IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 10515/2010

In the application between

NEWMAN DESIGN CC t/a WIZARDS GALLERY **APPLICANT**

And

THE DOCUMENT HOUSE (PTY) (LTD) **RESPONDENT**

JUDGMENT

EF Dippenaar AJ

[1] This is an application for the payment of the balance of the purchase price of R1 million for the goodwill of a business sold by the Applicant to the Respondent.

[2] The parties conducted a written Sale Agreement ("the Agreement") on 8 September 2009 relating to the sale of a clothing business which trades from the Hyde Park Shopping Centre as a going concern.

[3] Clause 10 of the Agreement details how payment of the R1 million payable by the Respondent in respect of the goodwill of the business was to be paid. R150 000,00 was to be paid on signature and the balance in instalments of R40 000,00 per month over a period of 23 months commencing on 31 October 2009.

[4] Clause 10.2 of the Agreement contains an acceleration clause which provides that if any payment is not made on due date, the full amount then outstanding would became immediately due or payable.

[5] It is common cause between the parties that a total sum of R270 000,00 of the R1 million was paid but that no further payments were made by the Respondent since 30 January 2010. The Respondent paid the amount of R150 000,00 in September and continued making the R40 000,00 monthly payments without demur until 30 January 2010.

[6] It is further common cause that the Respondent took occupation of the business and the premises in Hyde Park during September 2009 and has remained in occupation thereof and has enjoyed all the benefits thereof. The

Respondent has not disclosed the basis on which it has thus remained in occupation and the answering papers are silent on this issue.

[7] At the time the Agreement was concluded, there was a dispute between the Applicant and the landlord, Hyprop pertaining to the windows to the shopfront, the replacement costs of which the Applicant contends amounts to some R62 462,50 and which it is attempting to resolve with the landlord directly. No mention of this dispute is made in the Agreement concluded between the parties and it is common cause that the Respondent was at the time of conclusion of the Agreement not aware of the damage to the windows or the dispute between the Applicant and the landlord relating thereto.

[8] The Applicant launched the current proceedings on 18 March 2010 after demanding payment of the outstanding balance on 4 March 2010 and advising the Respondent that it was invoking the acceleration clause contained in the Agreement on 9 March 2010.

[9] The Applicant contends that in the circumstances and based on these common cause facts, the full outstanding balance of R730 000,00 is due owing and payable to it.

[10] The Respondent sought to strike out various allegations contained in the Applicant's replying affidavit on the basis that it constituted new matter. The Respondent in its heads of argument contended that if the new matter was not

struck from the record, it would require a postponement and leave to file a further affidavit dealing with such new matter. At the hearing of the application the Respondent did not persist with its request for a postponement and no further affidavit was filed by it. The Respondent apparently did not consider itself prejudiced in proceeding with the matter on the papers as they stand. Having considered the offending paragraphs in the replying affidavit, I am not convinced that these paragraphs constitute matter but rather constitute responses to issues raised by the Respondent in its answering papers.

[11] Both parties at inception of the matter confirmed to me that neither of them wished the matter to be referred to trial; and if I were to find that there were irresoluble disputes on the papers, the application was to fail. I specifically raised this issue with counsel in light of the Respondent's contention in its heads of argument that the matter was to be referred to trial by virtue of the existence of irresoluble factual disputes on the papers.

[12] The Respondent relies on clause 4 of the Agreement which provides that the Respondent *"shall take over the premises currently held in Hyde Park...being shop 52C and will enter into a new lease with Hyprop by the agreement of Reinette Van Tonder of Hyde Park Management with Naz Jacobs..."* and contends in rather ambiguous terms that by virtue of the dispute between the landlord and the Applicant, the landlord was not prepared to conclude a new lease agreement with the Respondent.

[13] It further avers that the Agreement contained a tacit term, to be inferred from clause 4, that the Applicant at the time of conclusion of the Agreement, expressly represented to the Respondent that "*all conditions pre-requisite to the transfer of the lease in terms of clause 4 of the agreement and all impediments thereto would be attended to as between the Applicant and the landlord including...the replacement of the plate glass windows at the premises"* and that it is entitled to a rectification of the Agreement to include a warranty by the Applicant that the window would be replaced "*as soon as possible after the conclusion of the Agreement*". The Respondent however did not institute any counter application for such rectification.

[14] Upon a proper interpretation of clause 4 of the Agreement and having regard to the express words contained therein, the clause does not envisage that the Applicant is obliged to procure a right of occupation for the Respondent and the Respondent does not contend this. Clause 4.1 specially provides that the Respondent's representative will enter into a new lease with Hyprop by the agreement of Reinette van Tonder of Hyde Park Management with Naz Jacobs.

[15] In order to determine whether the tacit terms contended for by the Respondent can be imported into the Agreement, the so called "officious bystander" test is to be applied: See: **Wilkens v Voges**, 1994 (3) SA 130 (A).

[16] In my view, the following factors militate against the tacit terms being imported into the Agreement: The parties were not legally represented or assisted by an

attorney at the time the Agreement was concluded and the Agreement nowhere else refers to any warranties given or contemplated by the parties at the time. The Agreement provides that it constitutes the sole record of the agreement between the parties in relation to the subject matter thereof. At the time the Agreement was concluded, the Respondent was not aware of any dispute between the Applicant and the landlord, and the Applicant regarded this dispute as not concerning the Respondent and being an issue between it and the landlord. This dispute was further not referred to at the time in the correspondence between the parties. It is accordingly doubtful that, had the parties been asked at the time of conclusion of the Agreement, whether the tacit terms contended for was included in their agreement, their respective answers would be in the affirmative. In my view, it does not appear that the parties' intention at the time included the tacit term or warranty contended for.

[17] At the time the Agreement was concluded during September 2009 no formal dispute had yet arisen between the Applicant and the landlord regarding the scratching of the windows of the business premises by cleaners of the landlord, although the parties were all aware of the existence of the scratches. This is common cause between the parties and is not disputed by the Respondent who on its own version was unaware of any disputes. The correspondence between the parties at the time does not support the Respondent's version. This puts pay to the Respondent's reliance on the alleged tacit term as the scratches to the windows do not appear to have been an issue or in the irrelevant of the minds of the parties at the time the Agreement was concluded between them.

[18] The issue only arose as a debate between the parties months after the conclusion of the Agreement and as such could not reasonably have formed part of the Agreement between them.

[19] In my view, had the Respondent sought rectification of the Agreement, which significantly it has not done, it would not on the available facts have been entitled thereto.

[20] I accordingly hold that the tacit terms contended for by the Respondent, cannot be imported into the Agreement between the parties.

[21] Even if the Applicant was obliged in terms of the Agreement to remove any impediment to the Respondent's occupation of the premises or possession of the business, factually, it does not appear that any such "impediment" to the Respondent's possession of the business or occupation to the premises exists and it does not appear that, even if I am not correct and the tacit term contended for by the Respondent, can be read into the Agreement (which I am not satisfied is the case), it would not provide the Respondent with a valid defence to the Applicant's claim.

[22] The Respondent further places reliance on the *exceptio non adimpleti contractus* and contends that it is absolved from payment of any further instalments.

[23] This reliance on the *excepho non adimpleti contactus* appears to be misconceived and the exception can only find application where the obligations of the parties are reciprocal.

[24] In the absence of the tacit terms and warranty contended for by the Respondent, there can be no reciprocal obligations in the Agreement between the Applicant and the Respondent, which can render the exception applicable.

[25] On the common cause facts, the Applicant finally discharged its obligation to the Respondent to give possession of the business to it by doing so during September 2009. The Respondent's obligation to pay the agreed goodwill payment of R1 million in terms of clause 10 of the Agreement endured for the entire instalment period of 23 months (disregarding for present purposes the acceleration clause).

[26] The Applicant's obligations under the Agreement did not extend to issues such as the quality or condition of the premises or expenses in relation thereto. The shopfront windows did not fall with the category of the premises to be sold.

[27] The Respondent's contentions that irresoluble factual disputes exist on the papers, must be seen against the backdrop of the requirements of a bona fide factual dispute, as formulated by Heher JA in **Wrightman t/a JW Construction v Headfour (Pty) Ltd and Another**, 2008 (3) SA 371 SCA paragraphs 11 to 13, as follows:

"[11] The first task is accordingly to identify the facts of the alleged spoliation on the basis of which the legal disputes are to be decided. If one is to take the respondent's answering affidavit at face value. The truth about the preceding events lies concealed behind irresoluble disputes. On that basis, the applicant's application was bound to fail. Bozalek J thought that the court was justified in subjecting the apparent disputes to closer scrutiny. When he did so he concluded that many of the disputes were not real, genuine or bona fide. For the reasons which follow I must respectfully agree with the learned judge.

[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict. Accept the version set up by his opponent unless the latter/s allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623A at 634E-635C. See also the analysis by Davis J in Ripoll-Dausa v Middleton NO and Others 2005 (3) SA 141C at 151A-153C with which I respectfully agree. (I do not overlook that a reference to evidence in circumstances discussed in the authorities may be appropriate).

[13] *A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirements because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they are not true or accurate but, instead of doing so, resets his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied, I say 'generally" because factual averments rarely stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit he commits himself to his contentions, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is a serious duty imposed upon a legal advisor who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the*

answering affidavit. If that does not happen it should come as no surprise that the court take a robust view of the matter."

[28] In my view, the Respondent has failed to set out his defence in sufficient particularity to justify a conclusion that it is bona fide, *inter alia*, for the following reasons:

[28.1] The Respondent has failed to provide any documentary evidence regarding the alleged unwillingness of the landlord to conclude a lease agreement with it and has provided no detail of its discussions or negotiations with the landlord regarding a lease;

[28.2] No confirmatory affidavit from the landlord's representatives is attached to the answering papers;

[28.3] The Respondent has dealt with this issue in vague and ambiguous terms in the answering papers and has not committed itself to a definitive version, which it should reasonable have been able to do; and

[28.4] The Respondent has failed to disclose on what basis he has remained in occupation of the premises since September 2008 and apparently studiously avoid the issue entirely in its answering papers.

[29] In the premises, I hold that there is no *bona fide* dispute of fact, material to the determination of this application.

[30] I further hold that the Applicant is on the papers entitled to the relief sought by it.

[31] I accordingly make the following order:

[31.1] The Respondent is directed to make payment of an amount of R730 000. 00 to the Applicant;

[31.2] The Respondent is directed to pay interest on the amount in [31.1] above at the rate of 15.5% per annum a tempore morae from 10 March 2010 to date of payment;

[31.3] The Respondent is directed to pay the costs of the application.

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EF DIPPENAAR

ACTING JUDGE OF THE HIGH COURT

Date of hearing	:	13 May 2010
Date of judgement	:	24 November 2010
For Applicant	:	Adv B Slon
		Eversheds
For Respondent	:	Adv M Novitz
		Schindlers Attorneys