

SOUTH AFRICA / JUDGMENT

Twoline Trading 2 (Pty) Ltd v Brainwave Projects 1232 CC and Others (29175/12)

[2012] ZAGPJHC 260 (15 October 2012)

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COURT

South Gauteng High Court, Johannesburg

BEFORE

RS Mathopo

CASE / FILE NUMBER

29175/12

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IN

THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND

LOCAL DIVISION)

CASE NO: 29175/12

DATE:15/10/2012

In

the matter between:

TWOLINE

TRADING 2(PTY) LTD.....Applicant
and

BRAINWAVE

PROJECTS 1232 CC.....First

Respondent

WILLEM

JOSEPH R VAN DER WALTSecond

Respondent

MARTHA

MARIA VAN DER WALTThird

Respondent

JONATHAN

SHEPHARD.....Fourth

Respondent

JUDGMENT

MATHOPO J:

Introduction

- [1] On the 10th October 2012, I gave an order ejecting the first respondent from the premises and indicated that I will give my reasons later. These are my reasons.
- [2] This is an application for the ejectment of the first respondent from the business premises owned by the applicant situated at shop 21 Florida Junction Shopping Centre, corner of Ontdekkers Road and Christiaan De Wet Street, Florida Park, Roodepoort.
- [3] The first respondent admit that it is substantially arrears in rental payment but opposes this application on the basis that the applicant embarked on massive construction works, which deprived it of beneficial occupation of the premises.
- [4] It is common cause that the first respondent occupied the premises in terms of a written lease agreement concluded on or about the 08th February 2010. On behalf of the first respondent the written lease was signed by the first and second respondents. Suretyships were also obtained from the second, third and fourth respondents.
- [5] In terms of the agreement, the rental period would be for a period of five (5) years commencing on the 01st November 2009 and terminating on the 31st October 2014.
- [6] In breach of the agreement, the first respondent failed to maintain regular payments of the rental and other related charges, with the results that on the 16th March 2011, was placed on terms in accordance with the agreement to bring its account to date. Again a similar letter was addressed to the first respondent on the 15th April 2011 requesting payment to no avail.
- [7] In the light of the several breaches and in an effort to accommodate the first respondent, the terms of the agreement were renegotiated and the rental was reduced. This notwithstanding, the first respondent failed to comply with the addendum to the lease agreement in respect of making prompt and regular payments.
- [8] As at the 6th June 2012, the first respondent was indebted to the applicant in respect of rental and other related charges in the sum of R602 585.08.
- [9] On the 18th June 2012, the applicant issued summons against the first respondent out of the Magistrate court for arrear rental and other charges.
- [10] On the 6th July 2012, the applicant cancelled the lease agreement in writing.
- [11] Mr Georgiades who appeared on behalf of the applicant submitted that, in view of the first respondent several breaches of lease and addendum to the lease agreement, the applicant was entitled to cancel the agreements and evict the respondent from its premises. This is particularly so because the respondent admitted that it is in arrears with its obligations for

the period May 2010 to date. It was further submitted that in addition to the arrears with rental payment, the first respondent was substantially in arrears in respect of electricity and water usage on the premises amounting to R123 4523.70 as at the 20th August 2012.

- [12] As regards the first respondent defence that it is unable to pay the rental because it has been deprived beneficial occupation by the applicant. The applicant submitted that the respondents cannot rely on the renovations as well as construction work on the premises to remain in the premises. In support of his argument, counsel relied on clause 20.6 of the lease agreement which reads as follows:

“The landlord shall be entitled to complete the building or to effect any repairs, alterations or improvements and additions to the building and to install all necessary equipment to bring about such work as may be required. The landlord shall be entitled to enter the premises in order to do such work and the tenant shall not have any claim for compensation, damages or remission of rental.”

- [13] Counsel for the applicant further referred me to the judgment of Wepener J in *Hyprops Investment v Sophia’s Restaurant* 2012 (5) SA 220 where he held that a landlord liability to a tenant for reduced beneficial use of lease premises in the event of renovation could be excluded by way of agreement. Wepener J further held that the common law obligation to give a tenant *commodus usus* of the premises was limited and excluded by the agreement between the parties. The court in *Hyprop supra* referred extensively to the judgment of Malan J (as he then was) in *Sweets from Heaven (Pty) Ltd and Another v Ster Kinekor Films (Pty) Ltd and Another* 1999 (1) SA 796 (W) where he said the following:

“The rules relating to the impairment of the commodus usus of a lessee and the consequent reduction of rent and the remedies of the lessee are based on ordinary contractual principles (Sishen at 955I –J, De Wet & Yates Die Suid-Afrikaanse Kontraktereg en Handelsreg

- (1978) 4th ed at 323). It follows that where the lessee expressly or tacitly accept the risk where the lease is concluded on the supposition that the lessee may be deprived of the beneficial use of the property, he cannot rely on any breach by the lessor in that regard. *Copper Landlord and Tenant* (1994 2nd ed at 125) Says:

“It is self-evident that the lessee of a business premises may claim damages from a lessor who causes the profitability of the premises to be reduced. This accords with a lessor’s obligation to afford the lessee commodus usus. At the same time the lessor’s obligations to abstain from conduct which affects the lessee’s profitable use of business is not absolute. A myriad of examples may be cited to illustrate this. For a lessee of business premises to succeed in the claim against the lessor’s conduct, the lessee must prove that the parties either explicitly or tacitly agreed that they would abstain from such conduct”.

- [14] In this matter respondent alleges that it has lost 40% of its turnover as a result of the renovations and thus on the authority of *Ntshinga v Andrews Supermarket (Pty) Ltd* 1997 (1) SA 184 TKSC and *Ntshinga v Andrew Supra* 1997 (3) SA 60 TKSC it is entitled to remain in occupation of the premises. While is it correct that following this decision it is not obligatory that the tenant had to give up possession of the premises before he could claim a reduction

in rental or nor he had to pay the full rental and then claim a pro rata portion by way of an action of damages. The argument of the respondent is defeated by clause 20.6 of the lease agreement and the authorities cited in para 13 supra.

- [15] The objective facts reveal that from inception of the agreement the first respondent have not been maintaining regular rental payment and also defaulted in electricity and water charges. As at the 6 June 2011, the amount outstanding was R602 585.08. This is a fairly substantial amount given the fact that at some stage during the currency of the lease, the applicant reduced the rental payment. The reduced rental was not paid by the first respondent promptly and regularly. It is obvious to me that the continued occupation of the premises, is without legal basis.
- [16] It is abundantly clear that the first respondent has committed several breaches relating to non payment of the rental and other related charges. A history of the first respondent payment schedule in respect of the rental reveal that from the inception of the lease agreement it paid the rental amount irregularly and sometime the full amount was not paid. The number of correspondences that was exchanged between the parties also indicates that the applicant, on several occasions called upon the respondent to remedy the breach without any success. The applicant also granted the respondent several indulgences to remedy the breach. In addition and in an effort to accommodate the first respondent, the rental was reduced and this notwithstanding, the first respondent still failed to maintain regular payments.
- [17] In my view and in the light of how the respondents conducted its affairs regarding rental payments and other related charges, the applicant was entitled to cancel the lease and eject the respondent. Respondent having admitted that it was substantially in arrears, it has no legal basis to continue occupying the lease premises. The reliance on the ground that because it was deprived beneficial occupation by construction works, cannot assist them. I am not persuaded that the renovations affected the respondent trade and turnover. From the inception of the lease agreement and before the renovations could commence, the respondent was already in arrears with his rent and other related charges. It's latest defence is a belated attempt to remain on the premises on flimsy grounds. I am in agreement with counsel for the applicant that clause 20.6 of the lease agreement exclude this defence. My view is further fortified by the ratio in *Hyprops* and *Sweets from Heaven* cases supra.
- [18] I therefore conclude that the respondent's defence is unsustainable. The lease agreement having been validly cancelled,

the respondent is obliged to vacate the premises.

In the result I therefore make the following order:

- [1] That the first, second, third and fourth respondents or whosoever is in occupation be immediately evicted on 31st October 2012 from the premises situated at Shop 21, Florida Junction Shopping Centre, corner of Christiaan de Wet Street and Ontdekkers Road, Florida Park, Roodepoort.
- [2] The Sheriff for the district of Roodepoort or his lawful Deputy be authorised and directed to take such steps as are required in order to give effect to the order in terms of 1 above.
- [3] That the first, second, third and fourth respondents be ordered to pay the costs hereof on an attorney and client scale jointly and severally, the one paying the other to be absolved.

RS MATHOPO

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant : Adv C Georgiades

instructed by : Horack Incorporated

For the Respondents : Adv DL Williams

instructed by : Eamonn David Quinn Attorneys

Date of hearing : 03 OCTOBER 2012

Date of Judgment : 15 OCTOBER 2012

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