,81 as payment in lieu of arrear rentals (if any) as well as possible damage to the leased premises*" (**paragraph 8.2 of the opposing affidavit, record p. 57 and paragraph 15.2 of the opposing affidavit, record p. 60**);
 - (iv) neither party "*would proceed against the other in terms of the Lease Agreement*" (**paragraph 15.3 of the opposing affidavit, record p. 60**),

whereupon, the First Defendant vacated the premises and regarded the matter as finalized.

[9] The question which I am now called upon to pronounce is, as was raised in argument on behalf of the parties, whether these factual averments constitute a *bona fide* defence if regard is had, particularly, to clause 16.2 of the lease agreement which reads as follows:

"No variation, amendment or cancellation of this lease, inclusive of this clause 16, shall be binding unless it is in writing and is signed by both the Landlord and the Tenant."

[10] It is trite that where a "*non-variation clause*", such as the one contained in that clause, is contained in a written agreement, any verbal amendment or cancellation of the agreement is null and void and of no force and effect (***SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren 1964 (4) SA 760 (A) at 766D-767C; Pelser v Smith 1979 (3) SA 687 (T) at 690F-691D***).

[11] Ms. Swanepoel who appeared on behalf of the Defendants acknowledged this principle, but submitted, relying on, *inter alia*, ***Christie, The Law of Contract in South Africa, Fourth Edition, p. 521 and decisions quoted by the learned author***, that the Defendants are in effect relying on a waiver by the First Plaintiff to pursue its remedies in terms of the agreement which does not constitute a variation of the agreement, but is rather a *pactum de non petendo*.

[12] It is correct that it has been acknowledged by our Courts that a non-variation clause will not prevent one party waiving a provision of an agreement that is entirely for

a party's benefit or waiving the right to pursue his or her remedy for a breach that has already occurred (*Hilsage Investments (Pty) Ltd v National Exposition (Pty) Ltd 1974 (3) SA 346 (W) at 354C-F; Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd 1975 (3) SA 273 (T) at 277B-G; Barnett v Van der Merwe 1980 (3) SA 606 (T) at 610A*).

[13] In my opinion the facts in those matters, are, as will be indicated below, distinguishable from the facts in this matter.

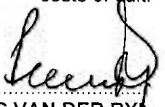
[14] It is in my view apparent from the opposing affidavit filed on behalf of the Third, Fourth and Fifth Defendants that the First Defendant's alleged entitlement to vacate the premises is, despite the use of expressions like "*compromise*" and "*novated*", in effect based on an oral agreement to cancel the lease agreement.

[15] The alleged right of the First Defendant to vacate cannot exist as long as the lease agreement is still in existence, hence the contention in the opposing affidavit that the parties agreed to cancel the agreement. The allegation contained in paragraph 15.3 of the opposing affidavit that neither party "*would proceed against the other in terms of the Lease Agreement*" is irreconcilable with an allegation that the agreement was cancelled.

[16] We are accordingly in my view not here concerned with a matter where the Plaintiffs waived a provision contained in the agreement which is entirely for their benefit or where the Plaintiffs waived their right to pursue their remedy for a breach that has already occurred, but, contrary to the non-variation clause, in reality with an oral cancellation of the agreement.

[17] Summary judgment is accordingly granted against the Third, Fourth and Fifth Defendants, jointly and severally, the one paying the other to be absolved, for -

- (a) payment of R92 575,94;
- (b) interest at the rate of 15,50 per cent per annum *a tempore morae*;
- (c) costs of suit.


P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF THE PLAINTIFFS

On the instructions of

ADV C L H HARMS

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ON BEHALF OF FIRST THE DEFENDANTS

On the instructions of

ADV G SWANEPOEL

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DATE OF HEARING

21 June 2010

JUDGMENT DELIVERED ON

7 July 2010