Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

Case Number: 11871/2011

In the matter between:

WINKELSHOEK WYNKELDERS (EDMS) BPK	First Applicant
WINKELSHOEK EIENDOMME (EDMS) BPK	Second Applicant
and	
JAMADU RESTAURANT (EDMS) BPK	Respondent

JUDGMENT DELIVERED ON 31 MAY 2012

ZONDI, J:

[1] In this application the applicants seek an order declaring that the lease between them and the respondent has been cancelled; an order evicting from the property the respondent and all those who occupy the property under the respondent and that should the respondent and all those who occupy the property under it fail to comply with the eviction order, that the Sheriff of the Court be authorised to take all the necessary steps to enforce compliance with the eviction order. The premises, in respect of which the orders are sought, are situated at Erf 3274 Winkelshoek Sentrum, N7, Piketberg ("the property").

[2] The respondent opposes the relief sought by the applicants on three main grounds, first, that the application lacks urgency; secondly, that the applicants should

have anticipated that there would be a serious dispute of fact incapable of resolution on the papers and for that reason should have used the action procedure not motion procedure and thirdly, that the applicants by their conduct in accepting rental after their purported cancellation of the lease had condoned the breach.

[3] Before dealing with the merits of the matter it is necessary to consider the two points *in limine* raised by the respondent, namely first, that the matter should be dismissed because of lack of urgency and second, that the applicants should not have brought this matter by way of motion proceedings in light of serious factual disputes.

[4] Mr **van der Merwe,** who appeared for the respondent, submitted that the application is an abuse of the Court process. He argued that it was brought on the basis of urgency but the applicants failed to establish a case for urgency in their papers. He accordingly urged the Court to dismiss it on this ground alone. In support of this contention Mr **van der Merwe** referred to and relied on *IL and B Marcow Caterers v Greatermans SA Ltd and Another; Aroma Inn (Pty) Ltd and Another* 1981 (4) SA 108 (C); *Vena v Vena and Others* 2010 (2) SA 248 (ECP) and on an unreported judgment of this division dated 10 April 1991 in the matter of *Roger John Douglas Hamilton Brown v Portaman Property Trust (Pty) Ltd and Others* case number 3855/91.

[5] On 13 June 2011 the applicants brought this application on an urgent basis for hearing on 21 June 2011. The respondent was given up until 20 June 2011 to file its answering affidavit. When the matter was enrolled on 21 June 2011 the respondent had not filed its opposing affidavit and by agreement between the parties the matter

was postponed to 9 November 2011 for hearing on the semi-urgent roll and the respondent was given up until 31 August 2011 to file its opposing affidavit, which it never did until it was ordered to do so by the Court on 7 September 2011 in terms of the order obtained by way of a chamberbook application. In their founding affidavit the applicants set forth clearly the circumstances which they aver rendered the matter urgent and the reasons why they claim that they could not be afforded substantial redress at a hearing in due course.

[6] In my view the matter is urgent enough to be heard on the semi-urgent roll. There are serious allegations of breach by the respondent of the franchise agreement which in all likelihood will jeopardise the contractual relationship between the first applicant and Spur Group Ltd, the franchisor, which may result in the first applicant losing the franchise. The interest which the applicants seek to protect in this matter is of a commercial nature. The urgency of commercial interest may justify the invocation of Rule 6 (12) of the Uniform Rules of Court. (*Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586 e-g)

[7] The fact that the matter was postponed for hearing on the semi-urgent roll does not mean that it completely lost urgency. To afford the respondent an opportunity to file its answering affidavit and the fact that an indulgence was extended to the respondent cannot be relied upon as a basis for the contention that the matter lost urgency. In my view the first point *in limine* should fail.

[8] The second point taken on behalf of the respondent relates to the form of procedure adopted by the applicant in seeking relief. In this regard, it was argued, on

behalf of the respondent that the applicant should have anticipated that there would be a serious factual dispute and should have approached the Court by way of action procedure not motion procedure. Mr **Van Der Merwe** urged the Court to dismiss the application for that reason alone or alternatively that the matter be referred for oral evidence.

[9] It is correct that an application will be referred for oral evidence only if there is a genuine dispute of fact, the resolution of which is material to the determination of the case (*President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 (1) SA 1 CC para. 235). In the present matter it is not necessary to do so because the resolution of the factual dispute is not material to the determination of the main issue, namely whether the respondent has committed breach of the lease entitling the applicant to cancel the lease. The respondent's second point *in limine* therefore fails.

[10] I turn now to consider the merits of the application. It is common cause that the applicants and the respondent entered into the lease agreement (the original lease) in or about July 2004 in terms of which the applicants let to the respondent the property for the period of a year from 1 August 2004 to 31 July 2005. The rental payable was R12 000.00 per month plus 2% of the restaurant monthly turnover which the first applicant was obliged to pay to the Spur Group in terms of the franchise agreement. The lease was subject to renewal and in which event the rental payable would escalate by 9% per annum.

[11] At the time of the conclusion of the original lease, the first applicant occupied

the property in terms of the lease agreement it had concluded with the second applicant for the purposes of conducting a franchise business, namely Spur Steak Ranch. The first applicant conducted the franchise business pursuant to the franchise agreement it had concluded with Spur Group (Pty) Ltd. In terms of the original lease the respondent would only use the premises for the purposes of conducting Spur Steak Ranch. Furthermore in terms of clause 5.16 and 5.17 the respondent was:

> *"5.16 Verantwoordelike wees vir alle bedryfsuitgawes verbonde aan die bestuur en bedryf van die Restaurant wat sal insluit alle gelde verskulidig aan Spur Group (Pty) Ltd voortspruitende uit die bedryf van die Restaurant;*
>
> *5.17 Gebonde wees aan all reels en voorskrifte soos opgelê deur Spur Group (Pty) Ltd ingevolge waarvan die Verhuurder die reg verkry het om 'n Spur Braaihuis te bedryf. Die Huurder erken dat hul hulself vergewis het van die "Franchise Agreement" en "User Agreement" soos gesluit tussen die Verhuurder en Spur Group (Pty) Ltd."*

[12] In relation to the remedies available to the landlord in the event of the lessee breaching the lease, clause 7 of the original lease provides as follows:

> "***7. KONTRAKBREUK***
>
> *7.1 Indien die Huurder sou nalaat om die huurgeld te betaal soos bepaal in hierdie huurkontrak of enige ander term van hierdie kontrak verbreek, sal die Verhuurder sonder benadeling van enige reg tot skadevergoeding of engie ander eis wat die Verhuurder teen die Huurder mag hê as gevolg daarvan geregtig wees om:*
>
> *7.1.1 hierdie kontrak te kanselleer, of*

7.1.2 die Huurder aanspreeklik te hou vir betaling van die huurgeld

7.1.3 in ieder geval skadevergoeding te eis.

7.2 Die Verhuurder is te enige tyd geregtig om hom op die bepalings van klousule 7.1 te beroep ongeag of hy vorgie verbreking van die bepalings van hierdie kontrak verontagsaam het."

[13] It is common cause that the parties did not enter into and conclude a written lease agreement after the termination of the original lease on 31 July 2005. The respondent continued to occupy the property and paid the monthly rental as escalated in accordance with the provisions of clause 4.3 of the original lease. The applicants allowed the respondent to occupy the property and accepted rent from the respondent.

[14] The dispute between the parties relates to the terms and conditions of the renewed lease which govern their contractual relationship and in particular whether their contractual relationship should be governed by the terms and conditions of the original lease. In this regard the applicants allege that during October 2005 the parties held a meeting at Winkelshoek for the purposes of reaching an agreement on what the terms and conditions of the new lease would be.

[15] The applicants aver that at the meeting the agreement reached was on the following terms:

"*22.1 Respondent sal voortgaan die eiendom by Tweede Applikant en die Spur Franses dranklisensie by Eerste Applikant huur op dieselfde terme en voorwaardes soos vervat in die aanvanklike ooreenkoms en sal alle verpligtinge van die Du Toit's oorneem in terme daarvan, behalwe dat*

die huurtermyn 'n tydperk van drie jaar sal wees effektief vanaf 1 Oktober 2005;

22.2 *Respondent word daarvan vrysgeskeld om die 2% op die restaurant se omset vir die periode 2004 tot Oktober 2005 aan Applikante te betaal"*

[16] The applicants say a new lease embodying the abovementioned terms was to be reduced in writing in due course. In support of the allegations that the lease agreement was concluded on the terms as contended for by them, the applicants refer to and attach to their founding affidavit the minutes of the meeting held by the parties.

[17] The applicants further allege that to give effect to what was agreed at the meeting, they instructed their attorney to prepare a lease agreement in accordance with their discussion. In this regard the applicants refer to the Addendum prepared by their attorney and which would be an Addendum to the original lease agreement.

[18] The proposed Addendum to the lease agreement provides as follows:

"Nademaal die partye 'n huurkontrak gesluit het wat verskryk op 30 September 2005;

En nademaal die partye begerig is om die bestaande huurkontrak verder te verleng;

Derhalwe kom die partye as volg ooreen:

1. *Die bestaande huurkontrak word verleng vanaf 1 Oktober 2005 tot 30 September 2006.*
2. *Die huurgeld sal eskaleer met 9% per jaar.*
3. *Alle ander bepalings van die bestaande kontrak bly onveranderd van*

krag".

[19] According to the applicants this Addendum was sent to Mrs Du Toit of the respondent for signature. She undertook to go through it and thereafter forward it to the applicants once she had done so. But she never sent it back to the applicants.

[20] The applicants allege further that the three year period provided for in the Addendum to the original lease expired on 1 October 2008 and was not extended. The respondent continued, however, to occupy the premises and conducted the Spur Steak Ranch business on the premises and paid rental albeit sporadically.

[21] In the circumstances the applicants contend that *"'n uitdruklike, alternatiewelik stilswyende, maand-tot-maand huurkontrak tussen applikante en respondent tot stand gekom op mutatis mutandis dieselfde terme en voorwaardes".*

[22] The applicants contend that *"die optrede deur die partye na Oktober 2008 bevestig weer eens dat die partye die situasie ook so verstaan het"*

[23] The applicants allege that the respondent is in breach of the lease in that it failed to pay rental and other related charges timeously and in May 2009 the arrear rental amounted to R162 959.78. On 5 May 2009 the applicants sent a letter of demand to the respondent demanding payment of the sum of R162 959.78 within 7 days. The respondent failed to remedy breach and the second applicant issued summons against the respondent for the payment of the arrears and subsequently obtained a default judgment in an amount of R203 327.43 plus interest and costs on 8

December 2010. It was only after the default judgment that the respondent paid the arrears.

[24] The applicants further allege that the respondent fell in arrears with its monthly rental payments again and as at April 2011 the arrears in respect of rental and electricity charges were R55 777.35 and R24 442.95 respectively.

[25] On 3 May 2011 on their instruction, the applicants' attorney of record addressed a letter to the respondent informing the latter that it was in breach of the agreement and that by reason thereof the applicants were cancelling the agreement. The applicants in their cancellation notice demanded that the respondent vacate the property on or before 20 May 2011.

[26] The respondent admits that it was in arrears with its rental and electricity payments but avers that in June 2011 it brought its payments up to date. It blames the economic down turn and the applicants' delay in providing it with the electricity accounts for its failure to pay rent and electricity charges timeously.

[27] The respondent also admits that the original lease expired on 31 July 2005. It, however, denies that its occupation of the property after 31 July 2005 was on the terms as contended for by the applicants. In this regard the respondent refers to and relies on a letter which its attorneys of record addressed to the applicants' attorneys of record on 12 May 2011 in which its version is set out. This letter is annexure "*WK14*" to the applicants' founding affidavit.

[28] According to the respondent the terms of the lease which governed their contractual relationship after the expiration of the original lease are the following:

"3. *Ons opdragte is dat daar inderdaad 'n tydelike kontrak vir 'n periode van 1 jaar gesluit is tussen Mnr en Mev du Toit as huurders en u kliënt as verhuurder. Hierdie ooreenkoms is duidelik gemerk as synde 'n tydelike kontrak in afwagting van die oprigting van 'n beslote korporasie of maatskappy deur Mnr en Mev du Toit.*

4. ...

5. *Mnr en Mev du Toit het na aangaan van die voormelde kontrak die maatskappy bekend as Jamadu Restaurant (Edms) Bpk gestig en gemelde maatskappy het gedurende ongeveer Junie of Julie 2005 'n nuwe ooreenkoms met u kliënt aangegaan. Hierdie nuwe ooreenkoms het beslis nie die bepalings van die tydelike kontrak in totaliteit bevat nie. Die ooreenkoms was mondeling gesluit tussen die partye en sou later in skrif vervat word. Die belangrikste bepalings van die nuwe ooreenkoms was dat ons kliënt die vaste eiendom, die Restaurant Dranklisensie en die Spur Franchise van u kliënt huur vir 'n periode van 9 jaar vanaf 1 Augustus 2005 tot en met 31 Julie 2014. Daarbenewens het die kontrak ook bepalings bevat waarkragtens die partye oor en weer 30 dae kennis moet gee aan die ander party van enige beweerde kontrakbreuk ten einde die ander party geleentheid te gee om sodanige kontrakbreuk reg te stel. Alhoewel daar sprake was van voorsetting van die reeling waarkragtens 2% van die maandelike omset van die Restaurant ook an u kliënt betaal moet word, is daar uitdruklike tussen die partye ooreengekom dat dit nie gedoen sal word nie aangesien ons kliënt onder*

andere verplig was om maandeliks die 4% advertensiekoste en 5% "royalties" aan Spur oor te betaal.

6. *Die voormelde ooreenkoms tussen u kliënt en Jamadu Restaurant (Edms) Bpk is inderdaad op skrif gestel en deur ons kliënt onderteken. Dit is daarna deur Mnr Hanekom van u kliënt met hom saamgeneem vir ondertekening deur u kliënt. 'n Afsrkif van die ondertekende ooreenkoms sou aan ons kliënt terugbesorg word maar dit is tot op datum nog nie gedoen nie. Onder die omstandighede het ons kliënt vanaf 1 Augustus 2005 voortgegaan met die huur van die eiendom ooreenkomstig die mondelinge ooreenkoms wat tussen die partye gesluit is vir 'n periode van 9 jaar tot en met 31 Julie 2014.*

7. *One kliënte deel ons mee dat hulle wel van tyd tot tyd agterstallig geraak het met betaling van die huurgeld en kostes verbonde aan elektrisiteitsverbruik. Daar was egter telkens met u kliënt reëlings getref dat uitstel aan ons kliënt verleen word vir bepaling van hierdie agterstallige huurgeld en is die huurgeld ooreenkomstig ons instruksies op datum gebring tot en met April 2011. Ons kliënt beoog dan ook om vir die volle duur van die ooreenkoms tot en met 31 Julie 2014 die huurgeld op datum te handhaaf."*

[29] The question is whether the new lease was concluded on the terms as contended for by the applicants and secondly whether its breach by the respondent was established. The *onus* is on the applicants to establish the terms of the lease agreement and its breach by the respondent. It is common cause that as at 3 May 2011 the respondent was substantially in arrears with its rent and electricity payments.

There seems to be no dispute that after the expiration of the original written lease agreement the respondent continued to occupy the property at which it conducted the Spur Steak Ranch business and also continued to pay rental. The applicants allowed the respondent to occupy the premises and accepted rental from the respondent. It can therefore, be accepted that there was a tacit relocation (*Tiopaizi v Bulawayo Municipality* 1923 AD 317 at 325; *Shell South Africa (Pty) Ltd v Bezuidenhout and Others* 1978 (3) SA 981 (N) at 984 C-D).

[30] It is correct that where the relocation is tacit, there is a presumption that the property is relet at the same rent and that those provisions that are "*incident to the relocation of landlord and tenant*" are renewed. (*Doll House Refreshments v O' Shea and Others* 1957 (1) SA 345 (T) at 348G). But the provisions that are collateral, independent of and not incident to that relation are not presumed to be incorporated in the new letting.

[31] As far as the duration of the new lease is concerned, Cooper: Landlord and Tenant, 2nd ed at 351, seems to hold the view that it must be inferred from the intention of the parties and where the parties give no indication that the relocation is for a specified period, it is for an indefinite period, thus terminable on reasonable notice.

[32] This line of reasoning was adopted by M T Steyn, J in *Fiat SA v Kolbe Motors* 1975 (2) SA 129 (O). He held at 139H-140B as follows:

> "*Hoe dit egter ook al sy, is die tydsduur van so 'n nuwe stilswyende kontrak iets wat van die bedoeling van die betrokke partye afhang, en wat hulle bedoeling daaromtrent is moet afgelei word van die feite en omstandighede van elke*

besondere geval. Vgl. Cooper, op. cit., bl. 321. Na my mening geld die oorwegings en beginsels hierbo aangehaal betreffende stilswyende ooreenkomste in die algemeen en huurkontrakte in die besonder ook vir 'n geval soos die onderhawige. Die feit dat eiser en verweerder na verstryking van die geskrewe kontrak op 31 Desember 1972 nog steeds sake met mekaar gedoen het en in hul handelinge met mekaar voortgegaan het op dieselfde wyse as dié waarop hulle te werk gegaan het terwyl die geskrewe kontrak nog gegeld het, is nie sonder regsgevolge nie. Besigheidstransaksies kan nie in 'n regtelike lugleëruimte geskied nie, en ek is tevrede dat die partye deur hul gedrag gedurende 1973 'n stilswyende ooreenkoms aangegaan het wat van krag was op 2 November 1973".

[33] Cooper, op,cit, p351 - 352 makes the following observation: *"In general our Courts have not followed the Roman-Dutch writers, but have made the duration of a tacit lease dependent upon the rent period. Thus, the effect of a tacit relocation of premises originally let for one year at a monthly rent is to renew the lease from month to month, and each time only for one month... On this reasoning, upon the expiration of a period the lessee should be entitled to vacate the premises and the lessor to claim his eviction, but the Courts hold that the tacit relocation can be terminated unilaterally only upon reasonable notice being given, the reason presumably being that, in the absence of an indication to the contrary, the parties have tacitly agreed that the relocation will be for an indefinite period". (footnote omitted)*

[34] In my view the aforementioned remarks, with which I am in respectful agreement, are of particular application to the facts in the matter before me.

[35] Turning to the facts of the instant matter, it is clear in my view that after the expiration of the original lease the parties did not terminate their contractual relationship. The respondent continued to use the applicants' premises and paid monthly rental as escalated in terms of the original lease. The parties did not agree on the terms and the duration of the new lease. In these circumstances they must be presumed that they intended the terms of the original lease to govern the new lease but that its duration would be for an indefinite period which according to Cooper: Landlord and Tennant *supra* at 351, could be terminable on reasonable notice.

[36] In terms of the original lease the premises were let for one year at a monthly rent. In my view the effect of a tacit relocation was to renew the lease from month to month in accordance with the rent period. In other words, the terms and conditions of the original lease should govern the parties' contractual relationship and that the dispute between them arising out of the lease should be resolved in accordance therewith. I find, therefore, that the new lease was concluded on the terms as contended for by the applicants.

[37] The question of the adequacy and validity of the applicants' termination notice should also be determined by reference to the terms of the original lease which the parties are presumed to have wanted to apply to the tacit relocation. In this regard, clause 7 of the original lease provided a remedy to the applicants in the event of its breach by the respondent. The applicants had an election. They could either cancel

the contract or hold the respondent liable for unpaid rental and in each case sue for the damages. The original lease does not provide for the obligation of the giving of the notice of breach to the respondent. There is nothing suggesting that the applicants' right to cancel the lease was subject to a notice being given to the respondent. In these circumstances, I reject the respondent's suggestion that in terms of the lease the applicants should have given it 30 days notice to remedy the breach before cancelling the lease and that the applicants' failure to give them such notice rendered the cancellation notice defective with the result that the cancellation notice could not be relied upon as a basis to evict the respondent.

[38] In any event, although the applicants were not obliged to do so, it is clear from the papers that on various occasions when the respondent fell in arrears with rental, the applicants on each occasion sent the respondent a letter demanding of the respondent to remedy the breach. The respondent would clear the arrears but would thereafter default again. In the result, I find that the applicants' notice of cancellation dated 3 May 2011, was valid. The respondent's suggestion, that the applicants waived their right to cancel the lease because in the past when the respondent was in arrears, the applicants' did not cancel the lease instead they allowed the respondent an opportunity to clear the arrears, cannot be correct having regard to the provisions of clause 7.2 of the original lease providing that:

> *"die verhuurder is te enige tyd gereging om hom op die bepalings klousule 7.1 te beroep, ongeaf of hy vorige verbreking van die bepalings van hierdie kontrak verontagsaam het."*

This is so because a right to cancel cannot be lost through mere delay in exercising it. (*Potgieter and Another v Van Der Merwe* 1949 (1) SA 361 (A)).

[39] In any event the mere acceptance of accrued rent does not amount to waiver of a right to cancel since even if the applicants were to cancel the lease, they would be entitled to claim arrear rent. Their acceptance of accured rent after cancelling the lease, therefore, is not an unequivocal act which is consistently "*only with the continuance of the lease*" (*Whittaker v Kiessling* 1979 (2) SA 578 (SWA) at 583 E).

[40] The next issue to consider is the question of costs. Mr **Jonker**, who appeared for the applicants, asked that costs be awarded on a scale as between attorney and client should the applicants succeed in their application. The original lease makes provision for the costs to be awarded on punitive scale in certain circumstances. In this regard clause 7.5 of the original lease provides as follows:

> *"7.5 Indien die Verhuurder verplig is om 'n prokureur opdrag te gee om geregtelike stappe teen die Huurder te doen ten einde die eiendom in besit te kry en/of te bewerkstellig dat agterstallige huurgeld en/of skade vergoeding vir kontrakbreuk van hierdie ooreenkoms betaal word en/of nakoming van enige van die bepalings hiervan af te dwing, dan moet die Huurder alle regskoste betaal wat tussen prokureur en kliënt in verband hiermee aagegaan is, met inbegrip van sondanige invorderingskommissie as wat sodanige prokureur regtens geregtig is om te vorder."*

[41] In my view the applicants have established that they are entitled to be awarded costs on attorney and client scale. The applicant informed the respondent of cancellation of the lease and demanded that it vacate the property. The respondent refused to vacate the rented premises contending that the cancellation notice was

defective. The applicants were forced to approach the Court for an order compelling the respondent to vacate the premises. In these circumstances, there is no reason why in terms of the lease the respondent should not be ordered to pay costs on attorney and client scale.

The Order

[42] In the result the following order is made:

1. The lease between the applicants and the respondent is hereby declared cancelled;
2. The respondent and those who occupy the property under or through the respondent are ordered to vacate the property within 30 days of the date thereof;
3. In the event of the respondent and those holding the property under or through it fail to comply with para 2 above, the Sheriff is authorised to enforce compliance with the provisions of para 2 above within a reasonable time;
4. The respondent to pay the applicants' costs on attorney and client scale.

D H ZONDI