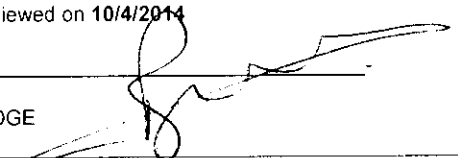




IN THE NORTH GAUTENG HIGH COURT PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO. 70335/11

Reportable	NO
Of interest to other judges	NO
Reviewed on	10/4/2014
	
JUDGE	

11/4/2014

In the matter between:

FOUNTAINHEAD PROPERTY TRUST

1ST PLAINTIFF

ATTFUND LIMITED

2ND PLAINTIFF

and

GOSPEL DIRECT (PTY) LTD

1ST DEFENDANT

LUKAS HERMANUS CARELSEN

2ND DEFENDANT

CORAM EBERSOHN AJ

HEARD ON 16 AUGUST 2013

JUDGMENT HANDED DOWN ON 11 APRIL 2014

JUDGMENT

EBERSOHN AJ.

[1] The plaintiffs are Fountainhead Property Trust and Attfund Limited.

[2] The defendants are Gospel Direct (Pty) Ltd. as principal debtor and Lukas Hermanus Carelsen as surety.

[3] On or about the 13th December 2007 the plaintiffs and the first defendant entered into a five year lease agreement in terms whereof the plaintiffs let to the first defendant certain shop premises in Centurion. The second defendant signed as surety for the obligations of the first defendant. The commencement date of the lease was the 1st October 2007. The first defendant was to pay certain amounts as rental, monthly in advance, to the plaintiffs including a 10% turnover rental to the plaintiffs. In addition to the rental the first defendant had to pay certain operating and maintenance costs to the plaintiffs and also a monthly contribution towards the recovery of municipal rates and taxes. The first defendant also had to pay a monthly contribution towards the Marketing Fund. Besides all the foregoing the first defendant also had to pay mora interest to the plaintiffs on any arrear amounts.

[4] Clause 26.02 of the Standard Terms and Conditions initialled and attached to the lease read as follows in the event of certain stated types of breaches of the lease on the part of the first defendant having occurred::

“While the lessee remains in occupation of the leased premises and irrespective of any dispute between the parties, including but not being restricted to, a dispute as to the lessor’s right to cancel this lease, then –

- a) The lessee shall continue to pay all amounts due to the lessor in terms of this lease on the due dates of the same;*
- b) The lessor shall be entitled to recover and accept those payments;*

- c) *The acceptance by the lessor of those payments shall be without prejudice to and shall not in any manner whatsoever affect the lessor's claim to cancellation of this lease or for damages or claim of any other nature whatsoever.*

Should the dispute between the lessor and lessee be determined in favour of the lessor, then the payments made to the lessor in terms of this sub-clause shall be regarded as amounts paid by the lessee on account of the loss and/or damages sustained by the lessor as a result of the holding over by the lessee of the leased premises."

[5] In terms of clause 14 of the Standard Terms the lessee may , with the prior consent of the lessor install any fixtures, fittings and equipment in the leased premises for the purpose of carrying on the lessee's business "and may at any time and prior to the termination of the lease if so required by the lessor, remove any such fixtures or fittings provided that the lessee shall repair any damaga caused by the installation or removal of such fixtures, fittings or equipment. If the lessee does not remove any fixtures and fittings and equipment on vacating the leased premises these shall become the property of the lessor and the lessee shall not at any time or under any circumstances have any claim whatsoever against the lessor for any fixtures and fittings and equipment not removed on the termination of this lease whatever the reason may be. However, the lessee shall be liable to reimburse the lessor on demand for any and all costs incurred by the lessor in having such fixtures and fittings and equipment removed and the leased premises reinstated on behalf of the lessee.

[6] In terms of clause 26.01 of the Standard Terms and Conditions the parties agreed that should the 1st defendant make default with any payment in time the plaintiffs could summons the 1st defendant and claim cancellation of the agreement and its ejectment from the premises. The 1st defendant in fact breached the agreement and the plaintiffs

forthwith cancelled the lease agreement during June 2011 by the issuing of a summons in the Magistrates Court for Pretoria in case 50333/2011 and obtained default judgment against the 1st defendant for payment of certain sums and ejectment from the premises. The sum claimed in case 50333/2011 was paid in full with costs.

[7] Despite the cancellation of the lease agreement during June 2011 the first defendant did not vacate the said premises and remained in occupation thereof until the 3rd October 2011 when it vacated the premises.

[8] The first defendant from time to time whilst still being in occupation of the premises made certain payments to the plaintiffs. Whilst still being in occupation of the premises the first defendant was liable in terms of clause 26.02 of the Standard Terms and Conditions to pay all amounts provided for in the lease as if the lease was still in force.

[9] The plaintiffs claim three amounts from the defendants. Firstly, R93 066,75 (particulars of claim par. 13.5) being amounts due as rent in terms of the lease agreement. Secondly, R93 964,50 (particulars of claim par. 14.4) being allegedly in respect of the reasonable costs of restoring the premises to a good condition after the first defendant vacated the premises. Thirdly, R88 608,24 (particulars of claim par. 15) being in respect of future loss of rental.

[10] The first defendant called one witness to testify namely a Mr. Carelsen. He testified that when the first defendant moved into the premises in October 2004 in terms of the first lease it was an empty shell with nothing in there and the walls were damaged. The first defendant fixed the walls and they installed shop fittings that suited

the specific purposes of the first defendant and installed counters and a hung ceiling. The first lease between the parties with regard to the premises commenced on 1 October 2004 and lapsed on 30 September 2007 and the second lease between them commenced on 1 October 2007 and was to lapse on 30 September 2011. On the 12th August 2011 the plaintiffs obtained default judgment against the defendants for *inter alia* cancellation of the lease in the Magistrate's Court after they summonsed the defendants for arrear rental. The amount owing in terms of the default judgment was paid by the defendants.

[11] He testified that the first defendant removed everything they installed during the currency of the lease, when the premises was vacated, the walls were plastered and everything was left in a perfect condition. He testified that he did not see the premises again after the first defendant vacated from it.

[12] It was put to him that the first defendant did not get the consent of the plaintiffs to remove the ceiling and fittings but he stated that the plaintiffs' centre and operational managers consented and handed them the keys to remove the belongings of the first defendant and to bring the place in the same good condition. This was not disputed by the counsel of the plaintiffs in Carelsen's cross-examination and no evidence in rebuttal was led by the plaintiffs.

[13] The area manager of the plaintiffs testified too. He stated that when he saw the premises it was in a good nice condition. He stated that the procedure is that they get a quotation before renovation is done. One thing that lacked in the evidence of the plaintiffs' witness is that he did not state that it was their contractor that renovated the

premises bearing in mind that the evidence of Carelsen was to the effect that the first defendant cleaned and repaired the premises themselves.

[14] The area manager testified that he was not around in 2004 and could not give any evidence of the state the premises was in when the first defendant took occupation.

[15] The plaintiffs did not present any evidence as to the alleged future loss of rental, being the third amount claimed.

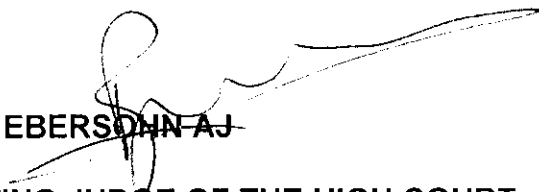
[16] In the premises the plaintiffs are entitled to the first of the three amounts (being in respect of the rent whilst the first defendant was still in occupation of the premises.) it is owing and was in any case admitted. The claim with regard to the second amount was not proven. The contractor was not called and although the amount was admitted the merits were disputed. The claim with regard to the third amount was also not proven.

[17] The defendants raised a defence to the effect that the plaintiff could not base a claim on the cancelled contract. In this case, however, the amount was admitted and liability was not disproved.

[18] The end result is that the plaintiffs succeed regarding the first amount and the claim cannot be met by the maxim *ne bis in idem* ("once and for all rule") (see *Union Wine Ltd. v E. Snell and Co. Ltd* 1990 (2) SA 189 (C)); but fail with regard to the second and third amounts claimed. It will only be fair if no costs are awarded.

[19] The following order is made:

1. Judgment is granted to plaintiff with regard to the first portion of the claim namely for R93 066,75 (particulars of claim par. 13.5) being an amount due as rent in terms of the lease agreement, with interest on it at 14% per year calculated from the date of issuing of the summons to the date of payment of the R93 065,75.
2. The plaintiffs' claim for the second and third portions of the claim namely for respectively R93 964,50 (particulars of claim par. 14.4 being allegedly in respect of the reasonable renovation costs of the premises after the first defendant vacated the premises) and R88 608,24 (particulars of claim par. 15 being in respect of loss of future rental.) is dismissed.
3. Each party must pay its own costs.


P.Z. EBERSON AJ

ACTING JUDGE OF THE HIGH COURT

The plaintiffs' counsel

The plaintiffs' attorney

Adv. G.T. AVVAKOUMIDES

Halse, Havemann & Lloyd

Ref. Mnr. Van Stade/Cindy

Tel. 012 348 5534

The defendants' counsel

The defendants' attorneys

Adv. D.A. JACOBS

Mark Efstratiou Inc.

TEL. 012 809 4301

REF. Mr. Efstratiou/E 10880