

REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE No: 4268/2000

In the matter of

GLYNNIS ANNE STRYDOM

Plaintiff

and

THE BLUE OWL CC

Defendant

JUDGMENT DELIVERED : 14 AUGUST 2002

MOOSA, J:

INTRODUCTION:

1. Plaintiff instituted action against defendant for cancellation of a deed of sale in respect of a business known as The Blue Owl Restaurant and Take-aways ("the

business”). She claimed refund of R244 000,00 being part payment of the purchase against delivery of the business to defendant. Plaintiff’s claim is based on the non-fulfilment of a suspensive condition contained in clause 7.1 of the deed of sale, alternatively on the fraudulent misrepresentation by defendant that the business made a nett profit of R38 000 per month.

2. Defendant denied the basis of plaintiff’s claim. It pleaded that the suspensive condition had been fulfilled and that the monthly nett profit was R38 000 when it conducted the business. It counterclaimed payment of the balance of the purchase price due and payable in terms of the deed of sale.

3. As a preliminary relief, plaintiff claimed rectification of clauses 7.1.1, 7.1.2 and 7.1.3 of the deed of sale by inserting the word “written” between the words “existing” and “lease” wherever they appear in such clauses. Plaintiff averred that due to a **bona fide** mutual error, the word “written” was omitted from the deed of sale and the parties signed the written deed of sale in the **bona fide** but mistaken belief that it recorded the true agreement between the parties. Defendant denied the allegations and averred that an oral agreement of lease existed between it and the landlord, Mrs Osman.

RECTIFICATION:

4. It is trite law that where a written agreement does not reflect the true intention of the parties, any one of them can approach the court for rectification of the written

contract. The **locus classicus** is the case of **WEINERLEIN v GOCH BUILDINGS LTD** 1925 (AD) 282 in which the full bench settled the doctrine of rectification. One of the judges, **Kotzé, JA**, says at p 294/5 as follows:

“The doctrine of rectification of a written instrument is fully recognised in our South African practice, which grants restitution or relief upon any just ground.”

The learned judge continues on p 297:

*“...and it is derived, whence most equitable rules have originated, from the **Corpus Juris**.”*

5. A party who approaches a court for rectification must satisfy such court that
 - a) a contract was entered into;
 - b) the written document does not reflect the true intention of the parties; and
 - c) what the true intention of the parties was.

(KERR on **LAW OF CONTRACTS**, 6th edition at p 152.) The first requisite for rectification is that the error or mistake of the underlying agreement is a mutual one. In **TRUST BANK OF AFRICA LTD v FRYSCH** 1976 (2) SA (C) 337 at 338G, **Van Zijl, JP** made the following observation:

“If the Court were to order a contract to be rectified to include a term or to cover circumstances that had not been mutually agreed upon, the Court would not be ordering the rectification of the agreement but would be imposing upon the parties a contract

which had not been arrived at by their agreement-consensus, the foundation upon which all contracts, i.e. agreements, rest.”

Rectification may involve the insertion of a material clause or for that matter, in my view, a word which was omitted from the written agreement. (**TESVEN CC & ANOTHER v SOUTH AFRICAN BANK OF ATHENS** 2000 (1) SA 268 (SCA) at para 16.)

6. It is common cause that no written lease existed between defendant and the landlord of the premises. According to the undisputed testimony of Mr Osman, the spouse of the landlord, a written agreement of lease was prepared between the landlord and defendant, but such agreement was never signed by the parties. As far as he was concerned, an oral agreement existed and such oral agreement incorporated the terms and conditions contained in the written document. Mr Abel, the agent who brokered the deal between defendant and plaintiff, testified that he had assumed that the lease was a written one. He had made the assumption on the representation by Mr Abdullah, the spouse of the sole member, that defendant had a lease of 10 years. He testified that a lease of 10 years is usually in writing. Mr Abdullah testified that his relationship with the landlord was such that he could negotiate any period of lease.

7. The suspensive condition in the deed of sale is silent as to whether the existing lease is a written or an oral one. The deed of sale was negotiated between Mr Strydom and Mr Abdullah on behalf of the respective parties. Mr Strydom

was a lawyer by profession. He perused and approved the terms and conditions of the deed of sale. The deed of sale was prepared by Mr Abel, the broker. Mr Strydom must have satisfied himself that the terms of the deed of sale reflected the true intention of the parties. Mr Abdullah, in my opinion, must have been aware that no written lease existed other than an unsigned document purporting to be a lease agreement. Nevertheless, Mr Abdullah could have created the fiction that a written lease agreement existed. It was probably on the basis of such fiction that Mr Abel had assumed that a 10 year written lease existed, and Mr Strydom had assumed, that a written lease existed. In my view the most that such fiction could have constituted was a representation, but not necessarily a term of the deed of sale. Such representation could only have been elevated to a term of the deed of sale if there was **consensus ad idem**. The overwhelming evidence is to the contrary. In my view plaintiff has not established that it was a term of the deed of sale. The possibility that it was a representation as part of the negotiations leading up to the conclusion of the deed of sale cannot be excluded. In the circumstances plaintiff has failed to prove, on a balance of probabilities, that there was a **bona fide** mutual error that a written lease existed between defendant and the landlord. The claim for rectification of the deed of sale must accordingly fail.

REPRESENTATION WITH REGARD TO THE LEASE:

8. Plaintiff alleged in the alternative, that defendant represented to her that a written lease existed in respect of the business premises. Plaintiff claims that this

representation was false and was intended to induce her to purchase the business. Defendant denies the allegations and averred that the suspensive condition has been fulfilled inasmuch as plaintiff has been in occupation of the premises since April 2000 until February 2002.

9. It is also common cause that the terms of the existing lease were partially verbal and partially in writing. This ambiguity could have formed the basis on which Mr Abdullah founded the fiction that I mentioned earlier, that the lease was in writing. It could account for the fact that the deed of sale is neutral on the issue. It could have been a deliberate and calculated omission on the part of the parties. In any event, prior to the effective date of the sale, Mr Abdullah introduced Mr Strydom to Mr Osman to negotiate a new lease. In view of this, the significance of the existence of a written lease between defendant and the landlord paled into the background. The terms and conditions of the proposed new lease were discussed and agreed upon. Plaintiff signed the final draft of the proposed lease and returned it to the landlord's attorneys. Such lease was never signed by the landlord. Mr Osman explained that the landlord wanted collateral security as she feared that plaintiff would not be able to meet her financial commitments arising from the business as she had paid far too much for the business.
10. It is common cause that defendant had a lease of three years and an option of two years. It is not disputed that this was reflected in an unsigned lease between

the parties. Two of the three years had elapsed at the time of the sale. It is also common cause that plaintiff negotiated a lease of three years with a two year option. This is evidenced by a lease signed by plaintiff but not signed by the landlord. In reality therefore, the situation that obtained between defendant and the landlord with regard to the lease, was similar to that which obtained between plaintiff and the landlord. The only additional requirement the landlord imposed on plaintiff was the furnishing of collateral security. I do not think that such requirement was unreasonable in the light of the circumstances. In any event, plaintiff continued in occupation of the premises until she decided, for reasons beyond her control and to which I shall return later, to hand the business over to Mr Osman as representative of the landlord in February 2002.

11. Defendant's averments and submissions that the suspensive condition has been fulfilled, are not without merit. Firstly, plaintiff negotiated with the landlord for a new lease and the terms and conditions of such lease was settled save and except for collateral security; secondly, plaintiff took possession of the business on the effective date in terms of the deed of sale; thirdly, plaintiff paid the second tranche of the purchase price directly to defendant in spite of the protection afforded to plaintiff in the deed of sale that should the suspensive condition not be met, the monies shall be held in a trust account until compliance therewith. I am not convinced that the representation made by Mr Abdullah of the existence of a written lease, induced plaintiff to purchase the business. I am inclined to accept that plaintiff was induced to purchase the business on the strength of the

representation with regard to the nett profit and subject of course, to her securing a lease, whether it was the cession or assignment of the existing lease or a new lease. It is clear from the evidence that the parties opted for a new lease.

12. In the light of all the circumstances, I am not satisfied that plaintiff has discharged the onus of showing that defendant had made a material representation with regard to the lease which was false and which induced plaintiff to conclude the deed of sale. With regard to defendant's averment that the suspensive condition has been fulfilled, I am prepared to make such assumption in favour of the defendant without making a formal finding in respect thereof. The reason for it will become obvious in what follows later in my judgment.

REPRESENTATION WITH REGARD TO THE NETT PROFIT OF THE BUSINESS:

13. I now turn to discuss the representation made by defendant to plaintiff that the nett profit generated by the business was R38 000 per month. Plaintiff alleged that such representation was false, whereas defendant alleged that it was true. It is common cause that defendant through Mr Abdullah represented to plaintiff that the nett turnover of the business was R38 000 per month. Defendant admitted this allegation in the pleadings. The nett turnover is confirmed by Mr Abel who reflected it on the written mandate he received from Mr Abdullah on behalf of the defendant. It is re-affirmed in the advert that was placed by Mr Abel's brokerage firm in the "Argus" as per exhibit B2. The representation is also confirmed by the witnesses who testified for plaintiff and defendant. The court therefore finds as a

fact that defendant represented to plaintiff that the nett turnover of the business was R38 000 per month.

14. Mr **Eia** argued that the representation was a “puff” and not a material consideration (“**dictum et promissum**”) which induced the contract. I respectfully disagree. Both plaintiff and Mr Strydom who at all material times acted for plaintiff, testified that they were induced by the representation with regard to the nett profit to enter into the contract. Mr Strydom said in his evidence:

“Daar was net een sover dit my betref, een werklike voordeel van hierdie transaksie en dit was die netto inkomste. Daar was verskeie nadele ... maar omdat hierdie inkomste so fantasties was, het ons besluit, kom ons doen dit vir h paar jaar. Ons werk hard vir h paar jaar. Ons vat nou maar al hierdie nadele en ons maak vir ons h neseier bymekaar en dan verkoop ons weer die besigheid en dan kan ons rustig raak.”

15. A **dictum et promissum** is a material statement made by a seller to a buyer during negotiations, bearing on the quality of the **res vendita** and going beyond mere praise and commendations. It is upon the faith of such **dictum et promissum** that the buyer is induced to enter into a contract or pay the purchase price. On the conspectus of authorities that **Holmes, JA** referred to in the case of **PHAME (PTY) LTD v PAIZES** 1973 (3) SA 397 (A) at 417H-418A-

B, the learned judge summarised the relevant law as follows:

“1. The Aedilitian remedies (actio redhibitoria or actio quanti minoris, as the case may be) are available if the res vendite suffered from a latent defect at the time of the sale.

2. The Aedilitian remedies are also available if the seller made a dictum et promissum to the buyer upon the faith of which the seller entered into the contract or agreed to the price in question; and it turned out to be unfounded.

3. A dictum et promissum is a material statement made by the seller to the buyer during the negotiations, bearing on the quality of the res vendita and going beyond mere praise and commendation.

4. Whether a statement by the seller goes beyond mere praise or commendation will depend on the circumstances of each case. Relevant considerations could include the following: whether the statement was made in answer to a question from the buyer; its materiality to the known purpose for which the buyer was interested in purchasing; whether the statement was one of fact or of personal opinion; and whether it would be obvious even to the gullible that the seller was merely singing the praises of his wares, as sellers have ever been wont to do.

The representation with regard to the nett profit, in my view, was a material statement bearing on the quality of the business and went beyond mere praise of the business. I am satisfied that the representation was not a “puff”, but was a material consideration which induced plaintiff to conclude the deed of sale.

16. The next inquiry is whether the representation was true or false. Mr Strydom testified that, prior to plaintiff concluding the deed of sale, he asked Mr Abdullah for the financial statements of the business. Mr Abdullah informed him that it was a “cash business” and no financial statements are available. Mr Strydom then requested Mr Abdullah to get defendant’s bookkeeper to prepare a financial statement for his scrutiny. A meeting was arranged where the parties met with a Mr Khumalo, defendant’s bookkeeper. Mr Khumalo produced certain monthly financial statements. Mr Strydom could not verify the figures appearing on those

statements. Mr Abdullah also showed him a desk calendar which apparently reflected the daily takings in the form of a code. Mr Strydom testified that Mr Abdullah appeared to be very nervous about the financial statements. He said the financial statements cannot “lie around, people can go to jail for them”.

17. Mr Strydom testified that the goodwill of the business bore a relationship to the nett profit, and the goodwill agreed to by plaintiff was based on a nett profit of R38 000 per month. According to the monthly financial statements of plaintiff which were kept and prepared by Mr Strydom, the nett profit was as follows: April, 2000 - R18 114,00; May, 2000 - R6 102, 00; July, 2000 - R8 156,00; September, 2001 - R10 183, 00; October, 2001 - R20,00; November, 2001 - R2 028,00; December, 2001 - R16 324,00. Mr Strydom testified that the best trading months were April and December. Even during those two months, the nett profit was more or less half of the amount which defendant warranted.

18. According to the annual financial statements of defendant as at 29 February 2000, the nett profit of the business for the year ended February 1999 was R37 380 and for the year ended February 2000, R66 252. This represented an average monthly nett profit of R3 115 for the year 1999 and R5 521 for the year 2000. These figures are a far cry from the R38 000 per month warranted by defendant. What, however, is strikingly obvious is the fact that the gross profit for the year ended February 2000, as reflected in the annual financial statements, is R456 180. If this figure is reduced to the monthly average, it amounts to R38

012. This is the average gross profit per month and not nett profit. Mr Abdullah was adamant that he was not confusing the gross profit with the nett profit. The accounting officer's report which appears on the letterhead of By-laws Dealings CC, and forms part of the annual financial statements for the year ended February 2000, the following appears:

"We have determined that the financial statements are in agreement with the accounting records and have done so by adopting such procedures and conducting such inquiries in relation to the books of account and records as we considered necessary in the circumstances."

19. It is common cause that Mr Khumalo is attached to By-laws Dealings CC. None of the books of account and accounting records referred to in the aforesaid report were produced by defendant for purpose of the trial. According to Mr Abdullah these records, for some inexplicable reason, were destroyed. It was put to Mr Strydom under cross-examination that Mr Abdullah will testify that the financial statements for the year ending February 2000 was made available to him at the time of them negotiating the sale. Mr Strydom denied the allegation. He said that he saw the financial statements for the first time a few days before he testified. I accept Mr Strydom's testimony in this regard. The Strydoms would no doubt have had serious reservations about purchasing the business as the financial statements would clearly have indicated that the nett profit warranted by Mr Abdullah was palpably false.

20. Despite overwhelming evidence to the contrary, Mr Abdullah maintained that the nett profit of the business was R38 000 per month. It was pointed out to him under cross-examination that the financial records of defendant, for the two years it traded at the business, reflected an average monthly nett profit of R3 115, and R5 521. He testified that the figures were deflated to defraud the Receiver of Revenue. When the court pointed out the serious implications and consequences such testimony may have for him and his wife, he persisted with such evidence. The court adjourned to enable him to take legal advice on the matter. On the resumption of the cross-examination he elected not to answer certain incriminating questions. The court will return to this aspect later when it evaluates his evidence.
21. Defendant suggested various reasons why plaintiff did not obtain the desired result with regard to the nett profit. Firstly, when Mr Strydom confronted Mr Abdullah about the profitability of the business in early May 2000, Mr Abdullah retorted: *"I cannot help if that is the way you run the business"*. He placed the blame on the Strydoms for the manner in which they conducted the business. Mr Strydom explained that they continued conducting the business in the same manner as defendant did. Secondly, that the business had a reasonably large Muslim clientele and plaintiff had failed to obtain a *"halaal certificate"*. Mr Strydom indicated that a *"halaal certificate"* was issued by the relevant religious authority, but they had not uplifted such certificate. However, Mrs Strydom

testified that they had a letter from the Muslim Judicial Council indicating that the business complied with the halaal requirements. I might mention in passing that it was a special condition of the deed of sale that plaintiff had to conform to the terms laid down by the Muslim Judicial Council for obtaining a halaal certificate. I am satisfied that plaintiff complied with such requirement.

22. Thirdly, Mr Abdullah claimed that they ran the business as a family business. They did not draw salaries but lived off the business. The evidence is that the Strydoms also ran the business as a family business. Both of them were intimately involved in running the business. Fourthly, it was suggested that plaintiff gave the staff a substantial increase in wages immediately after she took over the business and thereby increased the expenditure of the business. Mr Strydom admitted increasing the salaries of the staff. He said he wanted to bring it to an acceptable level in order to have a loyal and satisfied staff. I am not convinced that such increase in salaries would have had an appreciable affect on the nett profit. Fifthly, that the quality of their products, particularly the steak burgers , was compromised. Mr Strydom denied this allegation and testified that they maintained the quality of their products throughout their trading operation at the business. Sixthly, that Mr and Mrs Strydom were never in the business. They came and went and entrusted the running of the business to the staff. Mr Strydom denied these allegations. He testified that he and his wife staggered their duties at the business in such a way that one of them was always in control of the business during trading hours.

23. I am of the view that Mr Abdullah was clutching at straws in order to advance reasons why plaintiff was not meeting the warranted nett profit. There was no foundation or evidence to justify such a conclusion. Mr Osman sounded sceptical when confronted with the figure of a nett profit of R38 000 per month. The business belonged to him and a partner before it was sold to defendant for R150 000. He had serious doubts and reservations that the business could generate a nett profit of R38 000 per month. He testified that the turnover of the business at the time it was sold to defendant was between R45 000 and R50 000 per month. His partner, Mr Mullagee had lived off the business. No salaries were drawn as the business did not generate any profit. He testified that the turnover of the business after he took the business over from the Strydoms was approximately R65 000 per month and the nett profit was approximately R4 000 per month. The irresistible inference the court draws from all the evidence is that the nett profit generated by plaintiff was due to the inherent limitation and weakness of the business and not due to any fault of plaintiff.
24. Defendant tendered no reliable evidence in rebuttal. The only person called to give evidence for the defendant was Mr Abdullah. He was a pathetic witness. He was evasive. He adapted his evidence when driven into a corner. He refused to answer certain legitimate questions put to him, on the grounds that it may incriminate him. He perpetuated the untruth that the nett turnover of the business was R38 000 by stating under oath that the nett profit reflected for the years ended 1999 and 2000 in the financial statement for the year ended

February 2000, was deflated to evade payment of taxes. He could produce no documents, books, records or financial statements to corroborate the performance of the business according to his representation and evidence. He could give no plausible explanation why he destroyed important documents that could have substantiated his allegations. He testified that he can destroy anything. He does not have to prove anything. He came across as arrogant. Mr Abdullah testified that he was a shrewd businessman of many years standing. It is not reasonable to expect of a businessman of his experience and standing to destroy financial records of a business. The court can only infer that if he did so, it was for an ulterior motive. In the present instance it was done to destroy vital evidence which would have been inconsistent with his representation that the nett profit was R38 000 per month.

25. It was put to Mr Abdullah under cross-examination that he had stated under oath in certain criminal proceedings, that the “Food Planet” was his business. He retorted that he could not remember. When Mr **Le Roux** referred him to the record of the criminal proceedings, he tried to explain by saying that it was a matter of speaking. He maintained that the business belonged to his brother-in-law who worked for a foreign embassy. He merely helped out at “Food Planet” for pocket money. He admitted that it was not true what he had said in the criminal matter about the business being his. Mr Abdullah did not impress the court as an honest and reliable witness.

26. In my view, he was thoroughly discredited. The court rejects his evidence, save insofar as it is not inconsistent with plaintiff's witnesses, proven facts and the probabilities in the case. I wish to pause here momentarily and say that the court does not believe his story that he deflated the figures in the financial statements in order to defraud the Receiver of Revenue. I am of the view that he wove the story in order to justify the fraudulent misrepresentation made by him with regard to the nett profit of the business. I am fortified in this conclusion, in the first place, by the fact that it is unlikely that Mr Khumalo who is a professional person, would have been a party to such unlawful conduct. This inference is reinforced by the fact that Mr Khumalo was not called as a witness by defendant. In the second place, the financial statements, according to the accounting officer's report, were prepared from books of account and records. In the third place, according to the evidence of Mr Abdullah, these books and records were destroyed for no plausible reason. In the fourth place, the probabilities militate against the sort of monthly nett profit that Mr Abdullah represented the business could generate.
27. Mr Strydom on the other hand, gave his evidence in a forthright manner. He made many concessions that were favourable to the defendant. His evidence was substantiated by documents produced by both plaintiff and defendant. It was also substantiated by the testimony of the other witnesses for plaintiff. He impressed the court as an honest and reliable witness. The court accordingly accepts his evidence. The evidence of Mrs Strydom was short. It is common

cause that most of the negotiations were between Mr Strydom and Mr Abdullah. Their respective wives played a minor role in the negotiations. Mrs Strydom substantially corroborated her husband in those matters in which she was involved. Her evidence is also accepted. Mr Abel and Mr Osman were impartial witnesses. Their evidence was not seriously challenged under cross-examination. The court found their evidence to be reliable and the court likewise accepts their evidence.

28. In the light of the proven facts and probabilities, the court is satisfied that the representation made by defendant to plaintiff with regard to the nett profit of the business was false. The court is further satisfied that defendant made such false representation to induce plaintiff to enter into the deed of sale. This conclusion is fortified by the fact that when Mr Abdullah discovered that the Strydoms had backed out of the proposed sale and had purchased another business, he was upset and persuaded them to reconsider. Defendant was even prepared to sacrifice the deposit of R10 000 which the Strydoms had paid as a deposit for the other business, namely, Wayne's Fast Foods. When this did not materialise, defendant even took over the rights and obligations of the plaintiff in the purchase of Wayne's Fast Foods.

APPROBATE AND REPROBATE:

29. Defendant raised two further defences. I will discuss them in turn. The first is

that plaintiff has affirmed the deed of sale and is therefore not entitled to cancel the sale. The second is that plaintiff is not able to effect restitution in integrum, in other words, to restore the subject matter of the sale to what it was at the effective date of the sale. Mr **Eia** submitted that an innocent party to a fundamental misrepresentation has an election to approbate or reprobate. He has an option to either stand by the contract or claim rescission. He submitted further that plaintiff by continuing to trade and by continuing to pay the rental on the leased premises, affirmed the contract. According to Mr **Eia** this is further reinforced by the fact that plaintiff tried to impose the restraint of trade condition in the deed of sale. Mr **Eia** argued that plaintiff is estopped from cancelling the deed of sale. The court might mention at this stage that it is precluded from considering the issue of estoppel as it was not pleaded. Defendant introduced a proposed amendment to its plea dated 19 March 2001 which incorporated a plea of estoppel, but such proposed amendment was not proceeded with and was superceded by defendant's amended plea dated 13 February 2002 which does not include a plea of estoppel.

30. With regard to the doctrine of election, the evidence is that when Mr Strydom discovered early in May 2000, that the business was not generating the nett income represented by Mr Abdullah, he had immediately confronted the latter. Mr Abdullah put the blame for the non-performance of the business on the Strydoms. Certain correspondence followed between the parties. By letter dated 23 May 2000 from plaintiff's attorneys to defendant's attorneys, plaintiff cancelled

the deed of sale and tendered the return of the business against repayment of the money paid to defendant in respect of the purchase price. By letter dated 9 June 2000, from defendant's attorneys to plaintiff's attorneys, defendant repudiated the cancellation. On 9 June 2000, plaintiff issued summons against defendant claiming the necessary relief in the matter. I am satisfied that plaintiff had exercised her election to reprobate within a reasonable period of time. In the matter of **BOWDITCH v PEEL & MAGILL** 1921 AD 561 at 572-3, **Innes, CJ** held that:

“A person who has been induced to contract by the material and fraudulent misrepresentations of the other party may either stand by the contract or claim rescission. (**VOET**, 4.3, Sections 3, 4, 7.) *It follows that he must make his election between those two inconsistent remedies within a reasonable time after knowledge of the deception. And the choice of one necessarily involves the abandonment of the other. He cannot both approbate and reprobate.*”

31. The plaintiff's conduct after the cancellation of the sale, was in no way inconsistent with such intention. She tendered the return of the business on refund of the monies paid. She refused to effect any further payments on account of the purchase price. I am satisfied that she continued conducting the business and paying the rental for the benefit of defendant so that she could preserve the goodwill of the business and the right of occupation and mitigate the

losses. In my view, it was the unlawful conduct of Mr Abdullah that diminished the goodwill and eventually led to plaintiff handing the business over to the landlord. The court does not agree with the submission by Mr **Eia** that plaintiff affirmed the deed of sale by trying to enforce the restraint of trade. It is clear from the evidence that the opening of “Food Planet” by Mr Abdullah had a negative influence on the viability of “Blue Owl” and accordingly on the preservation of the goodwill. Plaintiff was entitled to draw defendant’s attention to the restraint of trade clause. Defendant ignored the complaint. The fact that plaintiff did not proceed with court proceedings negates any conclusion that plaintiff had elected to affirm the deed of sale.

32. CHRISTIE on **THE LAW OF CONTRACT** (4th edition) sets out the innocent party’s right to cancel the contract as follows (p 332):

“Where an innocent party has made his choice, which he may do by express notification to the maker of the misrepresentation or by conduct indicative of his choice, he cannot, without the consent of the other party, change his mind because he would place the maker of the misrepresentation in an intolerable position. This principle of irrevocability of choice, has been expressed in a number of more or less picturesque phrases; the innocent party is put to his election; he cannot both approbate and reprobate; he cannot blow hot and cold, he cannot have his cake and eat it.”

Plaintiff had exercised her election to reprobate and clearly expressed her

intention to defendant in writing. She could not approbate thereafter without the consent of defendant. There is no evidence of such consent whether expressed or by implication. These two remedies are, however, mutually exclusive and the overwhelming evidence is that plaintiff had irrevocably reprobated. (See **THOMAS v HENRY & ANOTHER** 1985 (3) SA 889 (A) at 896A-E.)

33. Mr **Eia** made great play of the fact that when plaintiff communicated her election to defendant in writing, she qualified such election with the words *“insofar as this may be necessary”*. This qualification must be seen against the background of plaintiff’s case. Her case was firstly based on the allegation that the sale was null and void by virtue of the non-fulfilment of the suspensive condition. Alternatively, if the court held the sale was valid, she pleaded that she had exercised her right to repudiate the contract. The qualification was dependent on whether or not the court granted the first remedy. The argument of Mr **Eia** on this point is, in my view, without merit.

34. The onus to prove that plaintiff has affirmed the sale after having reprobated, is on defendant. In **LAWS v RUTHERFORD** 1924 AD 261 at 263, **Innes, CJ** said as follows:

“The onus is strictly on the appellant. He must show that the respondent with full knowledge of his right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it.”

(See also **VAN SCHALKWYK v GRIESEL** 1948 (1) SA 460 (A) at 473; **FEINSTEIN v NIGGLI AND ANOTHER** 1981 (2) SA 684 at 698B-H.)

In my view, defendant has failed to prove on a balance of probabilities that plaintiff had an unequivocal intention to approbate after having reprobated.

RESTITUTION:

35. As a general rule, a party who seeks rescission of a contract of sale on the grounds of fraudulent misrepresentation, must restore to the other party the “merx” or the “**res vendita**”. **Restitutio in integrum** forms an integral part of such rescission. (**FEINSTEIN v NIGGLI AND ANOTHER** (*supra*) at 700F-H-701A-C.) It is common cause that plaintiff is no longer in possession of the business. She handed the business over to the landlord. Mr Osman testified that he and a partner is presently running the business. He admitted that the fixtures, fittings and equipment are still in the business. He was evasive when asked whether the premises in which the business is located, was available for letting to either party if the matter was finalised in court. He said any party was free to negotiate with the landlord.

36. Mr **Le Roux** submitted that restitution can be effected. He said that, according to the evidence, the fixtures, fittings and equipment are at the business; the name and goodwill are available and the stock can be restituted. He argued that the premises did not form a composite part of the business and defendant can trade under the same name at other premises. I disagree. The premises,

particularly its location in the present instance, forms an integral part of the business. The evidence is that the business was in existence at the premises for more than 38 years. It has a strategic location and was described as a landmark. Considerable goodwill is therefore attached to the business at the premises and such goodwill, in my opinion, would diminish in value if the business were moved to other premises. Not only would the business have to be redeveloped at the new premises, but it will have to contend with competition with the business at the existing premises.

37. Mr **Eia** submitted that plaintiff is not in a position to effect restitution as she is no longer in possession of the business. Moreover, while the business was in her possession, it deteriorated and the value thereof depreciated. There is no evidence that the business deteriorated as a result of the fault of plaintiff. The return of the business was tendered to defendant a few weeks after plaintiff took possession thereof, but defendant refused to accept such tender. The evidence was that Mr Abdullah from very early on, tried to disrupt the smooth operation of the business. He interfered with the staff of plaintiff by inciting them to strike. He intimidated the Strydoms. He opened the “Food Planet” in competition with the “Blue Owl” about 300 meters away. If anyone were to be blamed for the deterioration of the business and depreciation of the value of the business or the closure of the business, then it must squarely fall on the shoulders of Mr Abdullah as agent of defendant. In my view the plaintiff tried her best to preserve the assets of the business, but defendant, through the conduct of Mr Abdullah, made

such task difficult if not impossible. Defendant must therefore bear the consequences of such conduct.

38. The rule of **restitutio in integrum** is founded on the principle of equity and justice. In a number of varying circumstances, our courts have departed from the strict application of the rule and, where necessary, have adjusted the deficiency by monetary compensation. (See **FEINSTEIN v NIGGLI AND ANOTHER** (*supra*) at 700H-701A-C.) One of the defences raised by defendant was that plaintiff could not effectively reconstitute and place defendant in the **status quo ante**. In terms of the deed of sale, the subject matter of the sale was (a) the fixtures, the fittings and equipment; (b) the goodwill, including the right to continue under the present trade name and (c) the stock in trade as contained in the business. It is unfortunate that the parties did not make an inventory of the tangible assets which defendant sold to plaintiff. According to Mr Strydom these items were left in the care of Mr Osman when he returned the premises to the landlord. Mr Osman confirmed this and said that these items could be uplifted from the premises. Mr Strydom estimated the stock in trade at R20 000 when plaintiff took possession of the business from defendant. Mr Abdullah confirmed this figure.

39. Insofar as the fixtures, fittings and equipment are concerned, the court is satisfied that plaintiff can effect restitution thereof. With regard to the goodwill, firstly, plaintiff can effect the restitution of the trade name. Secondly, the goodwill was

not worth the value placed on it by defendant. The court found that the nett profit as represented by defendant, was false. The court is satisfied that the value of the goodwill, amongst other factors, is determined by the nett profit generated by a business as pointed out by Mr Strydom. Thirdly, the court found earlier that Mr Abdullah had deliberately and intentionally, by his unlawful conduct, substantially destroyed whatever was left of the goodwill after plaintiff tendered the return of the business to defendant. In this respect, defendant was the author of its own misfortune and must accordingly bear the consequences. Insofar as the stock in trade is concerned, it was disposed of in the normal course of business as contemplated and is no longer available for return. The court will have to make an adjustment of the deficiency by making an award for monetary compensation in the sum of R20 000. As far as payment by plaintiff to defendant is concerned, defendant admitted in its plea that it received from plaintiff the amount of R234 000. The court will bear these figures in mind when making its order.

COSTS:

40. In view of my findings, it is not necessary to make a decision in respect of the claim in reconvention. As far as costs are concerned, Mr **Le Roux** submitted that the wasted costs occasioned by the postponement to enable defendant to obtain a new set of attorneys and counsel, should be borne by defendant's attorneys on an attorney and client scale. After the commencement of the trial, defendant fired both his attorneys and counsel who appeared for it at the time. Subsequently defendant retained the same attorneys, but appointed new

counsel. No blame could be attached to plaintiff for the postponement. She was, in fact, prejudiced thereby and there is no reason why she should not be compensated for such prejudice by a suitable award as to costs. I do not think that defendant's attorneys could be blamed for them being fired and thereafter being rehired. In my view, no case has been made out by plaintiff for a **de bonis proprius** costs award against the attorneys for defendant and such request is accordingly refused. However, I am satisfied that plaintiff is entitled to costs on an attorney-client scale in respect of the wasted costs occasioned by the postponement to enable defendant to obtain new attorneys and counsel. Mr **Le Roux** submitted further that in view of Mr Abdullah's demeanour in the witness box and the fact that he had been purveying deliberate untruths, the court should express its displeasure by making an award for costs against defendant on an attorney and client scale. It is clear from the evidence that the relationship between the parties has soured. Both parties feel that they have been aggrieved by the other. It would be unfair to penalise defendant. As far as costs are concerned, I intend making the usual order that costs follow the outcome.

ORDER:

41. In the result there shall be judgment for plaintiff in the sum of R234 000 (two hundred and thirty four thousand rand) less R20 000 (twenty thousand rand) against delivery to defendant of the fixtures, fittings, equipment and all movable trade names which formed the subject matter of the sale. Defendant is ordered to pay plaintiff's costs on a party and party scale, save and except the wasted costs, occasioned by the postponement to enable defendant to obtain the

services of new attorneys and counsel, which shall be paid on an attorney and client scale. The claim in reconvention is dismissed with costs.

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