



HAAL DEUR WAT NIE VAN TOEPASSING IS

(1) RAPPORTEERBAAR: *JANNEE*.

(2) VAN BELANG VIR ANDER REGTERS: *JANNEE*

(3) HERSIEN.

14/8/2009
DATUM

[Signature]
HANDTEKENING

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

14/08/2009
CASE NO: 50347/2008

In the matter between:

BREAU INVESTMENTS (PTY) LTD

Applicant

And

MAVERICK TRADING 326 CC

Respondent

JUDGMENT

LEDWABA, J

- [1] The applicant is seeking an order in terms whereof the respondent should be evicted from shop 3, Village Square Shopping Centre, Amandalboom Road, Doornpoort Extension 35, Pretoria, Gauteng (the premises).
- [2] On 31 March 2004 the applicant and the respondent entered into a lease agreement for a period of three (3) years.

- [3] In clause 2.3 of the agreement it is stated that at the end of the lease period the lessee, the respondent had an option to renew the lease for a further period of three (3) years on the said terms and condition except regarding the rental and renewal. The last part of the clause regarding the rental should the lease be renewed by the respondent reads as follows:

"...The rental for the renewal period shall be negotiated between the parties and in the event of the parties being unable to reach an agreement as to rental it shall be referred to the LESSOR's auditors for determination, whose decision shall be final and binding on the parties."

- [4] In July 2006 the respondent exercised its right to renew the lease and requested the applicant to provide it with the rental amount and escalation percentage, see annexure B page 31.

- [5] The parties could not agree on the rental and entered into negotiations but could not reach a settlement.

- [6] In about July 2008 D. P. Funch and Associates CC appointed by the applicant determined the rental payable to the applicant in respect of the premises as follows:

"For the period 1 April 2007-31 March 200, R100,00 per square meter.

For the period 1 April 2008 to 31 March 2009 R110,00 per square meter."

- [7] The respondent disputed the amount determined by D. P. Finch and Associates CC and on the 29th August 2008.
- [8] In paragraph 5.1 of the particulars of claim the respondent (plaintiff in the action proceeding) made the following allegation:
"The Defendant attempted to unilaterally determine the rental in respect of the extended term of lease on 27 March 2007 by invoicing Plaintiff with rent amounting to R100-00 per square metre from 1 April 2007 onwards, which unilateral determination was not accepted by the Plaintiff."
- [9] Respondent further alleged in paragraph 6.2 and 6.2 that the determination of rent is *'so grossly excessive that it bears no reasonable relationship at all to the value of reasonable rent payable in respect of the leased premises; and no reasonable person in the position of the auditors of the defendant would have determined the rent payable for the extended lease period as D P Fuchs & Associates CC did.'*
- [10] The respondent alleged in its particulars of claim that the value of the reasonable rent should be R84-29 per square metre from the 1st April 2007-31st March 2008 with an escalation of 12% rent from 1st April 2008.
- [11] In terms of Annexure 'E' (page 41) dated the 14th August applicant's attorney informed the defendant's attorneys that as at 31st March 2008 the respondent was indebted to the plaintiff in the sum of R81 527-53, should payment not be

received before the close of business the 29th August 2008 their instructions are to proceed further against the respondent and, *inter alia*, apply to the court for eviction.

- [12] On 5th September 2008 (in a letter erroneously dated 14th August 2008), applicant's attorneys informed the respondent's attorneys that since the respondent failed to comply with the contents of annexure 'E' the applicant was in terms of clause 30 of the agreement of lease agreement cancelling the lease.
- [13] Both counsel during arguments submitted that the applicant and the respondent were *ad idem* that D P Fusch was not the applicant's auditors and Wasserman was the applicant's auditors Wassermas determination was similar to the one made by D P Fusch.
- [14] It is clear that there was no agreement on the rental amount. The legal position in such a situation states that the lease agreement is in existence. See **Hurwitz & Others NNO v Table Bay Engineering and Another** 1994 (3) SA 449 (C).
- [15] Advocate Morrison's submission that there is no lease is misplaced.
- [16] Applicant's counsel in the alternative argued that if the lease agreement is in existence same was cancelled in terms of annexure 'E'.

- [17] On the contrary the respondent's counsel submitted and argued that the applicant could not in law cancel the agreement because the respondent had already issued summons. To support the submission he referred the court to **Van Heerden v Basson 1998 (1) SA 751** on page 720 wherein Hartzenberg J said the following:

"Dit is derhalwe nou duidelikdat daar 'n reeks van beslissings bestaan in minstens drie Afdelings van die Hooggeregshof wat 'n regstelling van 'n prys deur 'n derde erken en wat voorts aanvaar dat ingeval van 'n regstelling daar 'n keuse gegee moet word aan die ander party om te besluit of hy gebonde wil wees aan die ooreenkoms of nie. Dit kan, myns insiens, aanvaar word dat daar op 'n vasstelling van die prys deur 'n derde ooreenkoms is omdat die partye voorsien het dat hy dit spoedig en relatief goedkoop sal doen. Indien dit nou nie geskied nie omdat die vasstelling onbilik is en daar moet 'n vasstelling van regsweë geskied wat baie duur gaan wees of die inwerkingtrede van die ooreenkoms lank kan laat sloer, skyn dit bilik te wees dat die party van wie die regsstelling vereis word die keuse moet hê om, voordat litigasie ontstaan, aan te dui dat hy nie bereid is om betrokke te raak by duur en tydrowende litigasie nie en aanvaar dat die ooreenkoms tot niet gegaan het omdat daar nie 'n behoorlike vasstelling was nie." (Own underlining).

- [18] Respondent's counsel submitted that the words "voordat litigasie ontstaan" should be interpreted to mean that after litigation commenced i.e after summons has been issued and a party does not have a choice to cancel the agreement,

I disagree. In **Van Heerden's** case Hartzenberg J referred to **Hurwitz case** at 457 A-C wherein the court said:

"I do not conceive it to be the law that, where a third party nominated by the parties fixes a rent which is shown to be manifestly unjust, the contract ipso facto falls to the ground. Whether in any particular case that will be the consequence will depend, so it seems to me, on the subsequent actions of the parties. If a party signifies that he will accept the determination of a court in lieu of the third party's determination, there is no good reason why he should not be bound to do so thereafter. He has agreed thereby to a variation of the rent fixing method originally agreed upon. But, if he declines to accept such a determination by a court, I do not think that he can or should be compelled to do so. Why should he not be entitled to say, for example, that he concedes that the third party's determination is indeed manifestly unjust and therefore not binding, but that he is not prepared to become involved in a litigious proceeding to determine what the rent should be, and prefers to allow the lease to lapse for want of the contractually agreed determination."

[19] The court in **Van Heerden's** case never said after litigation commenced the contract cannot be cancelled.

[20] The respondent's counsel argued that the applicants reason for cancelling the lease as set out in annexure 'E' is not to avoid being involved in litigious proceedings that the

respondent instituted. The cancellation cannot therefore be valid.

[21] Despite the fact that the applicant did not clearly state that the lease is cancelled on the basis of avoiding litigious proceedings, the applicant made it clear that to the respondent that it wanted the respondent to be evicted. In my view, that is an indication that the applicant did not want to be involved in litigation regarding the reasonableness of the rent.

[22] In the application before me I am not required by the parties to rule on whether the determination is reasonable or not.

[23] However, since there is a pending action, I think in eviction proceedings, I cannot ignore the contents of the particulars of claim read with the contents of the affidavit before me. Without binding the court that may adjudicate in the action proceedings, in my view, the respondent does not have a strong case.

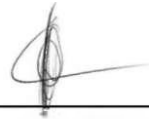
[24] Should I be wrong in considering the respondent's prospects of success in the action proceedings. I still think the applicant's cancellation of the lease is valid.

[25] **I therefore, make the following order:**

- (i) The respondent and all persons claiming to occupy Shop 3, Village Square Shopping Centre, Amandalboom Road, Doornpoort Ext 35, Pretoria,**

Gauteng should vacate the premises within 1 month of the granting of this order.

- (ii) Should the respondent fail to comply with the first order the sheriff of the court is authorised to evict the respondent.
- (iii) Respondent is ordered to pay the costs.



A. P. LEDWABA

JUDGE OF THE HIGH COURT