



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 44138/2010

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO	
(2) OF INTEREST TO OTHER JUDGES: YES /NO	
(3) REVISED	
9/7/2014	<i>[Signature]</i>
DATE	SIGNATURE

14/7/14

In the matter between:

TRANSNET LTD t/a TRANSNET FREIGHT RAIL

Plaintiff

v

CDW DU PLESSIS EN SEUNS (EDMS) BPK

Defendant

Heard: 3 – 6 March 2014

Delivered: 14 July 2014

JUDGMENT

A.A.LOUW J

Introduction

[1] The plaintiff is the owner and was the lessor of certain agricultural land situated in the vicinity of a station called Sentrarand. Exhibit "B" is a map of the whole area, approximately 3765 ha, and as appears from the heading thereof consists of Hornsrus agricultural holdings, Rykoes agricultural holdings and various portion of the farms Katboschfontein, Rietfontein, Bronkhorstfontein, Varkfontein and Knoppiesfontein.

[2] As exhibit "B" indicates the total area has been divided into different portions which consist of inner portions as well as an outer portion which was referred to in evidence as the "outside ring".

[3] I shall analyse the pleadings hereunder, but for the time being it is sufficient to state that the plaintiff seeks to recover the rental in respect of the land as well as the eviction of the defendant therefrom.

[4] The trial lasted four days, with only two witnesses testifying. On behalf of the plaintiff Ms Dallas in her capacity as the area manager of Real Estate of the plaintiff of Gauteng testified. The defendant's witness was its only director and shareholder Mr Poon du Plessis.

[5] From Du Plessis' evidence it appeared that various members of the Du Plessis Family farmed on the land since the mid 1980's. Mr Du Plessis testified that his uncle and his father farmed there. When his uncle died the uncle's portion was taken over by the father and he farmed until he passed

away in 1994. Thereafter Du Plessis and his two brothers farmed on different portions of the land, but at this stage Du Plessis in the name of the defendant is the only farmer and occupier of portions of the land.

The nature of the plaintiff's claim

[6] There are three lease agreements on which the claims are based namely annexures "TL1", "TL4" and "TL7" to the particulars of claim. Claim A is based on "TL1", claim B is based on "TL4" and claim C is based on "TL7".

[7] In respect of claims A and B it is alleged that the relevant agreements were entered into between the plaintiff and the defendant during August 2004 and February 2001 respectively. In respect of claim A it is alleged that the defendant was on 30 September 2009 in arrears with its rental in the amount of R2 062 749 as well as water and electricity in the amount of approximately R200 000. Claims for water and electricity were abandoned at the commencement of the trial in terms of a notice of amendment of the plaintiff which I marked "XYZ". This abandonment of water and electricity claims was in respect of claims A, B and C.

[8] In respect of claim "B" that leaves a claim for alleged rental of R2 317 874,24 for the period from March 2007 to March 2010.

[9] Claim C is based on a contract not entered into between the plaintiff and the defendant but between the plaintiff and JF du Plessis, the cousin of Mr Poon du Plessis. It is alleged that the agreement, "TL7", with JF du Plessis terminated during May 2006 when JF du Plessis vacated the premises. It is then further alleged that during June 2006 the defendant took occupation of that portion the land and by conduct hired from the plaintiff the land on the same terms and conditions as set out in the contract "TL7". In para 36 of the particulars of claim it is then alleged that the defendant is in arrears with the monthly rentals in the amount of R1 263 931. Confusingly, para 37 then states that the plaintiff is suffering *damages* as a result of the defendant's continued occupation and use of the land in the amount of R894 781.

[10] Claim D as it stood at the commencement of the trial was only for eviction. However the amendment "XYZ" introduced as prayer (c) of claim D payment of R7 452 400,39. This amount is calculated as set out in annexure "TL11" to the particulars of claim. This annexure deals with the land let in terms of all three contracts. Claim D is framed only as a claim for *damages* and not for contractual rental as per claims A, B and C.

[11] "TL11" is headed "Recon to project possible income based on info supplied by Property Management". This "possible income" was based according to the evidence of Ms Dallas, on the previous rental amounts escalated with certain percentages according to the original contracts.

[12] The plaintiff persisted in claiming the amount of R7 452 400,93 as per “TL11”. This annexure starts in January 2010 and projected rentals up to March 2013. As will appear from the more detailed discussion hereunder, by March 2010 there were no contracts in place in respect of any of the portions of the land. As I see it the amount thus claimed can only be a damages claim for holding over. The nature of such a claim is comprehensively summarised by a Full Court judgment of the South Gauteng High Court as follows:

“[59] There appear to be a number of features which may be distilled from well over a century of case law. They are:

(a) The ordinary measure of the amount payable for holding over is the 'market rental value' and not the rental that would be payable under the cancelled lease — Sandown Park at 256I and 260A.

(b) While courts have regard to the rental payable under the erstwhile lease, that exercise is not conducted as part of the substantive law element of a cause of action. The rental payable under the lease is introduced only for the purposes of constituting evidential material, under adjectival law, to determine the market related rental — Sandown Park at 258H and 260A – B. For this reason the damages claim does not only arise out of contract. With respect, LTC Harms in Amler puts it succinctly at 255:

'The plaintiff must allege and prove the market rental value of the premises for the period of the

unlawful occupation and must show at least prima facie that the premises were in fact lettable.'

*[Relying on Sandown Park.]*¹

[13] To add to the confusion, on the third day of the trial I asked plaintiff's counsel to clarify the nature of its claim. He put it unequivocally that the plaintiff's claim is *not for damages* but the rental amounts in terms of the three contracts.

[14] I proceed to deal with the alleged contracts

Claim A

[15] Annexure "TL1" was signed by Mr Poon du Plessis on behalf of the defendant on 23 August 2004. This was consequent to a tender process. The land let appears from annexure "A" to that contract, from which it is evident that the land in question consists of various of the inner portions.

[16] Surprisingly, although the lease agreement was approved by the tender board the defendant received the following letter from the plaintiff dated 25 October 2004:

"SENTRARAND: LEASE OF PREMISES

It is regretted to inform you that the Lease Agreement that was received from you was submitted to our Head office for approval

¹ *Hyprop Investments Ltd and another v NCS Carriers and Forwarding CC and another* 2013(4)SA 607 (GSJ) para 59

but it was rejected and not approved by them because the offer rental that was submitted by you and approved by the Tender Board does not escalate with 7% with effect from 1 October 2004. The rental of R29891,07 that was indicated in Clause 3.1 of the above-mentioned Agreement was applicable to the lease period 1 October 2003 until 30 September 2004.

As you will appreciate the rental was now escalated by the approved escalation rate of 7% and herewith, please find the attached Memorandum of an Agreement, Annexure "B" and Agreement plan for completion, initialling and signature by you and two witnesses, where indicated in pencil and early return.

Please return the duly signed Lease Agreement within ten (10) days from the date hereof."

[17] On 4 May 2005 the plaintiff again addressed the defendant in respect of this piece of land as follows:

"You are reminded that you have already signed the Lease Agreement on 23 August 2004 with the same areas but due to the Lease period deferred with another year, which required Tender Board's approval, the rental was not escalated for the first year and therefore the Lease was not approved. Cognisance should be taken that although a formal Lease Agreement is not in place a site inspection revealed that the

land has been planted and it stands presently in full crop. It would be appreciated if you will commit yourself to payment of rental.

It is stressed that the signing of this Lease Agreement is very important and it should be submitted within fourteen (14) days from the date of this letter. If you wish to ignore this request you are given notice to vacate the premises with immediate effect."

[18] There were further negotiations or discussions but no other agreement came into being. Exhibit "A" was handed in as being the agreement sent under cover of the abovequoted letter dated 25 October 2004. Exhibit "A" provides for a higher monthly rental amount which the defendant was not prepared to agree to. Exhibit "A" therefore remained unsigned. The envisaged lease period in terms of this contract was 1 October 2004 to 30 September 2009. Although the defendant continued to farm on the land he did not pay a cent. Du Plessis testified that he did not receive any invoices. The agreement was clearly repudiated by the plaintiff which repudiation was accepted by the defendant as pleaded.

[19] In addition to repudiation the defendant pleaded as follows:

"3.3 It was expressly, alternatively tacitly, further alternatively impliedly agreed during or about November 2004 at Delmas, alternatively at Johannesburg, between the plaintiff, duly represented by A Dallas and/or M Zietsman

and the defendant, duly represented by CDW du Plessis, that the defendant would be entitled to occupy the premises until 30 September 2009, renewable for a further five year period until 30 September 2014, on the basis that payment of rental would be due to the plaintiff in respect of such portions of arable land as would be actually utilised by the defendant for the planting of crops on a seasonal basis at a reasonable and market related rental to be agreed between the parties.

- 3.4 *The rental agreement was tacitly, alternatively impliedly, further alternatively expressly renewed for a further five year period until 30 September 2014."*

[20] Ms Dallas' evidence that neither she nor Mr Zietsman could conclude a contract of this nature could not be gainsaid and has to be accepted. It is on the basis of these allegations, and similar allegations were made in respect of the land in claims B and C, that the defendant is resisting the plaintiffs claim for eviction. Be that as it may, the dispute as to a reasonable and market related rental was never solved. Despite that the plaintiff threatened with eviction already in the May 2005 letter, no steps were taken in that regard until the issue of the summons herein.

[21] If the plaintiff persists that claim A is for agreed rental, as confirmed by counsel, such claim has to fail as "TL1" was repudiated. Thus there can also not be a claim for holding over. Any claim that the plaintiff may have will thus have to be based purely in delict namely the unlawful occupation of property which caused damage. Such a case was not made out.

[22] A further difficulty that the plaintiff has is that annexure "TL11" bears little resemblance to the amounts claimed in respect of claims A, B and D. Ms Dallas could not explain the calculations and neither the inconsistencies when "TL11" is compared to "TL8". In "TL8" the starting point in January 2010 is a monthly amount of R44 666,44 whilst on "TL11" it is R47 793,10. The same goes for the "TL4" contract (claim B) where the relevant amounts are R76 161,70 and R81 493,03. She could also not explain at all how the rates and taxes were calculated except to say that it was calculated by personnel in her office who on receipt of the account from the local authority allocated such amount to the various portions of land. This must have been a very complicated exercise having regard to the fact that various portions of farms, portions of such portions as well as about 58 smallholdings (agricultural holdings) are involved.

[23] This failure by the plaintiff to prove the amounts as per annexure "TL11" to be either agreed rental or damages is fatal to all the plaintiff claims.

Claim B

[24] This claim is based on annexure "TL4" and relates to the portions of land known as the outer ring. The contract commenced on 1 September 1999 and ended on 31 August 2005.

[25] The defendant attempted to negotiate a new lease agreement but the plaintiff refused because, according to it, the defendant was in arrears in respect of both contracts. I have already referred to the letter of 4 May 2005 where the defendant was given 14 days to vacate the premises. In regard to the renewal of this contract a letter of 31 May 2005 was written by the plaintiff to the defendant:

"Cognisance should be taken that your Lease Agreement expires on 31 August 2005 and approval will in the mean time be obtained to renew the Lease Agreement."

Please furnish your reply to this office whether you wish to continue with the leasing of the premises. No consideration will be given to enter into a Lease Agreement for a further period should your account be in arrears."

[26] When it comes to the calculation of damages for holding over, I have already set out the difficulty that the plaintiff has with the calculation in "TL11". It must further emphasized that a period of five years expired between 2005 and the starting date for the calculation namely January 2010. It cannot by any stretch of the imagination be accepted that the market rental value of this

agricultural land can be based on the previous rental escalated by 10% year on year since 2005

Claim C

[27] This is based on the contract between the plaintiff and JF du Plessis.

[28] Presumably because the plaintiff maintained that the claim is for rental and not for damages caused by unlawful occupation, this claim was abandoned during argument. Nothing more needs to be said about this.

Claim D

[29] This claim is on the basis that "the plaintiff has suffered damages in unpaid rental in the amount R7 452 400,39 for the entire period of the defendant's continued occupation, enjoyment and use to date. A copy of the reconciliation statement is attached hereto marked "TL11".

[30] This claim (and it is still unclear to me whether the plaintiff in fact claims damages) cannot succeed for the following reasons:

- (a) annexure "TL11" covers the period from January 2010 to March 2013. There was no agreed rental for this period;
- (b) a claim for holding over was not properly pleaded or proved;
- (c) damages was not proved on any other basis.

Eviction

[31] In evidence the defendant did not with any conviction pursue its alleged right to continue occupy the land on the basis as quoted in para 19 above.

[32] During argument the matter of eviction centered on an applicable date for eviction. The defendant has crops on the land, mealies and soy beans, which are due to be harvested in September. During argument counsel for the plaintiff agreed that it would be reasonable to allow the defendant to harvest before eviction. Thereafter the defendant needs a period of approximately six months to remove all his irrigation and other equipment. An order for eviction on these terms will accordingly be granted.

Costs

[33] The plaintiff was not substantially successful. It did not succeed in proving its claim for R7,5 m. On the other hand it was successful in obtaining eviction. On this basis I am of the view that it is fair that each party bears its own costs.

Order

[34] It is ordered as follows:

- (a) with effect from 1 October 2014 the defendant is evicted from all portions of the plaintiff's land as illustrated on exhibit "B";
- (b) the defendant is allowed access to the property until 31 March 2015 for the only purpose of removing its

borehole, irrigation and other equipment from the property.



A.A. LOUW

Judge of the High Court

For the Plaintiff	:	Ngutshane
Instructed by	:	Raborifi R Inc.
For the Defendant	:	Van der Merwe SC
Instructed by	:	KKR Attorneys