IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 59005/2015

Date: 9/6/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

.....9/6/2016..... .....
DATE SIGNATURE

In the matter between:

ELISE BOTHA

APPLICANT

And

PIETER GERHARD PRETORIUS

RESPONDENT

JUDGMENT

PRETORIUS J,

(1) In this application the applicant requests the court to order the respondent to immediately return and relinquish to the applicant full access and control in and to a portion of the property at Portion […], Broederstroom […], known as the Mango Bar, and a cost order on attorney and client scale. The respondent elected to appear in person, as his attorneys had withdrawn.

(2) This application is based on a *rei vindicatio* as the applicant seeks delivery of the possession of her property. It is common cause that the applicant is the owner of the property known as Portion […], Broederstroom […]. It is further common cause that the respondent is in possession of the property. It is in dispute whether the main agreement, as well as any other agreement, between the applicant and the respondent were cancelled. The respondent does not dispute that he did not comply with the obligations of any of the alleged agreements.

(3) The respondent relies on a defence that all obligations he had to pay rent and electricity had been suspended, as a result of the fact that he disputes that the agreements were cancelled. He relies on the *exceptio non adimpleti contractus*. This defence can only be considered if there is a proper agreement of lease and the performance by the lessee is conditional upon the performance by the

lessor. The respondent's performance was not conditional upon any performance by the applicant, should it be found that a valid lease existed.

BACKGROUND:

(4) The applicant allowed the establishment of two businesses on the property, namely the Bundu Bar and the Mango Bar. On 3 May 2010 the applicant entered into a lease agreement with Mr PV Gillingham in terms of which Mr Gillingham leased the full property, including the two bars from the applicant.

(5) On 3 June 2010, a month after entering into the original lease agreement, Mr Gillingham entered into a sublease, as he was entitled to do, with the respondent. In terms of the sublease the respondent obtained the right to occupy the Mango Bar and three huts on the property.

(6) This lease remained effective until 18 October 2012 when the applicant cancelled the main lease, as Mr Gillingham failed to fulfil his obligations in terms of the lease agreement.

(7) On 18 September 2012 the applicant, through her attorney, addressed a letter to Mr Gillingham, demanding that the breach of the main

agreement be rectified. A month later, on 18 October 2012, the applicant cancelled the main lease as a result of Mr Gillingham's failure to comply with the letter of demand and still being in breach of the lease agreement.

(8) Clause 20.2 of the main lease agreement provides:

> *"…Should the rent not be paid by the 3rd of the calendar month, the LESSOR will have the right to cancel this agreement in writing and to claim immediate vacation of the premises by the LESSOR and any other person or persons occupying the premises, allowing the LESSOR to take up immediate occupation himself."*

(9) The respondent only had the right to sub-lease in terms of the main lease and when the main lease was cancelled the sub-lease was automatically cancelled, according to the applicant. The respondent contends that there is an agreement between him and the applicant in terms of the main lease agreement where it is set out in clause 24.1:

> *"In the event that the LESSOR is declares insolvent, or fails his obligations as LESSEE to the owner, Elise Botha, the Sub-LESSEE will take over the rental agreement entered into between the LESSOR and the Owner of the property under the same terms and conditions."*

(10) According to the respondent he relies on the main lease agreement and it is according to this lease agreement that he occupies the property. This is contrary to the respondent's affidavit where he stated:

> *"My right to occupy the premises is not based on the sub lease, but on the new lease agreement that came into being as a result of the cancellation of the agreement between the applicant and Gillingham."*

(11) On 31 January 2013 the applicant's attorney addressed a letter to the respondent, in which, *inter alia*, it was stated:

> *"We confirm that the aforesaid lease with Mr Gillingham has been cancelled and that you claim a lease by default in terms of your sub-lease with Mr Gillingham.*
>
> *We confirm that we are at present busy in negotiations for a new lease on the premises."*

The content of this letter makes it clear that at that stage there was no lease agreement between the applicant and the respondent.

(12) On 22 April 2013 a further letter was addressed to the respondent wherein it was set out that the respondent was occupying the premises illegally and that:

> *"…**unless a lease agreement is negotiated and signed by the end of the current month we hold instructions to launch***

an application to Court for your eviction*.*

Will you kindly communicate with the writer to finalize the lease agreement and attend to the signature thereof." (Court emphasis)

Once more the applicant and respondent did not enter into a lease agreement after 22 April 2013.

(13) On 22 August 2014 a final letter of demand was sent to the respondent by the applicant's attorneys. The respondent was once more informed that, according to the applicant, no agreement existed between the applicant and the respondent. The respondent was further informed that he was in breach of the agreement, should it exist, by failing to pay the electricity account to Tshwane Municipality, despite undertaking to pay the outstanding amount of R500 000.00. Furthermore, Mr Pretorius was informed that he had illegally connected the electricity meter with a consumption of approximately R15 000 per month and have failed to pay the rental of R24 000 per month. In this letter the attorney proclaimed:

"The Lessor has elected to cancel the Agreement of Lease, (insofar as any Lease Agreement may have existed, which is denied), of which this is official notification to you."

It is thus clear that on 22 August 2014 the lease, if it ever existed, was cancelled.

(14) This letter was acknowledged by the respondent on 9 September 2014 but he did not reply to the letter. On 2 October 2014 the respondent was informed that an application would be launched claiming the return of the property and the eviction of the respondent.

(15) On 20 March 2015 the respondent instructed an attorney to act on his behalf. On the same date the respondent's attorney informed the applicant's attorney that the respondent is exercising his option to renew the lease agreement, although he must have known that the applicant had already cancelled the lease agreement on 22 August 2014.

(16) It is common cause that the respondent had not paid rent since cancellation of the alleged lease agreement during August 2014. The current application was launched on 27 July 2015 and was served on 28 July 2015 on the respondent's attorney. The respondent's attorneys had withdrawn thereafter.

(17) The further defence put forward by the respondent is that the tenants of the Bundu Bar and the occupiers of the other properties should have been joined as they have an interest in this application. I cannot agree with the respondent, as this application deals specifically with the Mango Bar.

(18) The respondent could not rely on a lease agreement as the lease, if it had existed, had already been cancelled during August 2014 by the applicant. There is thus no lease agreement and no obligation on the applicant to perform in terms of a non-existent lease agreement.

(19) Therefor the respondent cannot rely on the *exceptio non adimpleti contractus* as there exists no lease agreement between the applicant and the respondent. The respondent could not give any indication as to how and when the new lease was concluded. He could not inform the court as to the terms of the new sub-lease. His statement that a "new" lease agreement came into being, without setting out whether it was a written or oral agreement or any other relevant facts, cannot be entertained. No agreement comes "into being" automatically, as the respondent submits. His confirmation in the founding affidavit that he was prepared to negotiate a new lease agreement, militates against his contention that there existed a lease agreement between him and the applicant. This contradiction by the respondent is of utmost importance as it confirms that there was no lease agreement, at least since 22 August 2014.

(20) The respondent did not prove any payments to the applicant. I find that the lease had not existed, however even if there had been a lease agreement, it was cancelled on 22 August 2014.

(21) I cannot find that the respondent has any right to the property and the property should be returned to the applicant.

(22) Subsequently I make the following order:

1. The respondent is ordered to forthwith return and to relinquish full access and control in and to the portion of the property at Portion […], Broederstroom […], known as the Mango Bar, to the applicant.
2. The respondent is ordered to pay the costs.

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Judge C Pretorius

Case number	: 59005/2015
Matter heard on	: 25 May 2016
For the Applicant	: Adv BM Heystek
Instructed by	: JJ Badenhorst and Associates
For the Respondent	: In person
Instructed by	: In person
Date of Judgment	: 9 June 2016