

SOUTH AFRICA / JUDGMENT

Pienaar t/a KTS Boerdery v Pienaar and Others (40/2016) [2017] ZANWHC 50 (29 June 2017) [2017] ZANWHC 50

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

40/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE

NO: 40/2016

In

the matter between:

MATTHYS
MACHIEL PIENAAR
t/a
KTS
BOERDERY Plaintiff
and
SANETTE
ALWIENA PIENAAR 1st
Defendant
NGAKA
MODIRI MOLEMA
DISTRICT
MUNICIPALITY 2nd
Defendant
DATE

OF HEARING: 13 JUNE 2017
DATE

OF JUDGMENT:	29 JUNE 2017 COUNSEL
FOR THE APPLICANT:	ADV. P SMIT COUNSEL
FOR THE RESPONDENT:	MR. S MOSES

JUDGMENT

HENDRICKS J

Introduction

- [1] The first defendant and Mr. Pienaar is married. The plaintiff is their son. The first defendant and Mr. Pienaar acquired a plot in Burhmansdrift outside Mahikeng. This property is registered in the plaintiff's name in the Deeds Office, Pretoria. The first defendant and Mr. Pienaar experienced turbulence in their marriage relationship which ultimately led to a separation. The first defendant moved out of the communal home during December 2013 and stayed in a flat in Mahikeng. Divorce proceedings were instituted and are still pending between the first defendant and Mr. Pienaar. The plaintiff approached the first defendant and requested her to move into the house on the plot at Burhmansdrift. The first defendant obliged and the plaintiff assisted her to move into the house on the plot.
- [2] Apart from the house on the plot, there are also a tuck-shop and a tavern situated on the same property and in closed proximity to the house. Whilst occupying the house, the first defendant continued to operate and manage the tuck-shop and the tavern. There was an agreement between the first defendant and Mr. Pienaar that the first defendant will be responsible for the monthly payment of the electricity bill of Escom. This agreement was in place even before the plaintiff requested the first defendant to move into the house on the plot.
- [3] At the end of January 2015 Mr. Kallie Prinsloo, the boyfriend to the first defendant, moved in and stayed with the first defendant in the house on the plot. Relationships between the plaintiff and the first defendant (as well as Mr. Kallie Prinsloo) took a turn for the worst. The first defendant approached this Court on an urgent basis to have the electricity supply to the plot restored when it was terminated by the plaintiff. As a result of the sour relationship and occasional spats and aggression displayed by the plaintiff towards the first defendant and Mr. Kallie Prinsloo, they decided to move out of the house. The first defendant however continued to occupy and run the tuck-shop and the tavern. Unhappy with the presence of the first defendant on the premises of his plot, the plaintiff instituted an action against the first defendant and the Ngaka Modiri Molema District Municipality in which he prays inter alia for ejectment of the first defendant from the tuck-shop and tavern, as well as other ancillary relief. The Ngaka Modiri Molema District Municipality abide the decision of this Court.

- [4] On 29th March 2017 Leeuw JP granted an order, by agreement between the parties, in the following terms;

"IT IS ORDERED

(By Agreement)

1. THAT: The First Defendant and any person occupying through First Defendant vacate the property known as T & S Tavern and T&S Tuckshop ("the property") the Plaintiff's property, situated on PLOT 105, GROOTVALLEI 94 JO, BUHRMANSDRIFT, NORTH WEST PROVINCE on or before the 15th day of JUNE 2017;
 2. THAT: In the event first Defendant fail to vacate the property as described in paragraph 1 above and in the manner as set-out in paragra above, the Sheriff be and is hereby authorised to forthwith remove and/or evict First Defendant and any person occupying through first Defendant from the property, or cause such eviction to be effected with assistance of the South African Police Service;
 3. THAT: The matter be and is hereby postponed to the 13th day of JUNE 2017 for trial and adjudication of prayers (a), (e), (f), (g), (h), (i) and (j) of claim 1 as contained in Plaintiff's particulars of claim;
 4. THAT: Costs incidental to and occasioned by the postponement be reserved for arguments."
- [5] The relief referred to in paragraph [3] of the aforementioned order as contained in the amended particulars of claim are the following:

Wherefore Plaintiff claims:

- (a) An order for confirmation of cancellation of the oral lease agreement between the parties alternatively cancellation of said agreement;
- (b) An order ejecting First Defendant and any person occupying through First Defendant from the T&S Tavern and T&S Tuckshop ("the property") situated on PLOT 105, GROOTVALEI 94 JO BUHRMANSDRIFT.
- (c) An order determining on which date First Defendant and any person occupying through First Defendant must vacate the property;
- (d) An order authorising the Sheriff and/or his deputy to remove First Defendant and any person occupying through her should the premises not be vacated on the date as sought in prayer (c) above;
- (e) Payment in the amount of R96 000.00;
- (f) Payment of interest on the amount in prayer (e) hereof at the rate of 9% per annum a tempore morae;

- (g) Payment of R4500.00 per month from May 2015 to date of order,
- (h) Payment of interest on the amount in prayer (g) hereof at the rate of 9% from date of judgment;
- (i) Costs of suit on the scale as between attorney and client;
- (j) Further and/or alternative relief.”

It is the claim for the aforementioned relief which was before this Court on 13th June 2017 for adjudication.

The

Issues

[6] The issues for determination by this Court are:

- (i) whether there was an oral agreement of lease of the property (the plot) as a unit between the plaintiff and the first defendant;
- (ii) what the terms and conditions of the oral lease agreement was, if there was such an agreement;
- (iii) whether the first defendant is indebted to the plaintiff for arrear rental of the property (the plot);
- (iv) what amount, if any, is due by the first defendant to the plaintiff as arrear rental of the property (the plot).

The Plaintiff's case

- [7] The plaintiff testified and made it common cause that he is the son to the first defendant, his mother, and Mr. Pienaar. He admitted that he approached the first defendant, his mother, to rather stay in the house on the plot than in a flat in Mahikeng town. The first defendant moved into the house on the plot during December 2013. There was an initial agreement between the first defendant and Mr. Pienaar, his father, that the first defendant is responsible for the monthly Escom electricity bill which must be paid regularly. According to him, there was an oral agreement of lease of the property entered into between him and the first defendant. The terms of the oral agreement was that the first defendant would lease the property (the plot) as a unit from the plaintiff at an amount of R3500.00 payable monthly.
- [8] When Mr. Kallie Prinsloo moved in with the first defendant, the rent escalated with R1000.00 per month to an amount of R4500.00. It is the case of the plaintiff that no rent was paid for the period that the first defendant and later also Mr. Kallie Prinsloo stayed on the property until they moved out. Furthermore, they moved out without any prior notification of them vacating the property at the end of April 2015. The loss in arrear rental amounts to R96 000.00 calculated at the rate of R3 500.00 per month for the period of March 2013 to March 2014 and at R4 500.00 per month for the period April 2014 to April 2015. This is how the

amount of R96 000.00 is computed.

- [9] During cross-examination the plaintiff stated that he is unaware of the exact detail of the agreement between the first defendant and Mr. Pienaar, his father, with regard to the Escom account payments. According to him, his father Mr. Pienaar was in charge of the property by then. This agreement between the first defendant and Mr. Pienaar could not continue because they were not on speaking terms. He testified that it was not the agreement that the first defendant would only pay the Escom electricity account on a monthly basis. There was a stage when he consulted his attorneys of record in order to enter into a written agreement of lease with the first defendant because of the problems he encountered with her and Mr. Kallie Prinsloo. This proposed written agreement never materialized because the first defendant refused to sign same. When he demanded the arrear rental from the first defendant she said that she would pay him his money as soon as the divorce is finalised. This he accepted.
- [10] The plaintiff also called Mr. Clayton Harrison, a valuator, as a witness. His evidence is to the effect that the market related lease of the house on the property is R5000.00 per month and the market related lease of the shop (tuck-shop and tavern) is R3000.00 per month. This evidence was presented in relation to prayers (g) and (h) of the amended particulars of claim in which an amount of R4500.00 per month is claimed from May 2015 to date of judgment/ order of this Court plus interest. This is for first defendant's continued occupation of the tuck-shop and tavern even after they vacated the house. The evidence of Mr. Harrison is uncontested.

The First Defendant's case

- [11] The first defendant testified that the plaintiff approached her and asked her to move into the house on the plot. This was in December 2013 after she had moved out of their common home due to the pending divorce proceedings between her and Mr. Pienaar, her husband. She obliged and the plaintiff assisted her in the removal of her movable property. By then, one Tinus Buys was staying in the house on the plot. She shared the house with Tinus Buys until he moved out during
2015. She was all along in occupation of the tuck-shop and tavern. She bought the tuck-shop from Hans and Alida Steyn for R10 000.00. She caused the tavern to be built with her money. She had an agreement with her husband that she would pay the Escom electricity bill every month, which she did. She did not pay any rental to her husband for the tuck-shop and tavern.
- [12] When she moved into the house on the property, she was under the impression that the agreement that existed between her and her husband will continue and that is why she kept on paying the Escom electricity account on a monthly basis. There was no oral agreement of lease entered into between herself and the plaintiff. She confirmed that Mr. Kallie Prinsloo, her boyfriend, moved in and stayed with her in the house on the property. The relationship between herself and the plaintiff deteriorated to the extent that he, as her biological son,

even resorted to violence against her and Mr. Kallie Prinsloo. The assaults and threats of further assaults caused her and Mr. Kallie Prinsloo to vacate the house. She denied that she is indebted to the plaintiff for arrear rental for the house and for the continued occupation of the tuck-shop and tavern. She made it common cause that she launched an urgent application in this Court for the electricity supply to be resorted to the property in question.

[13] During cross-examination it was pointed out to the first defendant that her viva voce evidence in this Court is in contrast to what is contained in the affidavits she deposed to under oath in the urgent application she instituted for the restoration of the electricity supply to the property. In her affidavits she stated under oath that there was an oral lease agreement in place between herself and the plaintiff. This is in contrast to what she testified in this Court. Her explanation was to the effect that because she trusted her attorney who drafted these affidavits, she merely signed it without reading through it.

[14] It was also pointed out to her that in these affidavits she stated that she paid R5000.00 per month to the plaintiff as rental for the house whereas she testified in this Court that she never paid any amount to the plaintiff as rent. Her explanation was that the R5000.00 was an amount of money that she gave to the plaintiff as her son. She had at one stage contractors who lodged with her on the property and for whom she provided meals. The income she derived from this, she shared with the plaintiff. This is where the amount of R5000.00 comes from.

[15] She also explained further that the R5000.00 is not for the rent but it is an average of the monthly payment of the Escom electricity

bill, which ranged between R4000.00 to R6000.00 per month. This Escom account was never in her name. Mr. Pienaar in whose name presumably the Escom account was, would send a texted message (sms) on her cellular phone of the amount that she had to pay to Escom for electricity. This was done on a monthly basis. The amounts so sent were also incorrect to the extent that the Escom account was in credit to the tune of over R10 000.00.

[16] She denied that there was a further oral agreement between herself and the plaintiff that the monthly rental would escalate with R1000.00 per month after Mr. Kallie Prinsloo moved in with her. She deny ever seeing a written lease agreement which the Plaintiff

proposed should be entered into between them. She denied that she ever said to the plaintiff that she would pay him his money for the rent after her divorce with Mr. Pienaar is finalised.

Evaluation of the evidence

[17] In determining whether or not an oral agreement of lease existed between the plaintiff and the first defendant, this Court should have regard to the evidence tendered as well as the contents of the discovered documents. In the affidavits deposed to by the first defendant in support of the application to have the electricity supply to the property restored, the first defendant repeatedly refer to an oral lease agreement that was in place between the plaintiff and herself. As an example to illustrate this point, the first defendant mentioned in her

affidavit that the rental would increase with R1000.00 per month after Mr. Kallie Prinsloo moved in and stayed with her. This is exactly what the plaintiff testified. This is also borne out by the correspondence between the respective attorneys of the plaintiff and first defendant.

- [18] The first defendant in her affidavit stated that she paid R5000.00 to the plaintiff for rental. This amount is higher than the R3500.00 which the plaintiff said they agreed upon verbally as the amount of rental to be paid by the first defendant. It is even higher than the R4500.00 that should have been paid as the escalated rent after Mr. Kallie Prinsloo moved in and stayed with the first defendant. The explanation by the first defendant that this is an average amount that she paid towards electricity on the Escom account is highly improbable. First of all, her evidence in this Court is that Mr. Pienaar, on a monthly basis, would send a texted message (sms) with the amount to be paid to Escom for electricity. If this is true, then the question arises as to why would an average amount of R5000.00 be paid when the exact amount that is due to Escom, is monthly communicated to her by Mr. Pienaar? Secondly, this is in contrast with the contents of the letter which her attorney sent to the plaintiff's attorney.
- [19] The probabilities favour the plaintiff that there was indeed an oral agreement of lease entered into between the plaintiff and the first defendant, in terms of which the first defendant would pay an amount of R3500.00 as rent. This amount escalated with R1000.00 per month to R4500.00 after Mr. Kallie Prinsloo moved in and stayed with the first defendant. The first defendant and Mr. Kallie Prinsloo vacated the house at the end of April 2015. In my view, the first defendant is indebted to the plaintiff in the amount of R3500.00 per month for the period that she stayed alone and R4500.00 per month for the period that Mr. Kallie Prinsloo stayed with her until they vacated the house at the end of April 2015.
- [20] It is common cause that after the first defendant (and Mr. Kallie Prinsloo) vacated the house, she remained in occupation of the tuck-shop and tavern until 29th March 2017 when the order referred to in paragraph [4], supra was granted by Leeuw JP. There was however no agreement in place between the plaintiff and the first defendant that the tuck-shop and tavern will be leased quite apart from the house. On the plaintiff's own version the rent was R3500.00 and it was not specified that this amount was only for the house excluding the tuck-shop and tavern. The plaintiff testified also that it is extremely difficult to lease the house separate from the tuck-shop and tavern. Tenants don't last very long because of the noise at the tavern area. I find that the agreement was to lease the property inclusive of the tuck-shop and the tavern to the first defendant.

- [21] Steps could have been taken by the plaintiff to mitigate his losses after the first defendant (and Mr. Kallie Prinsloo) vacated the house at the end of April 2015. No steps were taken by the plaintiff to mitigate his losses. The plaintiff claim in his amended particulars of claim an amount of R4500.00 per month in respect of tuck-shop and tavern, as the current market rental value, from May 2015 until 29 March 2017 when the order was granted by consent ordering the first defendant to vacate the tuck-shop and tavern.
- [22] The amount of R4500.00 per month as rental for the tuck-shop and tavern is not what was testified by Mr. Harrison to be the market related rental value of “the shop” (tuck-shop and tavern). According to Mr. Harrison R3000.00 would be the fair market related rental value. As already alluded to earlier on in this judgment, the property, including the tuck-shop and tavern was rented as a unit. It defies all logic that the whole property was leased as a unit for an amount of R3500.00 per month to the first defendant and now R4500.00 per month is claimed for the tuck-shop and tavern. I am of the view that the plaintiff failed to make out a case for the relief claimed in paragraphs (g) and (h) of the prayers in the amended particulars of claim, as the second part of the claim.
- [23] In so far as costs are concerned, the plaintiff prays for costs on a punitive scale as between attorney and client. No reason was advanced as to why a punitive costs order is prayed for. I can’t think of any reason to grant same either. The awarding of costs is in the discretion of this Court. I am of the view that the plaintiff was only partially successful in his claim. The first defendant denied that she is indebted to the plaintiff for any arrear rental. The plaintiff did not succeed in proving his second part of the claim for the arrear rental of the tuck-shop and tavern. I am of the view that it would be just, fair and equitable if each party pay his/her own costs.

Order

[24] Consequently, the following order is made:

- (i) The cancellation of the oral agreement between the plaintiff and the first defendant is confirmed.
- (ii) The first defendant is ordered to pay an amount of R96 000.00 to the plaintiff in respect of arrear rental for the property.
- (iii) The first defendant is ordered to pay interest on the amount of R96 000.00 at the rate of 9% per annum *a tempore morae*.
- (iv) The claim for payment in the amount of R4500.00 per month for arrear rental of the tuck-shop and tavern from May 2015 to date of this order, is dismissed.
- (v) Each party is ordered to pay his/her own costs.

R D HENDRICKS

ACTING DEPUTY JUDGE PRESIDENT

NORTH WEST DIVISION OF THE HIGH COURT, MAHIKENG

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