REPUBLIC OF SOUTH AFRICA

GAUTENG LOCAL DIVISION
JOHANNESBURG

CASE NO: 12838/14

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

_____ _____
DATE SIGNATURE

In the matter between:

CONARA PROPERTIES (PTY) LIMITED Applicant

And

BENONI REX HOTEL CC First Respondent

DIONYSIOS PANAYIOTOU Second Respondent

BRANDON VISAGIE Third Respondent

JUDGMENT

CASSIM, AJ

Introduction

1. The applicant seeks an order ejecting the first respondent and all persons occupying under it from the premises leased by first respondent in terms of a written agreement of lease ("the lease") entered into on 18 July 2011.[1] The leased premises constitute commercial immovable property and the first respondent acquired the right to conduct a hotel, pub and bar.

2. The application was heard on 28 January 2015 and I gave judgment on 5 February 2015. Paragraph 1 of this judgment is a repetition of paragraph 1 of my earlier judgment. I made interim orders in my earlier judgment and I referred two issues for determination by way of oral evidence. The hearing of oral evidence took place on 13 July 2015. I heard the evidence of three witnesses on behalf of the applicant, and Mr Panayiotou ("Panayiotou") testified on behalf of the respondents. I now deal with the two issues referred for determination by way of oral evidence.

[1] The leased premises are identified in clause 1 of the lease agreement and further dealt with in schedule "A" to the lease agreement.

The determination as to whether the respondents committed fraud in procuring the liquor licence into the name of the second respondent

3. The controversy is this. On 23 October 2012, Panayiotou applied for the liquor licence held by the applicant over a portion of the property leased by the applicant to the first respondent and issued in terms of the Gauteng Liquor Act, 2 of 2003 ("the Liquor Act"). According to Panayiotou, the sole director and sole shareholder of the applicant, João Oliveira De Castro ("De Castro"), consented to the transfer of the licence into his name. Part A of the application is purportedly signed by De Castro authorising the transfer of the liquor licence to Panayiotou. De Castro denies that he signed the relevant document before a commissioner of oaths, certain Constable Baloyi, on 23 October 2012 at the Alexandra Police Station.

4. The first witness for the applicant, Mrs Lourika Buckley ("Buckley"), a qualified forensic document examiner, illustrated in her evidence by reference to her report as to why, in her view, the signature relied upon by the respondents is not that of De Castro. She concluded that in view of the dissimilarities in individual writing characteristics, that the disputed signature was not produced by De Castro. De Castro testified that he did not sign the document relied upon by the respondents. He testified that he would not have consented to the transfer of the liquor licence because it had a commercial value, and without ownership of the liquor licence, the property owned by applicant and let to first respondent would be diminished in value. He pointed out that from his understanding, the object of clause 5.1 of the lease agreement enabled the lessee, namely

the first respondent controlled by Panayiotou and Brandon Visagie ("Visagie") to appoint a manager to control the liquor licence for so long as the first respondent remained in lawful occupation.

5. Panayiotou testified that De Castro did sign the portion of the application for the transfer of the liquor licence in his presence and in the presence of a commissioner of oaths. Panayiotou, however, could not explain two material features of the application. First, he sought the transfer of the licence in his name, whereas the lessee of the premises is Benoni Rex Hotel CC. This is apparent from Part B of the application where he cites himself as the prospective holder as well as paragraph 1 of his written motivation in which he incorrectly states that he had purchased the premises from De Castro and that the business was transferred into his name in February 2010.

6. In cross-examination, he suggested that he had made a mistake in stating that he had bought the property and which was transferred to his name in February 2010. Secondly, Panayiotou saw nothing untoward with the contents of paragraph 7 of the application, which he signed under oath before Constable Baloyi and in which he affirmed that he, as the prospective holder, will have the right to occupy the premises in respect of which the liquor licence would be used. The fact of the matter is that the right to occupy the premises is that of Benoni Rex Hotel CC and not Panayiotou.

7. The application for a transfer of the liquor licence into the name of Panayiotou was made on 23 October 2012. The lease agreement governing the basis upon which the first respondent occupies the premises was entered into on 18 July 2011 and to endure for a period of 60 months. The lease would thus terminate ordinarily on 30 June 2016.

8. In evaluating the mutually destructive versions of De Castro, on the one hand, and Panayiotou, on the other hand, I must be satisfied upon adequate grounds that the version of the applicant upon whom the onus rest is true and the other false. "The degree of proof required by the civil standard is easier to express in words than the criminal standard, because it involves a comparative rather than a quantitative test. In the words of Lord Denning, *"it must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the Tribunal can say "we think it more probable than not" the burden is discharged, but if the probabilities are equal it is not."* (see: SA Law of Evidence, Hoffmann & Zeffertt, 4th ed., page 526). Recently, the court mindful of the dicta of Wessels JA in **National Employers' Mutual & General Insurance Association v Gany** 1931 AD 187 at 199 as diluted in effect in **African Eagle Life Assurance Co Ltd v Cainer** 1980 (2) SA 234 (W) gave the following guidelines in evaluating the evidence in **Stellenbosch Farmers' Winery Group Ltd v Martell et Cie** 2003 (1) SA 11 (SCA) para [5] at 14 as follows:

> "*On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.*""

9. In my view, the applicant has discharged the onus of proof to establish that Panayiotou did commit fraud. On Panayiotou's own version, he misled the Liquor Board when he applied to transfer the liquor licence into his name. I am unpersuaded by his version that he made an error when he asserted that he had purchased the premises from De Castro. It is not logical to accept such a version in the context of him further making the

written statement that the bought the premises and that same business was transferred to his name in February 2010. The wording of his motivation for the liquor licence is carefully crafted to create the impression that the business premises were transferred to him in February 2010 and hence, logically, the liquor licence must also go to him. It is difficult to imagine that any person of ordinary intelligence would make these statements unintentionally. Panayiotou also stated under oath in his affidavit to the Liquor Board that he occupies the premises, whereas in terms of the lease agreement, the tenant is Benoni Rex Hotel CC.

10. I am mindful of the criticisms made by Advocate Cohen, on behalf of the respondents in his insightful analysis of the evidence in his written submissions in support of a finding, that the applicant had not discharged the onus to prove that the respondents had breached clause 4.2 of schedule A to the lease agreement, which provides that the lessee shall not contravene or permit the contravention of any statutory provision and/or conditions of any licences relating to or affecting the occupation of the leased premises. I have already expressed the view that Panayiotou committed fraud and, in so doing in his capacity as the controlling mind of Benoni Rex Hotel CC, he contravened the provisions of section 128 of the Liquor Act. He furnished false and incorrect information to the Liquor Board in the application for the transfer of the liquor licence held in the name of the applicant into his own name. The Liquor Board, itself, did not apply its mind to the application nor did it critically evaluate the substance of the application. Thus for instance, there is no record of a full copy of

the lease agreement being part of the application. Only selected portions are to be found. There is no compliance with the rudimentary requirement of proper notice to the applicant.

11. My findings are not limited to the conclusions of the expert witness, Mrs Buckley. I could not do so as Mrs Buckley identified the limitations of her findings in her report. She pointed out that she only had copies of the documents made available to her and not the originals. She could hence not assess the line quality and the signatures. Whatever other limitations there may be in her report, as a qualified expert, she supported the version of De Castro that it was not his signature that appeared on the form purporting to authorise the transfer of the property to Panayiotou.

12. On the probabilities, it is not unreasonable to accept De Castro's version that he would not, on behalf of the applicant, part with the liquor licence which is an asset of the applicant. His explanation that he furnished a copy of his identity document to the respondents is consistent with clause 5.1 of the lease in terms whereof the lessor agreed to permit the lessee to appoint a manager on the liquor licence for so long as the lessee remains in lawful occupation and agreeing to pay all fees and charges attaching to the licence. It is also consistent with the common cause version that the parties attended at the offices of an attorney in Pretoria with the purpose of enabling the lessee to procure the appointment of a manager on the liquor licence. This De Castro explains why a copy of his certified ID was

furnished to the second respondent as a representative of the first respondent.

13. De Castro appeared to me to be an experienced businessman and it is unlikely that he would dispose of the liquor licence as contended for by the respondents. He was forthright in his evidence and struck me as an honest individual. Upon discovery, what he considered was a fraud, he reported the matter to the police. The affidavit in support of his report made at the time of him discovering the fact that the liquor licence was transferred into the name of the second respondent is consistent with his evidence before me. On the other hand, Panayiotou was an unsatisfactory witness in material respects. He was evasive and not forthcoming. Whilst I have found that there was actual fraud, it is also necessary to reflect on the accepted law that the courts will not readily infer fraud. This foundational theme steeped in bygone years where high standards of morality was the norm of the day has to be revisited in the modern day South Africa where fraud has become the order of the day. Orbiter, I observe, that in pursuing the true facts, our courts must be more vigilant to the current norm which is that people take chances based on dishonesty because they get away with dishonest conduct. That fraud is not readily inferred is not in sync with modern day morality.

14. Having found fraudulent and dishonest conduct on the part of the respondents, there is not only a breach of clause 4.2 of schedule A to the lease agreement, but a repudiation of the relationship arising from the

lease agreement. The applicant is entitled to accept that the agreement has been repudiated and hence is entitled to cancel the lease and an order for eviction.

The determination as to whether the applicant committed fraud in diverting water or in any other manner causing the first respondent to pay for water charges with the knowledge that the first respondent did not use such water

15. Both De Castro and Panayiotou testified on this issue. In addition, the applicant relied on the evidence of an experienced and qualified plumber, Mr Venter, whose evidence went unchallenged. His evidence is to the effect that he inspected the three metres installed at the premises occupied by some ten tenants and he verified that the three metres measuring the consumption of water by the first respondent is in working order and there is no diversion of water affecting the first respondent to any other tenant or third party.

16. The version of the respondents is that De Castro caused charges to be levied against the first respondent in respect of water supply to a butcher on the premises, because the butcher is a friend of De Castro. The respondents led no credible evidence to support such allegation; on the contrary, Panayiotou's evidence was based on speculation and his subjective belief that this had been done. His gripe was that water charges had been significantly increased and the speculation was that De Castro was up to no good. Thus for instance, there was a period when the municipality did not levy any charges and yet the landlord charged the

tenants – because subsequently the municipality got its act together and did levy charges. I find the reasoning of Panayiotou to be devoid of any logic and sadly so reflective of a mentality permeating our society where people fail to pay for the use of resources. If in fact the municipality did not charge on a particular month because for one or other reason it did not get its act together, this does not absolve the person who use the resources to be liable and to be prepared to pay for such use.

17. De Castro explained that he had installed separate meters for the tenants on the premises with reference to a meter reading returns of Motlala Utilities (Pty) Limited, a firm that specialises in this field. I was referred to the various tenants described on the returns and the particulars for each meter reading period appears thereon and the charges arising from usage of water. De Castro had experienced that persons unknown to him had tampered with meters and this caused him to move the meters to a secluded area in which access was prohibited, unless provided by the landlord. I would not be remiss to point out that it would be a fair inference (Wigmore deals with this fully in his treaties on the law of evidence) that those who tamper with the meters are likely to be the very people who are liable and responsible for payment and who do not wish to pay.

18. Reverting to the breach in question, I fail to understand the issue because first the landlord made no profit on water supplied to tenants. To the extent that this is suggested in the heads of argument prepared on behalf of the respondents, there is no evidence whatsoever to support such a

finding. On the contrary, an analysis of the meter reading and the charges arising therefrom correlates to the charges levied by the municipality. There is nothing untoward about this. The municipality charges the landlord and in turn the landlord charges the tenants for the use of water. The refusal of the first respondent to pay the sum of R10,428.78 for the period December 2013 to January 2014 is regrettable. This is the water consumed and charged for the hotel as appears on the meter reading return for the period 18 December 2013 to 29 January 2014 under description "Rex Hotel – Shop 89 and hotel rooms". The meter reading return appears at page 254 of Bundle 3 and was furnished to the first respondent. In fact, the meter readings for the period 29 July 2013 to 27 May 2014 form part of the papers and the first respondent could see that it was not charged for water that it did not use according to the meter readings which in turn is consistent with the charges meted out by the Ekurhuleni Municipality.

19. The refusal by the first respondent to make payment, despite demand in terms of the provisions of the lease agreement, entitled the applicant to cancel the lease and to seek the eviction of the first respondent. To date in fact this amount had not been paid and the first respondent refuses to make payment. In such circumstances, a court is left with little choice but to give effect to the terms of the lease agreement. I have already found that the lease agreement was validly cancelled.

20. In the premises, I make the following orders:

20.1. An order is granted ejecting the first respondent, and all person occupying under it, from the premises being:

20.1.1. all floors of the building constructed on the southern side of the property owned by the lessor (being the applicant), across Erf 1300 and 1298, Benoni Township, excluding the ground floor (the previous Rex Hotel premises); and

20.1.2. an area of approximately 145 square metres on the ground floor of the eastern side of the remaining building, north of the building referred to above, also built across Erf 1300 and 1298 Benoni Township (the previous Rex theatre); as per the sketch attached to the lease agreement to the application under this case number (also known as 78 Tom Jones Street, Benoni).

20.2. The respondents are to pay the costs of the application and the hearing before me, jointly and severally, the one paying the other to be absolved.

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NA CASSIM
Acting Judge of the High Court,
Gauteng Local Division

Date of oral hearing: 13 July 2015

Date of judgment: 16 July 2015

APPEARANCES

For the Applicant: Advocate G Meijers
Instructed Paul Farinha Attorneys

For the Respondents: Advocate S Cohen
Instructed by David C Feldman Attorneys