

**IN THE HIGH COURT OF SOUTH AFRICA  
(Cape of Good Hope Provincial Division)**

**REPORTABLE**

Case Number 393/2000

In the matter between:

**SHOPRITE CHECKERS (PTY) LTD.**

**Plaintiff**

and

**BUMPERS SCHWARMAS CC**

**1<sup>st</sup> Defendant**

**RUDOLF JAKOBUS KLOPPER**

**2<sup>nd</sup>**

**Defendant**

**MADELEIN JOHANNA KLOPPER**

**3<sup>rd</sup>**

**Defendant**

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**JUDGMENT: 8 FEBRUARY 2002**

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**DAVIS J:**

**Introduction:**

Plaintiff instituted action against defendants during January 2001 in terms of which it claimed an amount of R203 488,10 for goods delivered by plaintiff to first defendant during 1999 in terms of a written agreement entered into between the parties.

Defendants filed a claim in reconvention claiming, **inter alia**, rectification of agreement entered into between plaintiff and first defendant. The essence of defendants claim in reconvention is set out in paragraph 3 of his counterclaim as follows:

‘Voor en tydens die sluiting van die vermelde koopkontrak het eiser en eerste verweerder ooreengekom dat die koopkontrak onderhewig gestel sou word aan ‘n voorwaarde dat eiser sou toesien dat eerste verweerder ‘n skriftelike huurkontrak vir

die huur van die perseel waarin die sakeonderneming bedryf word, sou bekom van die verhuurder op dieselfde terme en voorwaardes as die wat ooreengekom is tussen SH Strand Bk, as verhuurder en D W Palmer as huurder gedateer 15 Julie 1996....vir 'n periode van vyf jaar gereken vanaf 1 Oktober 1998 met 'n opsie om die vermelde huurkontrakte te hernu vir 'n verdere vyf jaar na verstryking van die eerste vyf- jaar periode.'

Plaintiff denied that the so- called Palmer agreement had any application to the contractual relationship between first defendant and plaintiff.

At a Rule 37 conference the parties agreed to request the court to make an order in terms of Rule 33(4) of the Uniform Rules, namely that the dispute relating to rectification be adjudicated in the first instance and that the remaining disputes between the parties stand over for later determination. It was also agreed that defendants would have the duty to begin and that the onus to prove rectification was borne by defendants. An order in these terms was granted pursuant to Rule 33 (4) and the trial proceeded on this basis.

### **Defendants Case.**

It was common cause that on 2 October 1998 a written agreement of sale was entered into between plaintiff and first defendant, first defendant being represented by second defendant and plaintiff by Mr C. E. van Tonder. In terms of the agreement plaintiff

sold a business undertaking styled Eight Till Late, being a superette situated at 143 Kusweg Strand as a going concern for a purchase price of R600 000. According to defendants this agreement of sale was made subject to a condition that plaintiff would ensure that first defendant concluded a written agreement for the lease of the property wherein the superette was located on the same terms and conditions as had been obtained by the previous owner of the superette, Mr D W Palmer and which had been concluded between Palmer and the owners of the property, being SH Strand CC.

The precise terms of the rectification claimed by defendants read as follows:

‘Dit word spesifiek tussen die partye ooreengekom dat Eight Till Late (Shoprite Checkers (Edms) BPK onderneem om ‘n huurkontrak vir die huur van die perseel geleë te Kusweg 143, Strand, Wes Kaap en waarin die sakeonderneming bedryf word vir en namens Bumpers Schwarmas Bk. te beding met SH Strand BK as verhuurder, op dieselfde terms en voorwaardes as die huurooreenkoms ten aansien van die perseel tussen SH Strand Bk as verhuurder en D.W. Palmer as huurder gedateer 15 Julie 1996 hierby aangeheg as bylaag “B” dog met die voorbehoud dat:

1.5.1 Die vermelde huurkontrak ‘n aanvang sal neem op 1 Oktober 1998 en sal strek vir ‘n periode van vyf jaar en wat aan Bumpers Schwarmas Bk as huurder, die opsie verleen om die vermelde huurkontrak na verstryking van die vyf- jaar periode gereken vanaf 1 Oktober 1998 te hernuwe vir ‘n verdere periode van vyf jaar;

1.5.2 Dat die bedrag van die huurgelde betaalbaar onderling tussen die verhuurder en

Bumpers Schwarmas Bk. ooreengekom sal word.’

The initial formulation of the condition as appeared in the claim for reconvention did not include para 1.5.2 but by agreement between the parties defendants obtained an amendment to the rectification as initially framed in the claim for reconvention ; hence the inclusion of para 1.5.2.

Second defendant testified that during 1998 he became interested in acquiring the business which operated under the name Eight Till Late and which was located in the Strand. He approached Abbanis Business Brokers who had advertised the possible sale of the business and he concluded an agreement with Abbanis on 31 August 1998 to acquire the business. The agreement entered into with Abbanis, included a suspensive condition which made the deed of sale subject to the granting of a right ‘to a sublease or an assignment of the existing lease or a new lease on similar terms and conditions as the existing lease’.

It appeared from the evidence that Abbanis was acting on behalf of Palmer who ,at that time, owned the business. Thereafter Palmer experienced certain financial problems and plaintiff took over the ownership of the business. Shortly thereafter, on 2 October 1998 , second defendant was contacted by Mr van Tonder of plaintiff who informed him that plaintiff was interested in selling the business and that he should submit an offer for the purchase thereof. During the negotiations the issue of a lease agreement was raised as second defendant realised that the business was situated in a property owned by a third party , namely SH Strand CC. According to second defendant’s

evidence ‘Mnr van Tonder het vir my daar gesê hy het ‘n huurooreenkoms van vyf jaar vir vyf jaar, hy het een daar...dit is ‘n vyf jaar kontrak, na vyf jaar opsie om dinges weer te hernu het hy gesê en op dieselfde voorwaardes as wat Mnr Palmer dit gehad het’.

Van Tonder then prepared an offer to purchase. Certain additions were made to the initial draft and the document was then signed on 5 October 1998. When asked as to why the offer to purchase did not contain any reference to a contract of lease, second defendant said ‘omdat Mnr van Tonder vir my daai ding – nou gesê het daardie dag daar is reeds ‘n huur dinges, wat se naam kontrak op Eight Till Late se naam en dit is vyf jaar vir vyf jaar en ek het aanvaar dit is ‘n plek’.

Second defendant then testified that, on 12 October 1998, he was informed by Mr van Tonder that his offer had been successful and that he was to provide Mr van Tonder with a cheque for R300 000 and enter into an agreement of sale. When second defendant met with van Tonder he questioned the latter about the existence of the lease agreement and, according to his testimony, he suggested that he would only sign the contract of purchase and sale when he was certain that a lease agreement was in place. Second defendant testified that van Tonder then phoned a Mr Selwyn Hirschfield who represented the owner of the property, SH Strand CC. Second defendant and Van Tonder then met with Hirschfield, whereupon van Tonder told Hirschfield that second defendant required a five year lease with an option to renew thereafter for a further five years, effective from 1 October 1998. Hirschfield informed second defendant and van Tonder that the rent payable would be higher than which had been paid by Palmer. Hirschfield then said that he could not supply a lease agreement immediately as he was leaving for overseas. Upon return to van Tonder’s office second defendant expressed his dissatisfaction with the position whereupon he was assured by van Tonder that arrangements would be made for the conclusion of a lease in his own name and not in the name of Eight Till Late.

Second defendant then signed the sale agreement and paid the deposit of R300 000. The agreement was dated 2 October 1998. According to second defendant he did not notice that the lease agreement had not been incorporated into the sale agreement. The signing ceremony had taken place with great haste and in any event he had the assurance from van Tonder that the latter would ensure that the necessary agreement of lease was concluded.

Three weeks later second defendant telephoned van Tonder to enquire about the lease agreement. Van Tonder then requested that second defendant contact Hirschfield directly who proved to be unavailable. He then contacted both van Tonder and a Mr

Kobus Barnard ,an executive employed by plaintiff. He was informed that they were in the process of negotiations and that the lease agreement would be forthcoming.

He made a number of further phone calls to Barnard without any success. He then addressed a memorandum to Mr Andre Rossouw ,the executive officer in overall charge of the Eight Till Late franchise on 23 February 1999 in which he said ‘Na vele oproepe en gespreke met Mnr C van Tonder en K Barnard is ek nog nie in besit van ‘n getekende huurooreenkoms nie. Graag word verneem wanneer die ooreenkoms geteken gaan word....’

Upon Mr Rossouw’s failure to react to this enquiry, second defendant approached his attorney who on 2 March 1999 addressed a letter to Mr Martinengo , a director of plaintiff in which he requested a copy of the signed sale agreement . On 23 March 1999 Mr Barnard faxed a copy of the deed of sale to second defendant’s attorney, Mr Maree. On 15 April 1999 Mr Maree addressed a further letter to plaintiff requesting the lease agreement. A further letter of request was also sent on 7 June 1999. Finally an envelope which contained an agreement of lease was delivered( apparently by Hirschfield ) to the business of first defendant in July 1999. This agreement contained a renovation clause which entitled the lessor , at its sole discretion, to terminate the agreement of lease on twelve months’ notice to the lessee .It provided for lease payments of R6 500.00 per month, which represented a considerable increase from the R4 800.00 which had been paid by first defendant to SH Strand .

Second defendant testified that as a result of his dissatisfaction with this agreement a meeting was held on 28 July 1999 attended by second defendant , Barnard , Rossouw , third defendant and Mr Maree. The contents of that meeting were reflected in a document prepared by second defendant which on 3 August 1999 he submitted to Rossouw and Barnard. In that summary he confirmed the following: ‘U siening korrek is dat die voorwaarde waaronder ek die winkel gekoop het mb.t. die huurkontrak verwys na die huurkontrak en voorwaardes soos van toepassing was op die huurkontrak soos bestaan het tussen Mnr Palmer en die eienaar van die gebou....Ek vestig u aandag daarop dat totdat die probleme rakende die huurkontrak suksesvol opgelos word, ooreenkomstig my ooreenkoms met u op of ongeveer 5 Oktober 1998 afgehandel is, behou ek al my regte’.

Third defendant testified that she had contacted Barnard telephonically in order to enquire about the lease agreement and that Barnard had informed her that they were in the process of negotiating such agreement with SH Strand CC. She was somewhat suspicious of the veracity of this version and accordingly telephoned Hirschfield who referred her to Mr Arthur Fine who was dealing with the matter. According to third defendant Mr Fine was extremely curt on the telephone, told her not to telephone him again and that he was in the process of negotiating a lease agreement with plaintiff. She also testified that she had attended the meeting of 28 July 1999 and confirmed the accuracy of the version of that meeting which second defendant had set out in his

memorandum.

Although Mr Arthur Fine was called to give evidence on behalf of plaintiff, the nature of his evidence is relevant to an understanding of defendant's case. Fine testified that he was requested to arrange for the conclusion of a contract of lease for the premises occupied by first defendant. He discussed the matter with Hirschfield who provided him with the necessary details and which he then confirmed with second defendant. He arranged for attorneys representing SH Strand CC to draft the necessary lease. After this was done, he testified that [he] kept 'asking Mr Hirschfield when the signed document would be returned to me because it had to be signed by ourselves and had to be stamped. There seemed to be some problem in getting it back from Mr Klopper'.

At this stage Fine considered that he was negotiating with second defendant as opposed to plaintiff. He then testified that 'because of the new allegation that there was still an old lease applicable' a meeting took place between himself and Hirschfield as well as 'three gentlemen of Shoprite Checkers at their head office'. At that meeting 'we were shown the Palmer lease which was quite an involved lease because it had other details in it which we weren't aware of and once we were shown this lease and Shoprite Checkers advised us that they had the right to cede that lease to a new owner of the franchise Eight Till Late, that was the end of the discussions, that was the end of any negotiations to try and get the new lease signed. We then abide by the Palmer lease'. Subsequently Fine obtained an opinion from an attorney who concluded that plaintiff had no right to cede the lease.

Fine also confirmed that he had been surprised by aspects of the Palmer lease, in particular the obligation imposed upon the lessor that, in the event of redevelopment, the lessee would have the right to occupy 'a new shop...because at that point in time we weren't really thinking of redevelopment encompassing business premises'.

Mr Hirschfield was also called to testify on behalf of plaintiff. Mr Hirschfield confirmed that 'it was always the franchisee himself or (h)is company...it was never in any way surmised or indicated that Shoprite Checkers was desirous to have a relationship with us directly'. In short the lease agreement was to be concluded between SH Strand CC, being the owner of the property and the franchisee. He also testified that when he met, albeit briefly, with second defendant and van Tonder he indicated that there would be two new aspects introduced into a lease agreement, as compared to the Palmer agreement, namely a redevelopment clause and an increase in the monthly rental.

Hirschfield testified that plaintiff had never at any of the meetings attempted to become the 'landlord' although 'they tried to do it by way of that cession apparently they had in terms of their franchise agreement and they tried to do that and say did we want the same terms that Palmer had. That was, as far as we were concerned, a commercial ploy to negotiate better terms and conditions for themselves, that's the way we looked at it we didn't understand, certainly the way Arthur and myself interpreted Shoprite's

intervention was not as now they themselves were trying to come and negotiate a lease agreement with us.'

On being asked as to his interpretation of the validity of the Palmer agreement which had not been signed by the lessor, Hirschfield testified that they had never adopted the approach that the agreement was void as a result of the lack of a signature by the lessor but rather 'we interpreted that death of the business as being the end of this or any other agreement, written or verbal. The sequestration of Palmer's business I mean ended any agreement there could have been between us and him.'

Asked about his interpretation of the meeting that took place between van Tonder, second defendant and himself, Hirschfield conceded that no negotiations had taken place between himself and second defendant but that 'I certainly understood Dolf to accept and understand that day when they walked in and out of my office that if he comes on board as a franchisee that he would come into a lease agreement that would consist of the following which I explained to him that day'.

### **Plaintiff's Case**

Mr Raubenheimer, who appeared on behalf of plaintiff, attacked the version offered in testimony by second defendant and in particular the version that plaintiff was to play an important role in the conclusion of the contract of lease. In particular he emphasized the testimony of Mr Fine who had sought to negotiate with second defendant with regard to the applicable terms of the contract of lease as well as Mr Hirschfield's evidence that second defendant wished to conclude the contract of lease on behalf of first defendant rather than having plaintiff as a party thereto.

Mr Raubenheimer also emphasized the testimony of both Mr van Tonder and Mr Rossouw that it was the clear policy of plaintiff not to be involved in a lease agreement in respect of premises occupied by an Eight Till Late franchisee. In short he submitted that the express policy of plaintiff ran counter to the versions offered to the court by second and third defendant.

Mr Raubenheimer also placed considerable emphasis upon the written offer to purchase which was signed by second defendant on 5 October 1998 in Stellenbosch. Mr Raubenheimer submitted that second defendant's explanation, namely that the offer to purchase was signed at Mr van Tonder's office in Brackenfell and that the word 'Stellenbosch' was included because it constituted the business location of defendant should be rejected. He referred to the offer to purchase which was signed in Stellenbosch on 5 October 1998 and contended that this was indicative that defendants had a considerable opportunity to consider the offer to purchase before it was signed. Consequently, defendants had time to realise that no suspensive condition had been included to the effect that a contract of lease had to be concluded prior to defendant purchasing the business from plaintiff. Given that second defendant was an experienced business man and that he was prepared to expend a



considerable sum of money , by way of deposit of R300 000, his version that the agreements had been signed in haste without a consideration of the effect of an omission to include a suspensive condition should be rejected.

Mr Raubenheimer drew attention to the evidence of Rossouw who rejected the... contents of the memorandum which had been prepared by second defendant after their meeting on 28 July 1999. In particular, Rossouw rejected the statement contained in the memorandum to the effect 'U siening korrek is dat die voorwaarde waaronder ek die winkel gekoop het met betrekking tot die huurkontrak verwys na die huurkontrak en voorwaardes soos van toepassing was op die huurkontrak, soos bestaan het tussen Mnr Palmer en die eienaar van die gebou'.

Rossouw explained in his evidence that the meeting had been called so that 'ek en Kloppe het nog gesels oor sy roomys kaste en sovoorts, toe het hy 'n afspraak met my gemaak. Toe sê hy, hy wil my kom sien toe kom hy en sy vrou daar en die volgende oomblik toe kom die prokureur in . Omrede ek geen regs agtergrond het nie, is ek - wil ek my nie inmeng met sake wat ek nie weet van nie.....Ek het nooit betrokke ...by die oorspronklike onderhandelings nie. So ek kon nie erken het ...dat die huurkontrakte gesluit is. Ek weet nie daarvan'.

Mr Raubenheimer suggested on the basis of the evidence of Mr van Tonder, who claimed to have had a lengthy friendship with second defendant and had indeed been second defendant's best man at his wedding in 1977, that the reason for second defendant insisting that plaintiff had an obligation with regard to the conclusion of a lease agreement was that the franchise business had not proceeded in line with second defendant's expectation and second defendant 'gaan 'n gap seek om uit te kom'.

### **Evaluation.**

When he gave testimony Mr Barnard was asked a number of questions with regard to the contents of the membership agreement which had been entered into between plaintiff and first defendant in terms of which first defendant became a franchisee. In particular he was asked about paragraph 4.3 of the agreement which provided that a member must 'cede all its rights, title and interest in and to the right occupation of the premises to Eight Till Late or its nominee'. Mr Barnard confirmed that the printed membership contract had certainly been used by plaintiff in 1998. He was unable to explain, notwithstanding a number of evasive answers, how it could be suggested that

plaintiff's practice at the time of this dispute was not to become involved in contracts of lease when the standard form in terms of which a franchise agreement was entered into between plaintiff and a third party contained a cession of rights of occupation to plaintiff as provided in paragraph 4.13. He was unable to explain the letter addressed to SH Strand CC by Dr T G Wiese on behalf of plaintiff in which the following paragraph appears:

- '1.U is bewus daarvan dat die besigheid verkoop is gedurende Oktober 1998 aan Klopper Take Away CC.
2. As sulks het die regte verpligtinge van die Huurder in terme van die Huurooreenkoms aan die Koper oor gegaan in terme van klousules 8 en 10 van die Huurooreenkoms.
3. Die opsie om die perseel vir 'n verdere periode van 5 jaar te huur vanaf 1 Maart 1999 is uitgeoefen en is huurgelde intussen diensooreenkomstig oorbetal'.

On the basis that clause 4.13 constituted a standard practice whereby plaintiff ensured that the departing franchisee ceded its rights to plaintiff, Barnard was asked why this particular practice had not triggered a response from plaintiff in terms of which it would have provided defendants with the necessary lease. Barnard was extremely vague in his reply. He said 'It's difficult to say....because like I've mentioned previously at that stage I didn't work closely with regards to the contract so I can't tell you exactly what was the set up with the contracts then. I've also mentioned that there could have been differences in the context of these clauses might have been brought in, but at that stage the franchisees that was in our operation be it two or three with regards to Eight Till Late that was and I think this is the only contract whereby this appears is in the Eight Till Late contract specifically but be that as it may I doubt it. I mean that specific franchisees were then still members of ours at that time. So if

they would have parted which they didn't we would have known about it'.

This answer which is somewhat difficult to understand typifies the evidence which Barnard gave to the court. He was unable to provide any logical explanation as to the effect of a practice contained in a printed standard form contract prepared by plaintiff and in particular the implications of clause 4.13 thereof. He was unable to provide any cogent explanation as to why plaintiff insisted that it had no rights to the lease agreement yet when three members of plaintiff met with Hirschfield and Fine to discuss the lease, it appeared that they had informed the latter that plaintiff had obtained a cession of all rights to the Palmer lease.

Of particular relevance to the credibility of Barnard was a letter of 16 April 1999 which was addressed by Mr Maree on behalf of defendants to Mr Martinengo in which Mr Maree asked 'Geliewe ons asseblief vir die huurkontrak soos nou verwys te voorsien teen einde ons rekords volledig te kry.' Appended to this letter were the following comments: 'Cobus presumably they need a copy of the original rather than the fax....17/4 Sergio. A copy of the purchase and prev. lease agreement was send to them. I have made copies of same and will have it sent down to them. Ta Cobus.' Barnard was asked a series of questions as to how it was that if these copies had been sent prior to 17 April 1999 Mr Maree had then cause to write again on 7 June 1999 in which he claimed that he had received nothing from plaintiff. In argument Mr Grobler, who appeared on behalf of defendants, submitted that these handwritten annotations to the letter of 16 April 1999 might have been done ex post facto in an attempt to bolster plaintiff's case. In the absence of any other explanation, this may be the most plausible reason as to how these notes came to be made; itself a very serious allegation which Mr Grobler leveled against Barnard.

Barnard proved to be an evasive arrogant witness who showed as little courtesy to defendants as he did to the court during the proceedings. It is difficult to capture in words the extent to which Barnard exhibited a cavalier attitude to the entire proceedings before this court. All too often he simply refused to provide a coherent answer to questions under cross examination.

Dr Wiese who gave evidence in part on behalf of plaintiff, testified in a far more dignified, careful and truthful manner. Nonetheless he had considerable difficulty in explaining how it was that he came to write a letter on 19 October 1999 to Mr Maree in which he said the following: 'Ons let uit die lêer dat geen formele sessie aangegaan is nie maar bevestig die volgende –

1. Ons het die besigheid oorgeneem van Mnr Palmer in terme van ons

Ooreenkomste en Sekuriteite.

2. Ons het die besigheid weer verkoop aan die kliënt en die Huurkontrak aan hom oorgedra gedurende Oktober 1998 soos ons geregtig was in terme van die Huurooreenkoms.
3. Die Huurkontrak gaan voort tot 28 Februarie 2004.

Ons glo nie dit is nodig om 'n skriftelike Sessie dokument op te stel nie, maar ontvang graag 'n konsep vir oorweging.'

Earlier in his testimony, Dr Wiese confirmed that he had been at a meeting in either September or October 1999 with Messrs Rossouw and Martinengo as well as Mr Fine and Mr Hirschfield to discuss the question of the lease. He was asked about Mr Hirschfield's testimony that during that meeting 'we were commercially bullied'. To this Dr Wiese said, 'Ek het die indruk probeer skep, u weet, dat dit – om dit in 'n eenvoudige taal te sê, ek weet nie of daar 'n goeie Afrikaanse terme is nie, ek wou die verhuurder 'bull shit' om te glo dat die franchisee het die Palmer ooreenkoms oorgekom'. Later when confronted with the letter of 19 October the following passage of evidence followed:

'Was u voornemens om ook vir Maree, hierdie prokureur wat vir u irriteer te, vergun my, te bull shit – Ek het, op daardie stadium was dit die konstruksie wat ek aanvaar het is nou – is die geldige een. Toe u die oorspronklike opsie uitoefen aan SH Strand toe was u daarvan oortuig dat u dit geldig regs geldelik kon doen;? Ek was nie seker nie. So u getuie is vroeër van u voorneme om hulle maar doodeenvoudig maar net te bull shit in die ding in as syne Shoprite Checkers is nie werklik op daardie stadium gewees dat u onder daardie indruk was nie? Nee ek was nie seker nie. Hoekom ek so sê ek was nie seker, op watter basis ons Palmer se besigheid bekom het nie, want daar was geen aanduiding in die lêer of ons in 'notariële verband – want ek het net die Klopper lêer gehad, ek het nie die Palmer lêer gehad nie'.

Later he was asked by Mr Grobler 'Ek het nou u verstaan dat u reg van die begin af, probeer het om bewustelik die verhuurder te bull shit – dit is korrek maar daar was geen aanduiding uit die lêer dat dit of die sessie uitgeoefen is of die opsie uitgeoefen is nie'. Later the following proposition was put to Dr Wiese by Mr Grobler...'Nou die punt wat ek maak uit hierdie skrywe uit is dat u dra ook hieroor aan Maree, man hoekom vra jy vir 'n huurkontrak. Ons het vir jou 'n huurkontrak. Ons het die besigheid verkoop en hom oorgedra saam met die huurkontrak. Was dit deel van die bull shit of was dit u werklike siening op daardie stadium? Ek het nie geweet wat die werklike situasie was nie. Soos ek sê daar was eintlik te min inligting in die lêer'.

Dr Wiese was thus rather vague as to his purpose in penning the letter of 19 October

or as to the exact meaning thereof. He did however testify that when he examined the file relating to defendants, 'ek onthou spesifiek drie dokumente wat ek gekyk het na, Dit was die Palmer ooreenkoms. Dan was 'n aanbod om te koop van Klopper en dan was daar die koopkontrak self. Dit was die dokument. Dan was daar vele korrespondensie tussen verskeie partye wat vir my egter opmerklik was, was dat daar 'n lêer - aantekening was deur Mnr Martinengo dat hy die verhuurders gebel het op 'n stadium, ek dink in Maart om te vra na aanleiding van 'n huurkontrak. Ek onthou ook 'n skrywe van die Barnard waarin hy vir die verhuurder vra vir 'n huurkontrak vir die franchisee'.

This evidence makes clear that executives of plaintiff played a considerable role in the negotiations relating to the contract of lease. Numerous letters were written to SH Strand CC, correspondence was entered into with defendants' attorneys including promises relating to sending them a contract of lease, representations were made to Fine and Hirschfield that plaintiff had taken cession had been obtained. All of this action took place within the context of a standard contract prepared by plaintiff which related to the franchise of Eight Till Late and included plaintiff's right to have a lease agreement ceded to it in circumstances where the franchisee ceased business.

Rossouw suggested that all of this was merely representative of the considerable effort which plaintiff made in order to ensure the success of its franchisees.

van Tonder gave generally irrelevant testimony and to a large extent performed even more poorly as a witness than did Barnard. He suggested that second defendant was seeking a reason to extract first defendant from a disastrous franchise agreement. This claim must be weighed against the numerous phone calls made by Mr Martinengo to Hirschfield and Fine with regard to the rental agreement, the reactions of plaintiff to second defendant pursuant to the latter's enquiries regarding the lease agreement; in other words the considerable efforts made by a number of executives including r van Tonder to ensure that defendants obtained a contract of lease.

As Mr Grobler submitted, the business was sold as a going concern which would hardly have been a realistic transaction without premises. Furthermore the question was never satisfactorily answered by any of plaintiff's witnesses to why second defendant who was so tenacious in his conduct to procure a lease agreement continued to deal directly with plaintiff in order to obtain such an agreement but never had into contract with SH Strand CC after he addressed a detailed memorandum to plaintiff complaining about the absence of a lease. No similar correspondence was ever addressed to SH Strand CC.

Mr Raubenheimer made much of the fact that second defendant wanted to be the lessee rather than the sub-lessee thereby operating through plaintiff. Mr Grobler submitted that this particular approach was c not at all fatal to defend its case. To the contrary, defendant's case amounted to the following:

Plaintiff undertook to negotiate a contract of lease for the lease of the premises located at 143 Kusweg, Strand, in which the business undertaking to be acquired by first

defendant was situated. That defendants preferred to be the lessee rather than the sub-lessee does not run counter to this particular argument. The crux of the dispute did not concern the identity of the lessee but rather whether plaintiff was contractually obliged to ensure that a lease agreement would be concluded.

### **Principles Relating to Rectification.**

Since the decision in **Weinerlein v Goch Building Ltd** 1925 AD 282 our law has recognised that an action for rectification may be brought where there has been a mistake in the written document as a result of which the document does not correctly reflect the true intention of the parties to such contract. As Farlam AJA (as he then was) said in **Tesven CC v South African Bank of Athens** [1999] 4 ALL SA 396(A) 401 at para 16 ‘To allow the words the parties actually used in the documents to override their prior agreement or the common intention that they intended to record is to enforce what was not agreed and so overthrow the basis on which contracts rest in our law: the application of no contractual theory leads to such a result’. In **Tesven**, supra, the court considered whether the remedy of rectification was available in circumstances where the document correctly reflected the words which the parties intended to employ in the construction of the document but the document did not include the parties’ prior agreement or common intention which formed a critical part of the overall contract. In dealing with the court **a quo**’s decision that the parole evidence rule precluded a consideration of the prior oral agreement, **Farlam AJA** referred to the decision in **Mouton v Hanekom** 1959(3) SA 335 (A) it was held that it was admissible to rectify a written contract not because of the parties’ mistake as to what was recorded ‘but as to its effect, which was to prevent their oral agreement from

operating with their written contract’ (**Tesven** at para 17). **Farlam AJA** then went on to say ‘In the present matter also the signatories were mistaken as to what was contained in the documents signed by second defendant. The mistake which she says she and the plaintiff made wasn’t thinking that, despite the contents of those documents, the preceding oral agreements would still be operative. This mistake was clearly capable of rectification on the strength of the principle affirmed in **Mouton v Hanekom**’ (at para 18).

In a careful and incisive analysis of this area of law **Knoll J** said in **Brits v Van Heerden** 2001( 3) SA 257 (C) at 283 B raised the question of equity within this area of law. She then said ‘[i]t is my view that, although this Court may have no broad general equitable jurisdiction and cases must be decided on general principles of law, the equity is to be found in the remedy of rectification which has been expanded over the years to give full meaning to the basic principle on which it operates and that is that rectification may be granted where the written memorial of an agreement does not reflect the true **consensus** of the parties.’

I am somewhat uncertain as to the need for recourse to considerations of equity in such a case. The crisp question turns on the nature of that which was agreed between the parties . An examination of the content of the consensus prompts a consideration of the concept of **bona fides** which underpins contractual relationships. The concept of **bona fides** has proved to be somewhat illusive with regard to its definition and scope. See in particular **Lubbe** ‘Bona Fides, Billikheid en die Openbare Belang in die Suid Afrikaanse Kontrakte Reg’ 1990 Stellenbosch Law Review 7. Whatever the uncertainty , the principle of good faith must require that the parties act honestly in their commercial dealings . Where one party promotes its own interests at the expense of another in so unreasonable manner so as to destroy the very basis of consensus between the two parties, the principle of good faith can be employed to trump the public interest inherent in the principle of the enforcement of a contract.

This concept of good faith congruent with the underlying vision of our Constitution to the extent that our Constitution seeks to transform our society from its past, it is self evident that apartheid represented the very opposite of good faith. Concepts which were employed during apartheid lacked any form of integrity .Our Constitution seeks to develop a community where each will have respect for the other and in which integrity in government as well as in the exercise of power will be of paramount

concern. To rely on the strict written words of a contract and to ignore an underlying oral agreement which not only shaped the written agreement but which forms part of the essential consensus would be to enforce the very antithesis of integrity and good faith in contractual arrangements.

The onus lies on defendants to prove, on a balance of probabilities, that the conditions which they to have inserted into the contract formed part of the agreement into which they entered with plaintiff, in terms of which the business was acquired.

Within this context it is now possible to turn to the evidence of second and third defendants. In general, they testified in an honest manner. Second defendant did struggle to explain why he had signed the offer to purchase in such haste so that he omitted to ensure the inclusion of the condition regarding the lease agreement. Nonetheless, as Mr Grobler submitted, there was significant evidence to support second defendant's version that plaintiff undertook to obtain a lease in terms contained in defendant's the prayer for rectification. The correspondence generated by defendants and which formed part of the record, reflects a consistent theme of second defendant pestering plaintiff for a lease agreement. Very little if any contact took place between the representatives of SH Strand CC and defendants. By contrast, numerous letters and telephone calls were directed towards plaintiff in order to ensure that defendants obtained a lease agreement. When confronted with this documentation plaintiff's witnesses either equivocated or were unable to provide any satisfactory explanation as to their purpose in attempting to obtain the lease agreement or why defendant sought only to negotiate with plaintiff. For example, second defendant sent a handwritten fax on 23 February 1999 to Mr Rossouw which read as follows 'Na vele oproepe en gespreke met Mnr C van Tonder en K Barnard is ek nog nie in besit van 'n getekende huurooreenkoms nie. Graag word verneem wanneer die ooreenkoms geteken gaan word aangesien dit reeds vyf maande laat'. The addressee of this fax, Mr Rossouw denied that he had seen it, albeit that he accepted that it had been sent. The best that Rossouw could offer in evidence was that Barnard, whose office was adjacent to his, had taken the fax. This explanation still begs the question as to why second defendant faxed Mr Rossouw with regard to a lease agreement if the agreement between plaintiff and defendants never envisaged any involvement of plaintiff with regard to the conclusion of such lease agreement. The high water mark of plaintiff's explanation was that it sought to assist its franchisees. This explanation might have passed muster had no meeting taken place between representatives of plaintiff with Hirschfield and Fine in which the latter were informed of the former's rights in terms of the Palmer lease or the correspondence generated between second defendant, Maree and Barnard or the letters written by Wiese.

In keeping with the manner in which they testified, Messrs Barnard and Rossouw were extraordinarily vague as to the memorandum prepared by second defendant and faxed to the two executives of plaintiff on 3 August 1999 in which the issue of the lease agreement was raised. Rossouw denied that he had followed up on the question of the lease agreement although he said 'my groot punt was net oor die roomys kas wat



ek vir hom moet uitsorteer het. Volgens my die huurkontrak en goed is nie beding ons nie, dit is nie deel van ons goed nie’.

In his testimony, Barnard acknowledged that he had receipt of this document but that he did not discuss the matter with Rossouw neither did he attempt to reply to second defendant.

Although both men strenuously denied the veracity of the statements contained in second defendant’s memorandum neither appeared to have considered it necessary to contradict the document upon receipt thereof, nor did they deem it important to discuss the issue.

Whatever the status of the lease, plaintiff did consider it necessary to deal with the matter. In a letter of 8 March 1999 written by Barnard to Fine Brothers (Pty) Ltd regarding the rental agreement, he wrote ‘We refer to the above as well as numerous telephone calls by a Mr Sergio Martinengo. This matter is of great concern to us as well as Mr Klopper who is currently occupying the premises. We would appreciate it if you could inform us on the current situation and if you are prepared to negotiate a lease with our Franchisee. We wish to highlight the fact that Mr Klopper stands to lose (sic) his operation should he not enter into a lease agreement with the Landlord. ‘Notwithstanding the proclaimed policy of plaintiff not to get involved in the negotiation of lease agreements, it appears from this letter that the executive in charge of the entire franchise operation was concerned himself on ‘numerous’ occasions to telephone the owner of the property in order to secure the lease.

This approach is congruent with the attitude adopted by plaintiff at the meeting with Hirschfield and Fine that it had acquired the right to the Palmer lease by way of cession as well as the letter of 6 September 1999 in which Dr Wiese wrote to SH Strand CC and claimed ‘[d]ie regte en verpligtinge van die Huurder in terme van die huurooreenkoms aan die Koper oorgegaan in terme van klousules 8 en 10 van Huurooreenkoms’.

Mr van Tonder insisted that second defendant wished to negotiate without the assistance of plaintiff. When he was asked how it could be that second defendant would have been prepared to pay R600 000 on behalf of first defendant for a business without any contract of lease, Mr van Tonder said ‘Mnr Klopper het vir my gevra dat daar onder geen omstandighede ons die landlords alleen moet besoek nie....Hy het dit baie duidelik gestel dat hy saam met ons die landlords wil ontmoet en hy die onderhandelinge wil doen en as hy dan – Shoprite Checkers is nie ‘n mens wat sekere dinge – as hy na ‘n maand of twee maande terug gekom het en gesê het, kerels, ek het ‘n probleem, ek kry nie die huurkontrak nie, sou ons dadelik toegetree het hetsy om hom sy geld terug te gee of om vir hom ‘n huurkontrak te beding’.

By contrast the evidence reveals that, save for the initial meeting between Messrs Hirschfield, Van Tonder and second defendant, second defendant directed all his energies to plaintiff in order to secure a contract of lease.

In assessing the veracity of evidence, particularly that offered by plaintiff it is important to take account of the essential question raised in this dispute, namely which party was obliged to arrange for the conclusion of the lease. Defendants' case is based on the premise that plaintiff undertook to obtain a lease under which first defendant's right of occupation at 143 Kusweg, Strand would be secured.

The issue is not whether plaintiff or first defendant should be the lessee. The issue was whether there was an obligation on the part of plaintiff to secure a lease on behalf of defendants. Much of the argument raised by Mr Raubenheimer on behalf of plaintiff misconstrued this essential nature of the dispute in that it was based upon the contention that plaintiff had no intention of becoming a lessee. But that was not the basis upon which defendants' case rested. The case as presented in evidence of defendants together with the uncontested correspondence is indicative that, on the probabilities, plaintiff and defendant had agreed to contract for the sale of the Eight Till Late business on the basis that plaintiff would secure the necessary lease. Not only is this version congruent with the facts but it is also in keeping with ordinary commercial sense, namely the likelihood that a person would only spend R600 000 on such a business in circumstances where it was secure in the knowledge that it could continue to operate the business as a going concern in premises in which the business was housed. The alternative, that no such undertaking formed part of the agreement between plaintiff and defendants requires a reading of the correspondence generated by plaintiff which explains the extraordinary effort on its behalf to secure the lease as the actions of a generous Samaritan. It also requires an acceptance of evidence of van Tonder and Barnard both of whom proved to be unreliable witnesses for the reasons already set out above.

Once the dispute is so framed, the argument advanced by Mr Raubenheimer that rectification will not be granted if it would adversely affect the rights of innocent third parties, becomes inapplicable. Whatever terms may have been acceptable to SH Strand CC, the contractual relationship between plaintiff and defendants was predicated upon the conclusion of a lease agreement of the kind as set out in defendants' claim for rectification.

For these reasons the following order is made:

1. The written agreement in the Annexure A to defendants' counter claim is rectified as follows -

'Dit word spesifiek tussen die partye ooreengekom dat 8 Till Late (Shoprite Checkers (Edms)BPK) onderneem om 'n huurkontrak vir die huur van die perseel geleë te Kusweg 143, Strand, Wes Kaap en waarin die sake onderneming bedryf word vir en namens Bumpers Schwarmas Bk. te beding

met SH Strand Bk. as verhuurder, op dieselfde terme en voorwaardes as die huurooreenkoms ten aansien van die perseel tussen SH Strand Bk. as verhuurder en D W Palmer as huurder gedateer 15 Julie 1996 hierby aangeheg as bylaag “B” dog met die voorebehoud dat:

1. Die vermelde huurkontrak ‘n aanvang sal neem op 1 Oktober 1998 en sal strek vir ‘n periode van vyf jaar en wat aan Bumpers Schwarmas Bk. as huurder, die opsie verleen om die vermelde huurkontrak na verstryking van die vyf jaar periode gereken vanaf 1 Oktober 1998 te hernuwe vir ‘n verdere periode van vyf jaar;
  2. Dat die bedrag van die huurgelde betaalbaar onderling tussen die verhuurder en Bumpers Schwarmas Bk. ooreengekom sal word.’
2. Plaintiff is ordered to pay defendants costs.

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**DAVIS J**