IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 57062/16

In the matter between:

COACHMANS STEAK RANCH (PTY) LIMITED First Applicant

NICOLA ENGLEZAKIS Second Applicant

9/3/18

(1) REPORTABLE: ~~YES~~ / NO

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

09/03/18
DATE

SIGNATURE

and

SA RETAIL PROPERTIES (PTY) LIMITED First Respondent

SHERIFF OF THE HIGH COURT SANDTON NORTH Second Respondent

JUDGMENT

Tuchten J:

1 The applicants apply urgently to set aside warrants of attachment and eviction taken out under the present case number. The case turns on the interpretation of a settlement agreement concluded between the applicants and the first respondent which was made an order of court by Prinsloo J.

2 The first respondent (SA Retail) issued summons against the applicants under the present case number on 22 July 2016. In its summons, SA Retail alleged that it had leased premises in Sandton to the first applicant (Coachmans). Coachmans conducted a restaurant business from the premises. The second applicant stood surety for the obligations of Coachmans to SA Retail.

3 The particulars of claim to the summons alleged that the Coachmans had to pay monthly amounts under the lease in respect of a basic rental, operating costs, insurance charges, rates and taxes and refuse charges. The particulars of claim further alleged that as at 1 July 2016, the applicants owed SA Retail R1 0121 760 and that because this sum was not paid, SA Retail had elected to cancel the lease.

4 SA Retail went on to allege that it would suffer damages if Coachmans by refusing to vacate made it impossible to re-let the premises.

5 SA Retail claimed in its summons payment of R1 0121 760 with interest and eviction. It asked that its claim for damages be postponed until it was able to quantify it, It also claimed attorney and client costs. The lease made provision for this scale of costs.

6 The applicants defended the action. SA Retail applied for summary judgment. The parties then concluded an agreement, which they styled "DEED OF SETTLEMENT, ACKNOWLEDGEMENT OF DEBT, AND COURT ORDER" on 1 June 2017. The settlement agreement was made an order of court on 6 June 2017.

7 The settlement agreement recorded in clause 2 that the first respondent contended that the applicants were indebted to it in the sum of R2 187 548, calculated in accordance with a schedule attached to the settlement agreement. Clause 3 read with clause 4 provided that the applicants could if they wished provide the first respondent with their calculation of the "arrears due and owing". If they did not do this within 30 days, the quantum owing would be as SA Retail asserted in clause 2.

8 The applicants did not challenge SA Retail's asserted quantum, which then became binding.

9 Clause 5 proceeded to require the applicants to pay certain amounts to SA Retail. The clause is not well drafted. It reads:

> In the interim period, the [applicants ...] undertake to effect payment of the following amounts, in liquidation of [Coachman's] indebtedness to SA Retail], and payment of future rental on due date.

10 The clause then sets out six amounts, each of R200 000, to be paid from 31 May 2017 first on 31 May and then on 7 June 2017 and thereafter from 1 July to 1 October 2017.

11 Clause 6 provided that if "anyone payment" was not made on due date, SA Retail would be obliged to inform the applicants' attorney by email that payment must be made within seven days. If payment were then not made, SA Retail would

> ... be entitled to proceed forthwith with the warrant of eviction and warrant of attachment for any amount then due and outstanding.

12 Coachmans then paid the six amounts listed in clause 5. They paid them late but I do not think this matters. They were paid electronically. They were accepted without protest and retained. In respect of the late payments of some or all of the six amounts, SA Retail either waived its rights to evict and execute or agreed to amend the due dates for payment to accommodate the lateness.

13 However, after it had received the six listed amounts, SA Retail began to exert commercial pressure on the applicants to pay the balance owed to it. This balance included monthly rental due in respect of Coachmans' occupation of the premises. There was much correspondence but I need not refer to it. Suffice it to say, on 19 January 2018, SA Retail, through its attorney, sent a demand to the applicants' attorney in which the applicants were informed that the January rental had not been paid and giving notice that if payment were not made within seven days, SA Retail would be entitled to proceed forthwith with "the warrant of eviction."

14 The warrants of eviction and attachment which SA Retail proceeded to have executed were dated 8 August and taken out on 18 August 2017. They were taken out when the applicants were late with one of the six payments but then not executed until 27 February 2018. The result of the execution of the warrants was that Coachmans could no longer trade. I ruled that the matter was urgent and argument proceeded on the merits of the dispute.

15 The essence of the dispute between the parties is this: the applicants contend that the entitlement to execute conferred by clause 6 extended only to a failure to pay the six listed amounts; SA Retail, on

the other hand, argues that the entitlement to execute extended also to a failure to pay rental due and outstanding.

16 The relevant provisions of the deed of settlement are not easy to interpret. As was so trenchantly observed in *Potgieter v Olivier and Another*,[1] the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[2] provided an exposition of the principles of interpretation. It is a unitary exercise that requires the consideration of text, context and purpose.

17 The context is that when SA Retail issued summons, the applicants owed it a large sum of money. By the time the application for summary judgment was settled, the sum had doubled. SA Retail wanted to keep Coachmans on as its tenant but also to get paid what it was owed and to put commercial pressure on the applicants to pay on due date what they owed. Coachmans wanted to keep on trading from the premises. There is considerable goodwill to a restauranteur in the premises in which she trades. These were the purposes for which the parties entered into the settlement agreement.

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1 2016 6 SA 272 GP para 30

2 2012 4 SA 593 SCA

18 By June 2017, the applicants had given SA Retail something of a runaround. SA Retail manifestly wanted to limit the applicants' ability to use the delays which attend the enforcement of commercial rights through the courts by obtaining rights to enforce its claims which eliminated the applicants' capacity to delay the day of reckoning. To achieve this, SA Retail did not agree to reinstate the lease but to defer the enforcement of its right to evict and execute provided the applicants paid substantial amounts on account of their overdue indebtedness.

19 it is quite unclear what the parties meant by "the interim period". It could be the interregnum which would arise if the applicants challenged the quantum of their indebtedness under clauses 3 and 4. However, there is no indication in the settlement agreement that this interregnum would end before, on or after the due date of the last listed payment. Furthermore, there is no indication of a regime which would begin to operate after the conclusion of the interim period.

20 The settlement agreement further does not expressly provide for the amounts of future rentals which would become due. There are however the allegations in the particulars of claim and more importantly in the schedule to the settlement agreement, from which one could determine retrospectively what the rentals had been. There

is the added complication that the summons refers to a component for "basic rental" and then components for operating costs rates and taxes and the like. But the settlement agreement refers only to "rental" without quantifying or defining it. To compound the uncertainty, there is no claim in the summons for the very substantial electricity charges for which the applicants by their failure to raise a challenge under clauses 3 and 4 accepted liability.

21 Giving all these difficulties due weight, I nevertheless conclude that the interpretation of SA Retail is to be preferred. It wanted to be able to enforce its claims for future rental without being delayed by precisely the kind of procedural challenge that the applicants have mounted in the present case. This was not a consideration which the applicants would have been commercially able to deny SA Retail. I find that "anyone payment" in clause 6 includes a payment in respect of "future rental on due date" in clause 5.

22 As SA Retail gave the notice contemplated in clause 6 in respect of the January rental which was due and unpaid, the jurisdictional prerequisite to the exercise of the right to take out warrants was satisfied. SA Retail was then entitled both to evict and to execute for "any amount then due and outstanding". The applicants do not

challenge the amount for which SA Retail in its warrant of execution seeks to execute in that regard.

23 The application must accordingly fail. In clause 7 of the settlement agreement, the applicants agree to pay costs on an attorney and client scale for "any further costs incurred in the event of breach hereof". I can find no reason to deprive SA Retail of the benefit of this provision.

24 I make the following order:

1 The application is dismissed.

2 The applicants, jointly and severally, must pay the first respondent's costs in the application on the scale as between attorney and client.

NB Tuchten
Judge of the High Court
9 March 2018

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