

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: **4897/2018**

In the matter between:

PIENROX INVESTMENTS CC

Plaintiff

and

MEC FOR HEALTH, FREE STATE PROVINCE

Defendant

CORAM:

AK RAMLAL, AJ

HEARD ON:

18, 19 & 21 JANUARY 2022

HEADS OF ARGUMENTS RECEIVED: 8 FEBRUARY 2022

JUDGMENT DELIVERED:

26 APRIL 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 26 April 2022.

[1] The Plaintiff leased its premises to the Defendant under a written lease agreement entered into in June 2007, which lease agreement was later extended between the parties.

[2] The Plaintiff claims that it suffered damages when the Defendant vacated the leased premises, since the Defendant failed to give proper notice of its intention to terminate the contract of lease and that such vacation of the premises led to vandalism of the leased premises.

[3] The Plaintiff's claims against the Defendant are:

3.1 That the Defendant is liable to the Plaintiff for the payment of three months' rental which should have been paid as a result of the provisions of clause 2 of the lease agreement, which require that the parties should provide each other with three months' written notice prior to termination; and

3.2 That the Defendant gave insufficient notice of termination that resulted in the Plaintiff suffering consequential damages in the form of the decreased property value due to the leased premises being vandalised, after the Defendant abandoned the property.

[4] It is common cause that:

4.1 There was a written contract of lease concluded between the parties during 2007 which endured until 2010. Thereafter, the contract of lease continued between the parties as the Defendant remained in occupation of the rental premises and the Plaintiff received and accepted rental payments until August 2017;

- 4.2 The representatives of the Defendant attempted to hand over the keys to the leased premises to the Plaintiff's representative on the 11th September 2017 and that the Plaintiff's representative refused to accept the keys;
- 4.3 On 16th October 2012, an inspection of the premises which was attended by representatives of the Plaintiff and the Defendant, revealed that the premises had been vandalised;
- 4.4 That as a result of the extensive damage caused by the vandalism, the Plaintiff later sold the property for an amount of R120 000-00 and that the Plaintiff suffered damages in the amount of R360 000-00, when the Plaintiff had to sell the property at the reduced price;
- 4.5 The two Expert Reports regarding the alleged damages that Plaintiff suffered have been filed and that the contents of those reports are not in dispute.

[5] The issues for determination are:

- 5.1 whether the Defendant terminated the lease of the Plaintiff's property in accordance with the contract between the parties;
- 5.2 whether the Plaintiff was entitled to rely on a three month's written notice issued by the Defendant to terminate the lease;
- 5.3 whether the Defendant is liable for consequential damages suffered, being the amount by which the value of the property decreased due to the vandalism of the property after the Defendant vacated the premises without a proper handover of the property.

[6] Plaintiff's First Witness: Mr van den Berg:

- 6.1 Mr van den Berg, the attorney for the Plaintiff, testified that his involvement in the matter was initiated when Mr Pienaar (representative of the Plaintiff) established telephonic contact with him on 11 September 2017. Mr Pienaar informed him that the representatives of the Defendant wanted to hand over the keys of the leased premises to him. He did not want to accept the keys from the representatives of the Defendant as he believed that they needed to give him 3 months' notice of their intention to vacate the premises and that an inspection of the property should be done to effect a proper hand over. He was instructed by Mr Pienaar to address his concerns with the Defendant.
- 6.2 Mr van den Berg duly complied with these instructions by addressing a letter to the Defendant on 14th September 2017, wherein he informed the Defendant that three months' written notice is to be given by either party to the lease agreement who is desirous of terminating the lease agreement. The Defendants were also informed that the Plaintiff would not accept the keys to the premises before a proper inspection of the property was done between the parties.
- 6.3 During cross examination Mr van den Berg conceded that there is nothing contained in the agreement that stipulates that at the time of the handing over of the keys, an inspection of the premises should be conducted but he explained in re-examination that the purpose of an inspection was to conduct an exit inspection as is routine in order to determine whether any repairs are necessary and for which the lessee could be held responsible.
- 6.4 Although Mr van den Berg testified that he was of the view that the initial lease agreement had lapsed and that the lease agreement that existed between the parties was on a month-to-month basis which required at least one months' notice to terminate, he stated that the Plaintiff was under the impression that three months' written notice is required before the lease may be terminated by either party.

6.5 Mr van den Berg also confirmed that he was present when an inspection of the leased premises was eventually conducted on 16th October 2017 in the presence of the Plaintiff and the Defendant and that the premises were substantially vandalised. He was also aware that as a result of the vandalism the property was sold at a reduced price resulting in a loss of R360 000-00 being suffered by the Plaintiff.

Plaintiff's Second Witness: Mr Christiaan Frederick Pienaar:

6.6 Mr Christiaan Frederick Pienaar testified that the Plaintiff was the owner of the premises situated at Erf [...], Koffiefontein and that these premises were leased to the defendant in accordance with a lease agreement entered into between the parties. He stated that the lease agreement stipulated that the lease will continue for a period of three years where after the lease may be extended on a month-to-month basis and that a three-month notice period is required for the lease to be terminated.

6.7 To the best of his knowledge, Mr Pienaar, testified that the lease agreement, after the initial period of three years had expired, continued on a month-to-month basis on the original terms and conditions, in that the defendant continued to occupy the premises and paid the rentals in accordance with the stipulated 8% increase¹ (even though there were times when the Defendant failed to make regular payments), and that a three months' written notice was required to terminate the lease agreement.

6.8 On 11 September 2017, on the street next to where he lives, Mr Pienaar was approached by two representatives, of the Defendant, who attempted to hand over the keys to the leased premises to him. He refused to accept the keys and he informed them that it would be proper

¹ Clause 2 of Annexure "A" to the Particulars of Claim

to have an inspection of the premises to assess the condition thereof. Mr Pienaar then drove past the leased premises where he noticed that the gate was opened and one of the doors had been smashed. He contacted Mr van den Berg to attend to the matter on his behalf.

6.9 In respect of the internal memo², Mr Pienaar testified that he recalled having made suggestions on the document as to a new lease agreement being entered into but that no such new lease had been concluded between him and the Defendant.

6.10 Mr Pienaar explained during cross examination that he required capable representatives from the Defendant to attend to an inspection of the premises with him but he conceded that this was not a stipulation in the lease agreement between the parties. He explained that even though he did not have the keys to the premises on the 11th September 2017, he drove to the premises and observed that one of the doors next to the kitchen was kicked in. He further stated that he could not dispute that there was other damage in the form of missing geyser pipes at the premises at that time. Mr Pienaar also conceded that he did nothing to secure the premises from 11 September 2017 to 16th October 2017. He was not comfortable to accept that he should have acted differently to secure the premises when it came to his attention that the premises were vacant on 11th September 2017.

6.11 The main thrust of Mr Pienaar's evidence was, however, that he was under the impression that a period of three months' notice is required in order to terminate the agreement in that the Defendants had remained in occupation of the premises after the initial three years' period had expired and they continued to pay the increased rentals. He also believed that an inspection in the presence of both parties is to be conducted at the termination of the lease agreement, so that an

² Page 3 Defendant's Trial Bundle

assessment of the condition of the property could be conducted as part of the process of the termination of the agreement.

6.12 The evidence of Mr Pienaar also confirmed that he suffered a loss when he sold the property at a reduced price as a result of the vandalism that had taken place. He relied on the expert valuations in order to determine this loss.

[7] Defendant's witness, Mr Charles Swiegels:

7.1 The Defendant called Mr Swiegels, who is employed at the Free State Department of Health as a Logistics and Asset Manager, to testify about the lease agreement entered between the Plaintiff and the Defendant.

7.2 Mr Swiegels confirmed that he had knowledge of the lease agreement entered into between the parties in 2007. The duration of the agreement was three years so it expired during 2010. After discussions with the Plaintiff and officials from the Defendant, the lease was extended for a year and again until December 2011. An internal memorandum dated 16th February 2012 was generated and approved internally by the accounting officer to continue the lease with the Plaintiff on a month-to-month basis until new accommodation had been provided to the Defendant, by the Department of Public Works. The purpose of the internal memorandum being generated was to ensure that payments would be made for the lease of the premises when the invoices are generated.

7.3 According to Mr Swiegels, no mention was made of a three-month notice period being required for the termination of the extended agreement. He stated that if this was the position, it would have been reflected on the memorandum. He further stated that the Plaintiff was paid the increased rentals as per the initial agreement. The amount as stipulated on the internal memorandum of the 16th February 2012 was not paid by the

Defendant as it was not part of the agreement between the Plaintiff and the Defendant.

7.4 During cross examination Mr Swiegels conceded that no new written contract was discussed and that the internal memorandum dated 16th February 2012 was never accepted by the Plaintiff. He was of the view that since the memorandum on which the payments were approved internally by the Defendant did not reflect that a three-month notice period is required for the termination of the agreement, no such period was applicable.

7.5 Lastly, Mr Swiegels confirmed that he was part of the delegation that conducted the inspection of the premises on the 16th October 2012 when the keys were handed to the Plaintiff.

[8] The original written contract of lease between the parties was entered into during 2007. This lease was for a period of three years.

[9] Clause 2 of the written lease agreement³ stipulates that the lease shall continue on a monthly basis and that such lease may be terminated by either of the parties giving three calendar months' written notice to the other party. The agreement is drafted in Afrikaans and clause 2 thereof reads as follow:
“Die huur sal vir ‘n periode van 3(drie) jaar wees met ‘n eskalasie van 8% jaarliks, daarna sal dit op ‘n maandlikse basis wees wat beeindig mag word deur enigeen van die PARTYE op ‘n 3 kalendarmaande skriftelike kennisgewing gegee deur een van die PARTYE aan die ander.....”

[10] Upon the expiry of the three-year period, the Defendant continued to occupy the leased premises and continued to pay the rental, until August 2017, without any further written lease agreements being entered into.

³ P.16 of pleadings. Annexure “A” to the Particulars of Claim

- [11] Although the aspect of a new contract being entered into between the parties or that the initial terms regarding the cancellation period was amended by agreement between the parties, was put to the Plaintiff's witnesses, the existence of a new contract or the amendment of the original terms, was not canvassed by the Defendant in the pleadings.
- [12] The evidence placed before the court by Mr Pienaar in evidence in chief as well as in cross examination is plainly that no new contract was entered into between the parties and that the written terms of the agreement regarding the termination period of three months' written notice was never altered. The lease agreement continued as stipulated in clause 2 of the lease agreement that was entered into during June 2007.
- [13] The onus of proof regarding the continuation of the lease on the original terms and conditions rests on the Plaintiff whilst the Defendant bears the onus to prove any amendment to the original terms and conditions.
- [14] Mr Swiegels, who testified on behalf of the defendant, confirmed that the terms contained in the Internal Memo⁴ on which the Defendant relied to prove a new contract, was never accepted by the Plaintiff, consequently, the amended terms of the contract that the Defendant relied on, never came into operation.
- [15] The evidence given by Mr Pienaar regarding the amount of the rental that was paid monthly by the Defendant also confirms that the original terms of the agreement were adhered to by the Defendant, in that, the rental amount was R5500-00 at the commencement of the lease agreement and as a result of the 8% annual increase in the rental payments, at August 2017, the Defendant was paying an amount of R8926-20 per month.
- [16] The evidence supports the claim by the Plaintiff that the original lease agreement was entered into for a period of three years. Thereafter, the lease

⁴ Page 3 Defendant's Trial Bundle

continued on a monthly basis and that such lease could be terminated by either of the parties giving three calendar months' written notice to the other party.

[17] The failure of the Defendant to give the plaintiff three months' written notice to terminate the lease agreement constitutes a breach of contractual obligation of the Defendant. The Plaintiff is therefore entitled to the payment of the unpaid rental for the period September, October and November 2017, totalling R26 778-60, as claimed.

[18] The final issue for determination is whether the vandalism was a direct cause of the Defendant having breached the terms of the lease agreement by vacating the premises without affording the Plaintiff adequate prior notice of its intention to vacate the property: The Plaintiff alleges that it was not invited to inspect the building with a representative of the defendant and accordingly could not take occupation of the premises as the Plaintiff was unaware whether some of the Defendant's goods were still in the buildings or not or whether the Defendant would agree to the checklist of alterations, improvements and/or repairs that had to be made to the property, typically of the termination of the long lease⁵ and that during the inspection of the property it was found that the property had been completely vandalised, which vandalism was a direct cause of the Defendant breaching the terms of the Lease Agreement by vacating the property without giving Plaintiff adequate prior notice of its intention to vacate the property.⁶

[19] The Defendant denies that its failure to give proper notice of its intention to terminate the lease caused the Plaintiff to suffer damages in the form of loss of proceeds of sale in respect of the property.

⁵ Paragraph 9 of the Particulars of Claim

⁶ Paragraph 11 of the Particulars of Claim

- [20] The Defendant in addition pleads that the Plaintiff contributed towards its own damages and prays for a reduction of the award of damages in terms of the Apportionment of Damages Act⁷
- [21] Mr van den Berg in his evidence conceded that there is no provision in the lease agreement that stipulates that an inspection of the premises must be done at the time of the termination of the agreement of lease or at the time that the keys are handed over. He however stated that as part of the handing over process an inspection should be conducted to determine the state of the property and record any damages for which the tenant could be held accountable.
- [22] The evidence of Mr Pienaar demonstrates that the Plaintiff became aware on the 11th September 2017 that the Defendant had vacated the leased premises. Prior to 11 September 2017, the Defendant gave no notice to the Plaintiff that they were no longer in occupation of the premises. Mr Pienaar drove to the property where he established that there were visible signs of damage to the property in the form of the door being smashed. He immediately instructed his legal representative to address the failure of the Defendant to comply with the terms of the lease agreement with the Defendant on his behalf.
- [23] Mr van den Berg confirmed that he addressed a letter to the Defendant, dated 14 September 2017 wherein he requested the presence of the Defendant to conduct an inspection of the leased premises. When no response to this request was received, Mr van den Berg sent further electronic communication to follow up and attend to the termination of the lease agreement. That these communications were sent on 20 September 2017, 3 October 2017, 9 October 2017 and 12 October 2017, is not disputed by the Defendant.
- [24] On 12th October 2017, it was agreed that the parties would meet at the leased premises on the 16th October 2017. It is common cause that such meeting

⁷ Pleadings Bundle page 43

took place and the material vandalism of the property was observed by all present. It is apposite to mention that the Plaintiff, when he became aware that the premises had been abandoned, immediately initiated steps to address the breach of the terms of the agreement by the Defendant. Despite the urgency with which the Plaintiff acted, the meeting between the Plaintiff and the Defendant only took place some six weeks later, to accommodate the availability of the Defendant.

[25] A lessor who seeks to recover compensation from a lessee for damage to a leased property must at least in the first instance show that such damage had occurred during the tenancy of the lessee.⁸ During cross examination, a version was put to Mr Pienaar that evidence would be led by the Defendant that there were other visible signs of vandalism already at the leased premises on 11 September 2017 when representatives of the Defendant observed that the pipes outside of the premises were damaged or vandalised, thus suggesting that this damage had occurred whilst the premises were still in the possession and under the control of the defendant.

[26] Common sense dictates that if the breach by the Defendant had not taken place, and the property was not abandoned before any notice was given to the Plaintiff, the vandalism and consequential devaluation of the property would not have occurred. The evidence demonstrates that the vandalism to the Plaintiff's property occurred as a direct result of the Defendant's abandonment of the property and its failure to comply with its contractual obligation of furnishing the requisite notice of intention to terminate the lease agreement.

[27] It is common cause that the extensive damage caused by the vandalism resulted in the Plaintiff selling its property for R120 000 and that the Plaintiff suffered damages in the amount of R360 000-00.

⁸ See *Nel v Dobie* 1966(3)SA352(N) at 355D-F

[28] In consideration of the Defendant's prayer⁹ that the Plaintiff's claim be reduced and apportioned in accordance with the provisions of section 1 of the Apportionment of Damages Act, Act 34 of 1956, the defence of contributory negligence is not available when the claim is based on the breach of a contract¹⁰, as is the position in this case.

[29] The Defendant is liable for damages suffered by the Plaintiff as a result of its breach of contract with the Plaintiff.

[30] There is no plausible reason to deprive the Plaintiff as the successful party of the costs of suit.

[31] In the result the following order is granted:

1. The Defendant is ordered to pay to the Plaintiff the amount of **R386 778-60** (Three Hundred and Eighty-Six Thousand Seven Hundred and Seventy-Eight Rand and Sixty Cents);
2. The Defendant is ordered to pay the Plaintiff interest at the rate of 10.25% from the date of the issuing of the summons to the date of payment;
3. The Defendant is ordered to pay the Plaintiff the costs of suit, which costs include the costs of the two expert witnesses, Mr Ignatius Fourie and Mr Raymond Taylor.

A.K. RAMLAL, AJ

⁹ Page 43 Pleadings Bundle

¹⁰ Thoroughbred Breeders' Association of SA v Price Waterhouse 2001(4)SA551 SCA

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