IN THE HIGH COURT OF SOUTH AFRICA
(FREE STATE PROVINCIAL DIVISION)

Case No.: 2971/2009

In the matter between:

KAIZEN HOTELS (PTY) LTD Plaintiff

and

ECHO CANYON TRADING 39 (PTY) LTD
trading as MONT D'OR HOTELS Defendant

JUDGMENT: BLOEM, AJ

HEARD ON: 5 MARCH 2013

DELIVERED ON: 7 MARCH 2013

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[1] The plaintiff is Kaizen Hotels (Pty) Ltd and the defendant is Echo Canyon Trading 39 (Pty) Ltd trading as Mont D'or Hotels. On 16 January 2009 the plaintiff issued summons against the defendant wherein it seeks an order for the confirmation of the cancellation of an agreement between the parties, payment of R1 705 000,00, interest thereon and costs of suit. The summons was served on the defendant on 8 July 2009. The defendant delivered a plea wherein it denied liability to the plaintiff. On 17 August

2012 the action was set down for hearing on 5 March 2013. On 7 February 2013 the defendant's attorneys delivered a notice wherein they informed the plaintiff and the Registrar that they ceased to act on behalf of the defendant and withdrew as its attorneys of record in this action. The above notice was sent to the respondent by registered mail. I am satisfied that the defendant's previous attorneys complied with the provisions of Rule 16(4) of the Uniform Rules of Court and that they have accordingly properly withdrawn from this action as the defendant's attorneys of record.

[2] The plaintiff pleaded that during April 2008 and at Clarens the parties entered into an oral agreement in terms whereof the plaintiff undertook to manage and market the defendant's hotel and conference centre operations for a period of 3 years (commencing 1 April 2008) at payment of R55 000,00 per month, payable on the 25th day of each and every month. It also claimed that, in terms of the agreement, where a party failed to fulfil any of the material conditions of the agreement, the innocent party should give notice to the defaulting party to remedy the default within

fourteen days. If the defaulting party failed to remedy the default within the 14 day period, the innocent party may claim specific performance or, if the default is material, cancel the agreement.

[3] The plaintiff furthermore pleaded that on 31 August 2008 the defendant repudiated the agreement by way of an e-mail, that it accepted the repudiation and that it elected to claim damages in the sum of R1 705 000,00 from the defendant being payment of R55 000,00 per month over the remaining 31 months of the agreement.

[4] In its plea the defendant admitted that during April 2008 it entered into an oral agreement with the plaintiff in terms whereof the plaintiff undertook to manage and market the defendant’s hotel and conference centre operations. It denied that the agreement was for a period of three years, claiming that it was for a period of one year at the end of which the parties would consider its extension. The defendant furthermore pleaded that the parties agreed that it was entitled to immediately cancel the agreement in the case of a material breach by the plaintiff. It claimed that

the plaintiff breached the agreement in that it failed to secure a 50% occupancy of the hotel within three months from 1 April 2008, it failed to properly manage the hotel and conference centre in that it did not appoint and control competent personnel and it failed to properly look after the guests at the hotel. It denied that the e-mail that it sent to the defendant constitutes a repudiation of the agreement. It claimed that the e-mail constitutes a cancellation of the agreement because the plaintiff breached the agreement in the material respects set out above. It accordingly denied that it was liable to the plaintiff.

[5] At the hearing, James Brown, the plaintiff's managing director with approximately 25 years' experience in the hospitality industry, testified that he concluded the oral agreement with a Mr Theron of the defendant for a period of three years during which the plaintiff would manage and market the defendant's hotel and conference centre operations and the defendant would pay the sum of R55 000,00 per month to the plaintiff for the duration of the agreement. He stated that the plaintiff could not have entered into an agreement with the defendant for one year

only because it was financially not viable for the plaintiff to enter into a one year agreement. Furthermore the marketing of the hotel works on a three year cycle. During the first year clientele for the hotel would be built up and a proper assessment of the sales and marketing of the hotel and its products would be made only after three years. Real returns on the investments on the sales and marketing of the hotel and its products would be seen only after three years. It was for those reasons that, at the conclusion of the agreement, the parties agreed to consider, after the three year period, extending the agreement by an additional two years.

[6] During April 2008 the hotel was a construction site. Only 50% of the building was ready to be run as a hotel. It was officially opened only on 1 August 2008. Prior to that date the operations of the hotel were seriously hampered as a result of which the plaintiff could not properly fulfil its contractual obligations. However, before 1 August 2008 the plaintiff put management infrastructures in place, as it was required to do in terms of the agreement.

[7] Mr Brown testified that he had weekly meetings with Mr Theron. At no stage prior to 31 August 2008 was he informed by Mr Theron or any other of the defendant's

personnel that the plaintiff had problems with the way in which the plaintiff performed its contractual obligations. The defendant's e-mail of 31 August 2008 accordingly came to the plaintiff as a huge surprise.

[8] After the cancellation of the agreement the plaintiff looked for other contracts in the hospitality industry. For instance, it tendered for a similar contract at Tangle Wood Estates, a new development in Pretoria, Lodge Rhona in Pretoria and Metsi Pepe Lodge Estate in the district of Ventersdorp. All the plaintiff's efforts to mitigate its damages were unsuccessful. He claims that, had the defendant not repudiated the agreement, the plaintiff would have received R55 000,00 per month from 1 September 2008 until 31 March 2011, a period of 31 months. Mr Brown testified that the defendant should be ordered to pay those sums to the plaintiff.

[9] Mr Brown testified that the agreement provided that, in the instance where the defendant believed that the plaintiff breached the agreement in a material respect, the defendant should have given the plaintiff fourteen days to remedy the breach. If the plaintiff failed to remedy the breach, the defendant would then be entitled to cancel the agreement. The agreement accordingly made provision for a procedure to be followed for its cancellation. The effect of Mr Brown's evidence is that the defendant did not follow that procedure. Where a contract lays down a procedure for cancellation, that procedure must be followed or a purported cancellation

will be ineffective. (Christie's: **The Law of Contract in South Africa**, 6th Edition at 562.) I find that the defendant did not properly cancel the agreement when it forwarded the e-mail to the plaintiff because it failed to give the plaintiff fourteen days' notice to remedy the breach. In any event, there is no evidence that cancellation by the defendant was justified.

[10] In the e-mail the defendant informed the plaintiff that "I am terminating the business relationship between [the defendant] and [the plaintiff] with immediate effect." That constitutes a clear intention on the part of the defendant no longer to be bound by the terms of the agreement. On receipt of the e-mail the plaintiff took it to its attorneys who, by letter dated 25 September 2008, informed the defendant that, through the e-mail, the defendant repudiated the agreement and that the plaintiff accepted the repudiation. In my view the e-mail constitutes a repudiation in that it reveals an unequivocal intimation on the defendant's part that it did not want to continue with the business relationship with the plaintiff and that it was terminating that relationship. The business relationship between the parties is what the agreement was about. It went to the heart of the agreement. Without the business relationship between the parties there could have been no agreement between them. The repudiation was sufficiently serious to justify the cancellation of the agreement by the plaintiff.

[11] In the circumstances I am of the opinion that the defendant repudiated the agreement when he sent the e-mail to the plaintiff. On receipt thereof the plaintiff's response was to elect to accept the repudiation and to cancel the agreement.

[12] Regarding the plaintiff's damages and the quantum thereof, there is no reason not to accept Mr Brown's evidence that, after the plaintiff had cancelled the agreement, it sought other business opportunities but was unsuccessful. There was not much more that the plaintiff could do under the circumstances to mitigate its damages. The plaintiff is accordingly entitled to payment of R55 000,00 per month from 1 September 2008 until 31 March 2011, a period of 31 months.

[13] In the circumstances, I make the following order:

13.1 that the agreement between the parties was validly cancelled;

13.2 that the defendant pay to the plaintiff:

13.2.1 the sum of R1 705 000,00;

13.2.2 interest on the sum of R1 705 000,00 at the rate of 15,5% per annum from 8 July 2009 to date of payment thereof; and

13.2.3 costs of suit.

G.H. BLOEM, AJ

On behalf of the plaintiff:	Adv F.D. Birkholtz Instructed by: Mr P.D. Yazbek Lovius Block BLOEMFONTEIN
On behalf of the respondent:	No appearance

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