

SOUTH AFRICA / JUDGMENT

De Sousa v Vermaak and Another (11321/2012) [2013] ZAGPPHC 120 (15 May 2013) [2013] ZAGPPHC 120

COURT

North Gauteng High Court, Pretoria

BEFORE

H J De Vos

CASE / FILE NUMBER

11321/2012

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

CASE NO: 11321/2012

DATE:15/05/2013

In the matter between:

A A G DE SOUSA..... APPLICANT

and

P J VERMAAK..... FIRST RESPONDENT

Y WENG.....SECOND RESPONDENT

EX TEMPORE JUDGEMENT

DE VOS J

[1] It is common cause that the Applicant is the lawful lessor of a property situated at 164 Bloed Street Pretoria. An agreement of sub-lease was concluded between the Applicant and the First Respondent. Prior to the sub-lease entered into between the Applicant

and the First Respondent, the Applicant obtained the permission of the Pretoria City Council (the owner of the property) to sub-lease a portion of the premises on condition that the Applicant remained responsible for the conduct of the sub-lessee, and that any agreement of lease that might be concluded would be subject to the provisions of the written agreement entered into between the Applicant and the Council as set out in their written lease agreement.

- [2] The Applicant is seeking a cancellation order against the First Respondent and an eviction order against the First and Second

Respondents. The eviction order pertains to the premises which form the subject matter of the sub-lease agreement as well as to any other persons holding rights to the premises under the First Respondent.

- [3] It is common cause that on 25 July 2005 the Applicant and the First Respondent entered into a written agreement of sale of a business know as Champion's Tavern and Restaurant. This agreement of sale is not germane to the present application. Simultaneously, with the conclusion of the agreement of sale in respect of the said business, the Applicant concluded a sub-lease agreement with the First Respondent also dated the 25th July 2005.
- [4] The material terms of the sub-lease agreement were that the leased premises comprised of a shop situated at 164, 170 and 172 Bloed Street, Pretoria, together with some outbuildings. The lease commenced on the 1st August 2005, and would endure for as long as the main lease agreement between the Applicant and the City Council of Pretoria was not cancelled. It incorporated the terms of the head lease. There was agreed upon a monthly rental and an annual increase of 10% per year in the amount of rental to be paid as from the 1st January 2006, and yearly thereafter.
- [5] The First Respondent at some stage sub-let the premises or a portion thereof, with permission of the City Council, to a tenant. The sublease was subject to the conditions contained in the main lease and sublease. When the matter was heard, the First Respondent
- informed the Court that both the First Respondent and the sub-lease tenant had vacated the premises on account of the fact that the First Respondent had disposed of the business that was being conducted from the premises. The First Respondent contended that a third party/the Second Respondent, Yuhui Weng has concluded a new lease agreement in his own name with the City Council for the said premises.
- [6] The Applicant's case is that the First Respondent was not entitled to sub-lease the premises or any portion thereof, or to cede, transfer or alienate the leased rights without the Applicant's written consent, as set out in Clause 9 of the sublease agreement. Various other terms and conditions are contained in the contract. I do not regard them as relevant at this stage.
- [7] The Applicant contends that during the existence of the sublease he experienced problems regarding the sub-lease with the First

Respondent. There were numerous incidents where the Applicant complained to the First Respondent. According to the Applicant these

complaints were not properly complied with. The First Respondent denies these allegations. Eventually the Applicant approached an attorney and they prepared a letter addressed to the First Respondent with the object that the First Respondent should obtain a lease in his own name from the City Council of Pretoria. The First Respondent failed to obtain such a lease in its own name within thirty days of 21 October 2011, i.e. the time set in the Applicant's attorney's letter to obtain such lease.

[8] On the 10th November 2011, the Applicant was informed by the First Respondent's attorney, Mr Blom, that the First Respondent had sold the business and that his client wanted to negotiate a cession of the lease agreement into the name of the

new purchaser. A cession document was also attached to that letter. It is common cause that the Applicant refused to sign the cession document.

[9] On the 16th November, Mr Blom addressed a further letter to the Applicant's attorney denying that the Second Respondent was in arrears with his rental obligations. The effect of these letters were that on the 29th November 2011, the Applicant gave notice to the First Respondent that he was in breach of the provisions of the sub-lease agreement on the ground that he has given possession of the property to the Second Respondent - who has purchased the First Respondent's business - and that the sub-lease agreement will be cancelled if such breach was not rectified within two days. The lease agreement between the Applicant and the First Respondent was subsequently cancelled on the 7th December 2011 by the Applicant after the First Respondent's domicilium was changed to his attorney, Mr Blom's, address.

[10] It is clear from the papers that there was a breach of the lease agreement between the Applicant and the First Respondent. On 21 October 2011 the Applicant's attorney notified the First Respondent to obtain his own lease for the premises from the Council within 30 (thirty) days. On that condition the Applicant is prepared to cancel the lease in the First Respondent's favour. On the 9th November 2011 the Applicant's attorney wrote a further letter to the First Respondent notifying the First Respondent that the monthly rental is in arrears and has not been paid for a period of two months. The First Respondent was notified that upon failure to comply with the terms and conditions of the agreement, the Applicant will proceed to cancel the agreement. On the 29th November 2011 the Applicant's attorneys wrote a further letter to the First Respondent informing him that he was in breach of the agreement as appears from paragraph 3 thereof. This letter was properly served on the First Respondent's attorney by e-mail on 2 December 2011. The Second Respondent admits in his opposing affidavit that he is now occupying the leased premises. Such occupation was in breach of clauses 6.1 and 6.2 of the sub-lease agreement. The Applicant is correct in stating that the First Respondent was in default when the contract was cancelled on 7 December 2012. The contract could not be transferred or alienated or sublet or ceded to the Second Respondent or any other person at any stage. The Applicant was therefore entitled to cancel the contract, which he did. The First and/or Second Respondents, who purchased the First Respondent's business, are apparently still in possession of the said premises and refuse to

give occupation back to the Applicant. I say this for the apparent reason that the Applicant is not obliged to contract with the new owner, nor is he obliged to cede the existing lease agreement to anyone.

- [11] At this hearing, the Second Respondent was represented by counsel. I made mention that no heads were filed on behalf of the First or the Second Respondents when the matter was set down for hearing and therefore the Respondents did not comply with the Rules of Practice of this Court.
- [12] This morning, counsel for the Second Respondent attempted to hand in a statement prepared by the Second Respondent in which it is stated that he, the Second Respondent, is now in possession of the premises and that he obtained the permission of the City Council to proceed with the lease agreement in his name. The Applicant denies that the Second Respondent obtained the permission of the City Council to occupy the premises. The said statement was not accompanied by a proper application to join the proceedings in terms of the Rules of Court. In any event, the lease agreement between the Applicant and the City Council has not been cancelled and is still in existence.
- [13] There is no explanation as to why the Second Respondent's statement should be taken into account by the Court, or that I should deal with it. I accordingly refused to accept that statement. That leaves me with the version of the Applicant before me. There is nothing to contradict his version that the sub-lease agreement between himself and the First Respondent was lawfully cancelled on the ground that the First Respondent transferred occupation of the premises to the Second Respondent. Under the circumstances the Applicant is entitled to an order as set out in the notice of motion.
- [14] Insofar as the counter-application is concerned, an order is sought against the Applicant to sign a cession document. There are no merits in the counter-application and/or allegations made by the First Respondent in his opposing papers. Regarding the cession, it is common cause that the cession document was not signed by the Applicant. The First Respondent's attorney, in his letter dated 10 November 2011, addressed to the Applicant's attorney, said "we now want to negotiate the cession of the lease agreement". This proposal was obviously not accepted by the Applicant. In its counter-application the Second Respondent contends that he has retention for necessary and useful improvements made to the property. This was done without the written consent of the Applicant. In terms of the sub-lease agreement the only remedy available to the Second Respondent is to dismantle the improvements and to return the property to the Applicant in the state that it was when it was let. Therefore the counter-application must be dismissed.

I THEREFORE MAKE THE FOLLOWING ORDER:

1. Declaring that the agreement of sub-lease concluded between the Applicant and the First Respondent on the 21st July 2005 is cancelled

and no longer of any force and/or effect.

2. That the First and Second Respondents and all persons in occupation of the properties situated 164 Bloed Street, Pretoria, hereinafter

referred to as the property, are to vacate the property within 7 days of the date of the granting of this order.

3. That in the event of the First and Second Respondents not vacating the property within 7 days of the date of the granting of this order, the Sherriff of the High Court is hereby authorised to do all things and take all things as may be necessary and required to evict the First and Second Respondents and all persons holding title and occupation of the property by, through or under the First and Second Respondents from the property.
4. That both the First and Second Respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.

H J DE VOS

JUDGE OF THE NORTH AND SOUTH GAUTENG HIGH COURT

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