IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 44763/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED. ✓

8/3/16 (DATE)

(SIGNATURE)

8/3/2016

In the matter between:

CASPER JAN HENDRIK BREED — APPLICANT

And

HEAVEN ON EARTH COMMERCIAL FARMING (PTY) LTD — RESPONDENT

JUDGMENT

Fabricius J,

1.

Applicant applies for the eviction of Respondent and all persons occupying through it from the remaining extent of Portion 7 of the farm Rondawel 22, District Marble Hall ("the property"). Applicant is the owner of the property and contends that Respondent remains in unlawful occupation thereof as the relevant lease agreement in terms of which it initially occupied the property was cancelled by the Applicant.

2.

For a proper understanding of the prospective arguments of the parties hereto, it is necessary to briefly set out the contextual background. Apart from the property in issue herein, Applicant was also the owner of four other properties in that area. A contract of sale was concluded on 21 May 2012 ("the first contract of sale"), in terms of which the Respondent bought these four farms. On the same day that this contract of sale was signed, an addendum thereto ("the first addendum"), was concluded in terms of which payment of R 5 million of the purchase price was

deferred. The contract of sale contained certain suspensive conditions which were not fulfilled. The result was that on 10 August 2012, the parties concluded a subsequent contract of sale ("the second contract of sale"), and addendum ("the second addendum"), that replaced the first contract of sale and the addendum. The essential terms of the contract remained the same. Clause 23 of the second contract provided that no agreement between the parties that would be at variance with the terms of the sale agreement would be binding, unless reduced to writing and signed by, or on behalf of the parties. Further, no indulgence or extension provided to Respondent by the Applicant would prejudice the rights of the Applicant in any way and would not create any new rights. Also, the Applicant was not bound by, or liable in regard to any representations made, other than those incorporated in that particular written agreement. The property that forms the subject matter of the eviction application was not bought by the Respondent together with the other four farms.

3.

On 10 August 2012, a further agreement was entered into, namely a written lease agreement, in terms of which the Respondent agreed to lease the property from the Applicant for a period of three years with an option to extend this lease for a further period of two years. It was also agreed that Applicant would apply for permission to sub-divide this property, and the Respondent was given an option to purchase it once the required approval was obtained. Clause 11 of this agreement is of particular relevance and in translation it deals with cancellation as follows:

3.1

The lessor could cancel the lease agreement with immediate effect and evict persons occupying the property if the lease or any part thereof was not paid when due. It could also so cancel if the lessee failed to pay the annual instalments and interest due punctually in terms of the sale agreement. It could also cancel if the lessee breached any other condition in the lease agreement. If the Applicant wanted to cancel the lease agreement and the Respondent disputed the cancellation, the latter would continue to pay rental until the dispute had been resolved and the

Applicant would accept this rental without prejudice due to the cancellation. The lessee was also given an option to purchase the property once the necessary permission to sub-divide it had been obtained. Clause 19 of this lease agreement dealt with amendments thereto and provided that no amendments, additions, suspension or cancelation of any condition or provision of the lease or the lease itself, excluding as provided for in the lease, would have any legal force and effect until such time as it was reduced to writing and signed by or on behalf of both parties.

4.

The four properties sold to Respondent were transferred into its name on 20 December 2012.

5.

It is not disputed that the Respondent breached the second agreement and addendum thereto by repeatedly failing to pay amounts that were due promptly on

the day that they were due. On 20 December, and up to 21 December, the Respondent was in arrears in the amount of R 1, 909, 568.65 and on 22 December 2014, the amount of R 1, 409, 568.65 remained outstanding in respect of instalments and accrued interest. At the end of December 2014, the Applicant acquired from Mario Grobler when the Respondent intended to pay the outstanding amounts. Mario Grobler responded on 30 December, by electronic mail and (in translation) said the following:

5.1

The contents of Applicant's email was noted;

5.2

He (Mario Grobler) had paid an amount of R 500 000 to the Applicant on 20 December 2014, and that the outstanding amount, which included interest amount was R 404 000.

5.3

"They" were however not in a position to now pay the balance and kindly requested an extension to pay as follows:

5.3.1 A further R 500 000 would be paid on 31 January 2015;

5.3.2 A final payment of R 904 000 would be paid on 28 February 2015;

5.3.3 A final interest payment would be made on 28 February 2015, calculated on the R 1 404 000 outstanding amount.

"They" offered to pay interest at prime rate plus 5% on the outstanding amount.

They apologised for the inconvenience which was caused by a poor grape harvest and income that had not been realised as a result thereof. He made a sincere request that Applicant help it out of its dilemma.

6.

In a follow-up electronic mail dated 5 January, Mario Grobler enquired from the Applicant what its response was to his proposal of 30 December 2014. He also proposed that the parties meet and discuss the matter. A meeting was subsequently held on 15 January 2015, and Applicant handed Mario Grobler a notice of cancellation of the lease drafted by Applicant's Attorneys, dated 14 January 2015. In translation, this notice states that Respondent was in default of the payments of

the purchase price of the properties referred to in par. 11.1.2 of the rental agreement. Notice was given that the lessor cancels the agreement of lease in terms of Clause 11. Further discussions were held at this meeting and proposals made in respect of the lease of a store room and the purchase of certain movable assets. Discussions were also held about the payment of the outstanding amounts and on 19 January Applicant stated that such arrangements were in order, subject to conditions of the written agreement. A further meeting was held on 28 January 2015.

7.

On 18 February 2015, Mario Grobler wrote to Applicant and confirmed certain decisions taken at the meeting of 28 January. This agreement was in respect of the store room. Certain proposals were made in this regard, as well as in respect of certain movables. Nothing in this letter disputes the cancelation or refers to any misrepresentations or to any waiver of Applicant's rights.

8.

In the Answering Affidavit, Respondent raises aspects never previously raised, such as representations made by Applicant as to the number of hectares with planted vines, and the fact that Applicant accepted late payments over a lengthy period of time, and was therefore estopped from now relying on the relevant contractual clauses that I have referred to regarding waiver and/or variation. There are other defences also relating to the sub-division of the property and the exercise of an option. I do not intend dealing in any great detail with these defences which were never raised at the meetings on the one hand, and which are in direct conflict to the mentioned non-variation clauses in the agreements.

9.

It is clear from the affidavits as a whole that the facts that gave rise to Respondent's occupation are common cause. It is also common cause that the Respondent on numerous occasions failed to make payments when they were due. The non-waiver and non-variation clauses are in my view clear. There is no doubt as to their

interpretation and applicability. It is also doubtful whether the particular option was validly exercised at the time and for present purposes I cannot have regard thereto. The necessary allegations to found the exercise of such an option in terms of the contractual provisions have not been made. There is for instance, no allegation that the required consent for sub-division of the property, that is a pre-requisite, had been obtained prior to the exercise of such option. I agree with Applicant's Counsel that all of the mentioned defences were raised *ex post facto* and were not referred to when one would have expected them to be dealt with. In my view there is no room for the argument that the particular clauses in the contract of sale and the contract of lease were tacitly amended or varied or that the Applicant waived any of its rights in that context. Parties must abide by the agreement that they have signed in the absence of any fraud. Non-variation clauses are binding and are not *per se* contrary to public policy.

See: ***Brisley v Drotsky 2002 (4) SA 1 SCA.***

Waiver is in any event not assumed lightly and clear evidence thereof is required.

See: ***Feinstein v Niggli 1981 (2) SA 684 AD.***

10.

The result is that Respondent has no sustainable defence and accordingly the following order is made:

1. **Respondents and all persons occupying through it, are evicted from the remaining extent of Portion 7 of the farm Rondawel 22, District Marble Hall, and are to leave this property within 30 days from date of this order;**

2. **Respondent is ordered to pay the costs of this application on the scale as between Attorney and client.**

JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Case number: 44763/15

Counsel for the Applicant: Adv D. Prinsloo

Instructed by: Rudi Kotze Attorneys

Counsel for the Respondent: Adv P. A. Swanepoel

Adv C. A. Boonzaaier

Instructed by: Youngman Attorneys

Date of Hearing: 24 February 2016

Date of Judgment: 8 March 2016 at 10:00