IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

16/3/15.

CASE NO: 36167/2013

In the matter between:

PROC CORP 160 (PTY) LIMITED Plaintiff

and

(1)	REPORTABLE:	~~YES~~ / NO
(2)	OF INTEREST TO OTHER JUDGES:	~~YES~~ / NO
13/03/15 DATE		SIGNATURE

INTERACTIVE TRADING 626 (PTY) LIMITED First Defendant

ANDRE GEORGE LUBBE Second Defendant

JUDGMENT

Tuchten J:

1 The plaintiff sued the defendants for R895 000, arising from a written lease between the plaintiff and the first defendant. There was also a claim for rectification of the lease but that claim played no part in the proceedings before me and I shall say no more about it. The monetary claim is for the alleged cost of restoring the leased premises to the same good order and condition in which they were, fair wear and tear excepted, at the commencement date of the lease.

2 On the fifth day of the hearing before me, the plaintiff withdrew its claim against the second defendant. It was agreed between the parties that this withdrawal should carry no cost implications.

3 The plaintiff is the owner of a shopping centre in Rooihuiskraal, Centurion called the Mall@Reds. Erection of the mall was completed in 2003 and the first defendant was one of the original tenants. It operated a Spur restaurant in the premises. The plaintiff provided the first defendant with what was described in the evidence as a clean shell, ie empty premises into which the first defendant installed its own equipment and finishes. Spur restaurants are a well known brand in South Africa. It is of the essence of Spur branding that every Spur restaurant should have the same finishes. For example, it has special ceiling boards in its seating area and characteristic wooden stack doors at the entrance through which customers are welcomed.

4 The first defendant was allowed onto the premises before the parties entered into the lease for the purpose of fitting out the premises. The defendant took what was described by the plaintiff's agent in a letter dated 27 February 2003 as beneficial occupation on 17 March 2003. The lease was signed by the first defendant on 10 April 2003 and by the plaintiff only on 25 June 2003. But there is no possibility of confusion about the commencement date of the lease: it is given in

item 4.1 of the schedule to the lease as 1 May 2003. The expiry date is given in clause 4.2 of the same schedule as 30 April 2008 and was subject to an option to renew given to the first defendant.

5 The relationship between the plaintiff and the first defendant descended into acrimony, apparently almost from inception. The alleged cause of the acrimony was referred to in passing during cross-examination by counsel for the defendants. Who did and did not participate in the acrimony and the actual causes of the bad relationship were not made clear in the evidence.

6 Suffice it to say that the first defendant did not exercise its option but refused to vacate on the termination date. The plaintiff brought an urgent application in this court under case no. 26533/08 to evict the first defendant. The plaintiff's notice of motion was dated 2 June 2008. The case was heard and judgment reserved. Judgment was only given on 25 June 2010. By then the judgment was of academic interest because the evidence is that the first defendant physically vacated the premises on 17 November 2009, although it only returned the keys of the premises to the plaintiff on 12 January 2010.

7 The case for the plaintiff was that it was unable to gain access to the premises until after the keys were returned to it and that on 21

January 2010, Mr Monteith, an architect whom the plaintiff retained for this purpose, made an inspection of the premises and took a comprehensive series of photographs. These photographs show that the interior of the premises had been wrecked. The term used by some of the plaintiff's witnesses was vandalised. Interior walls within the premises had been partly demolished. The ceiling, which was constructed of ceiling boards attached to a system of suspended trusses had been partly demolished. Much of the sanitaryware in the restaurant's cloakrooms had been smashed. Many of the wires leading both into and out of the electricity distribution board had been cut. Tiles had been detached from both the walls and the floor. The airconditioning units had been removed. There was a hole in the roof. The sprinkler system had been damaged.

8 On the same day, the plaintiff's leasing and development manager, Mr Thomas, instructed Mr Monteith in writing to provide, in addition to a report on the condition of the premises and photographs, to do two costing exercises: firstly "*to re-instate the premises to its original condition (i.e. clean shell, before Spur took beneficial occupation)*[1] by 01 March 2010" and, secondly, to "amend the premises to condition agreed for new tenant and to be handed over to new tenant by 01 March 2010".

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[1] My italics

9 The reference to a new tenant was to the Standard Bank which had agreed to take much of the space formerly occupied by the Spur restaurant. The Bank wanted its own layout and finishes and, as might be expected, required an interior layout quite different from that of the Spur.

10 The costings requested by Mr Thomas were in fact done by Mr de Haas, a quantity surveyor in the employ of Anastasi Projects, a firm in which Mr Anastasiades snr either had a substantial interest or control. There was a family connection between Anastasi Projects and the plaintiff. The costings done by Mr de Haas were approved and Anastasi carried out the work required to get the premises into the condition required by Standard Bank. Mr de Haas said in evidence that he thought he began the work on 28 January 2010 and had finished the work by 22 February 2010. A strange feature of the case is that Anastasi has never (at least up to 2012) invoiced the plaintiff for this work and has never been paid. Apparently the plaintiff was not happy with Anastasi's costing and because of the family connection between the two firms, Anastasi did not press for payment.

11 The plaintiff decided to take an expert opinion from Dr PC Botha, a quantity surveyor of high repute. He furnished a report dated 31 May 2012. Why the plaintiff delayed formulating its claim for this lengthy

period was not explained in the evidence. Dr Botha concluded that the cost of demolition and reinstatement to bring the premises to the status of a clean shell was R895 000 inclusive of VAT. Dr Botha identified 58 items of cost in this regard, all of which were subject to upward adjustment in respects specified in his report and explained in his evidence..

12 But the calculation of the cost to achieve a clean shell status was based on a misconception which unfortunately permeated the plaintiff's case and caused most of the evidence led on its behalf to be irrelevant. I shall explain why I say this.

13 The plaintiff's case was based squarely on the provisions of clause 12.1.5 of the lease:

> The [first defendant] shall at its own cost, keep and maintain the premises in a clean sanitary and good condition. Without derogating from the generality of the aforegoing, the [first defendant] shall ... at the expiration ... of this agreement, and in the event only that the [first defendant] shall have failed to restore the premises to the [plaintiff] in the same good order and condition as they were at the commencement of this lease, fair wear and tear excepted, pay to the [plaintiff], on demand, the reasonable cost of restoring the premises to the same good order and condition in which it was at the commencement date. Without derogating from the generality of the aforegoing, the cost of restoring the leased premises

shall include the cost of redecoration and the cost of steam cleaning any carpeting in the premises.

14 The plaintiff's claim is pleaded on the same basis. In paragraph 11 of the particulars of claim, the plaintiff alleges that the first defendant failed to restore the premises to the plaintiff in the same good order and condition in which they were at the commencement date of the lease agreement (fair wear and tear excepted). In paragraph 12, it is alleged that the reasonable cost of restoring the premises to the same good order and repair in which they were at the commencement date of the lease amounts to R895 000.

15 But empty shell status is not what the first defendant promised the plaintiff in clause 12.1.5 read with the schedule. On 1 May 2003, when the Mall opened officially to the public, the first defendant had equipped and was operating a fully functioning Spur restaurant. It was that layout, stripped of such fixtures and fittings as were movable and did not accede to the premises which the first defendant was required to hand back to the plaintiff.

16 This was not appreciated by the plaintiff and its legal representatives. The result of this misconception was that Dr Botha's expert analysis and evidence was misdirected. The position was also confused by the fact that by the time Dr Botha had been retained, Standard Bank had

altered the space allotted to the Bank, which included a large part of the space previously occupied by the Spur, to suit the Bank's requirements.

17 The plaintiff's representatives only appreciated the manifestly correct position during the fourth day of evidence. For various reasons, Dr Botha's cross-examination had not been completed by then and Dr Botha returned to the witness box to concede, apparently enlightened by the removal of the misconception, that many of the 58 items of cost in the schedule to his report were not for the account of the first defendant. It is not necessary to list those that survived the enlightenment. Dr Botha still at that stage was under the impression that the provisions of clause 12.1.5 required the first defendant to remove what it had constructed prior to the commencement date of the lease. That, as I have said, is not what the lease provided.

18 I need not deal with the defences raised by the first defendant in its plea. None of them ultimately was advanced with any vigour and it is unnecessary to deal with them because of the conclusions I have reached on the assessment of the damages claimed by the plaintiff and certain concessions made on behalf of the first defendant in argument.

19 A dispute arose about who was responsible for the damage to the interior of the premises. This was not directly foreshadowed on the pleadings but was adequately ventilated in the evidence. The plaintiff sought to demonstrate that the persons who did the damage could not have been employed by the plaintiff because the plaintiff did not have keys to the Spur. The evidence was that the managing agents did not keep keys to tenants' premises within the Mall. On the other hand, there was credible evidence, particularly by Mr Lubbe jnr for the defendants. This witness was in operational charge of the Spur restaurant. He testified that the physical relocation of the Spur to new premises nearly took place over the period 17-18 November 2009. He was able to fix the date with accuracy because the last day on which the Spur traded at its premises within the Mall was on 16 November 2009 and he wanted to get the restaurant up and running in its new premises as soon as possible.

20 Lubbe jnr's evidence was that the relocation took place under his supervision and that although he was not present at the premises in the Mall throughout the period of relocation, he was there when the premises were opened to begin the relocation and when they were locked at the end of the process. His purpose was to complete the relocation as quickly as possible. He used his own staff who would have been on shift at the time in question but one or two builders

might have been part of his team for certain specialised work. The tables and benches and kitchen equipment were removed. In two instances this resulted in damage to the premises: the one required a hole to be made in the roof sheeting to remove the ducts leading upward from the extractor fan in the kitchen; the other required the partial demolition of a brick and mortar unit that housed the salad bar, a feature of Spur restaurants at which customers help themselves to the salads of their choice. The only fixture as such, according to Lubbe jnr, which was removed from the premises during the relocation process was the special Spur branded ceiling boards which were in place over the seating area. These boards, his evidence went, were donated at the premises in the Mall to needy persons, some five or six of whom were at the premises during the relocation to receive what the first defendant wanted to give away. In addition to the Spur ceiling boards, Lubbe jnr said, he also gave away small kitchen items.

21 Lubbe's evidence was corroborated by Mr Bradfield, one of the Spur's senior managers who was also present that day and at some stage relatively shortly thereafter returned to the premises to make a telephone call to one of the Spur's suppliers. I found both of these witnesses to be generally credible in the respects I have described.

22 Lubbe was extensively cross-examined about why the keys to the premises were only returned to the plaintiff's agent in January 2010. The reasons he gave for the delay were not very convincing but I think on the probabilities the delay in handing over the keys took place because Lubbe did not regard it as very important to hand back the keys. He had other things on his mind, particularly getting his new restaurant properly operational.

23 Then there is the fact that although the plaintiff repeatedly asked the first defendant to participate in a joint inspection of the premises, the plaintiff's requests met with no adequate response and no such inspection took place. The parties were on bad terms at that stage and the material which made up these requests took place largely through correspondence between the attorneys for the parties. Lubbe jnr was not responsible for this aspect of the first defendant's administration and said in evidence that he was not aware of any request for a joint inspection. Lubbe snr, although available, did not give evidence. Quite possibly, Lubbe snr did not respond to the requests for an inspection because he did not want to cooperate with the plaintiff. I do not think that this takes the present dispute any further.

24 Counsel for the plaintiff suggested that the damage to the premises might have been caused by the persons who were at the Mall premises to receive what the first defendant wanted to give away. I think that this is highly improbable and indeed borders on speculation because there is no evidence that any of these persons or others returned to the Mall to strip the premises. Furthermore, the Mall was policed by a number of security staff. This would have had to have taken place with their knowledge and concurrence and there is no evidence of that either.

25 This debate is however largely academic because counsel for the plaintiff argued his case on the basis that the first defendant vacated as described by Lubbe jnr, ie by at the latest 18 November 2009 and that at the conclusion of the relocation process, the premises were restored to the plaintiff. So any damage to the premises which took place *after* the conclusion of the relocation process was, on this basis, not the responsibility of the first defendant.

26 But I think that the over all probability is that the damage was caused by a contractor who was instructed by the plaintiff or its agent to reduce the premises to a clean shell preparatory to refurbishment and occupation of the premises by the Standard Bank. The damage visible in the photographs is not the kind of damage which would have been

caused by looters. There would have been , eg, no need for looters to expend time and energy and make a noise demolishing the interior walls and other interior brickwork and wrecking the sanitaryware. Nor was there any need for Lubbe jnr to do so. For Lubbe jnr to have taken the trouble maliciously to damage the premises would have been a distraction from his main goal of getting his new restaurant operational and would have had to be done in at least earshot of the mall's security officers. Lubbe jnr denied that he personally invested any emotional energy in the vendetta and there is no reason to disbelieve him in this regard.

27 A telling item of evidence given by Lubbe jnr was left uncontested. He said that the flow of current *into* the electrical distribution board was under the control of the plaintiff. The first defendant was only able to switch off current flowing *out of* the distribution board. This meant that anybody cutting the wires at the distribution board bring current *into* the distribution board was risking electrocution and therefore his life. From this it follows that the current to the distribution board was probably switched off by or on behalf of the plaintiff for the very purpose of rewiring the premises.

28 Few of Dr Botha's 58 items can survive this analysis. Counsel for the plaintiff ultimately contended for items 4-8, 27-36, 44, 45, 49, 52 and 53 with an upward adjustment for contractors' preliminaries and profit and VAT.

29 Items 4-8 provide for demolition and removal of rubble. The problem for the plaintiff is that these claims are predicated on the false notion that the first defendant was obliged to leave the plaintiff with a clean shell. Although some rubble must have been caused when the salad bar was detached, there is no evidence as to how much rubble this caused. The place where the salad bar stood was not the subject of any of the photographs so the probability is that it did not cause very much rubble. The rubble removal claims are for the rubble caused by the demolition of a raised floor and interior walls. One cannot extrapolate from this a cost for removing the salad bar rubble. There was no specific claim for the removal of the salad bar rubble. These claims must fail.

30 Claims 27-36 are for removal of fixtures such as a cupboard, the ceilings, the construction of a new ceiling, the removal of airconditioning components, removal of carpets, replastering to convert the Spanish (rough) plaster on the walls to smooth plaster and

removing wall and floor tiles. Once again, these claims must fail because they are directed at producing a clean shell.

31 Item 44 is for the installation of a completely new ceiling, incidently to the specifications of the Standard Bank. The first defendant did not have to provide a new ceiling when it left the premises. The first defendant was liable of course for reinstating the ceiling in the seating area. But there is no evidence to identify the cost of replacing the Spur branded ceiling boards or an appropriate alternative. This claim fails.

32 Item 45 is for a new airconditioning system. The first defendant did not have to provide a new airconditioning system when it left the premises. This claim fails.

33 Item 49 is for the servicing of the existing sprinkler system. While this claim might have been appropriate in the context of the true liability of the first defendant under clause 12.1.5, the basis of Dr Botha's assessment was that the photographs showed that the sprinkler system had been damaged and he testified that he raised this item because of the damage. As this damage has not been proved to have been caused by 18 November 2009, this claim too must fail. The same is so in respect of item 53, the repair to the electrical system within the premises, and this claim similarly fails.

34 This leaves, of the substantive items, item 48 (preparing and painting interior walls) and repair to the roof where the extractor fan ducting was removed. These claims are good and were conceded as such by counsel for the defendants. Dr Botha accepted that the quantum he had allocated for the roof work was excessive and that the true amount should be, before adjustment, R6 120.

35 To summarise: the plaintiff has proved damages, before upward adjustment, of R7 560 (painting) plus R6 120 (roof work) = R13 680. To this must be added 15% for preliminaries, R2 052, giving R15 732. To this figure must then be added 10% for contractor's profit, R1 573,20, giving R17 305,20. Finally VAT at 10% must be added, giving a final figure of R19 035,72.

36 Counsel for the plaintiff submitted that although the plaintiff had not succeeded in proving, except as I have said above, the case upon which it came to court, it should nevertheless be awarded certain items on the basis of what counsel called practicality. There is simply no conceivable legal basis for this argument. In any event, it can hardly be practical to mulct the defendant on a basis at variance with the agreement between the parties. Yet another difficulty for the plaintiff is that no attention was given in the evidence that the restoration had to take place subject to fair wear and tear. The plaintiff

of course bears the onus in relation to the matters which I have identified in this judgment.

37 I turn to the question of costs. The plaintiff has manifestly not been substantially successful. It took up the better part of four court days of a five day trial trying to prove a claim based on a misconception. The first defendant on the other hand played its cards very close to its chest and did not disclose the basis of the defence which ultimately prevailed until after the issue had been raised by me during the evidence of the architect, Mr Monteith, on the fourth day. In addition, the first defendant has been held liable in a relatively small amount. I think the fairest would be to make no order as to costs.

38 I make the following order:

1 There will be judgment for the plaintiff against the first defendant for the sum of R19 035,72;

2 There will be no order as to costs.

NB Tuchten
Judge of the High Court
13 March 2015

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