Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 15275/2015

Before: The Hon. Mr Justice Binns-Ward

Hearing: 18 April 2016

Judgment delivered: 20 April 2016

In the matter between:

HENCETRADE 15 (PTY) LTD Applicant

And

TUDOR HOTEL BRASSERIE & BAR (PTY) LTD Respondent

JUDGMENT

BINNS-WARD J:

[1] The applicant has applied for an order authorising the eviction of the respondent company and all those holding occupation under it from certain premises situate at 153 Longmarket Street, Cape Town.

[2] The respondent took occupation of the premises pursuant to the conclusion by it of a lease agreement with the applicant. The property let in terms of the lease comprised all the buildings and improvements situate on Erf 2665, Cape Town, known as the 'The Tudor

Hotel' (excluding the penthouse) and the third floor of the adjoining building, known as the 'Huys Heeren XVII' building. The lease period commenced on 1 July 2012 and (subject to a right of renewal) was due to expire on 20 June 2022. The lease provided, in terms of clause 10.1 of Annexure B thereto, that 'all [rent] payments in terms of [the] lease [had to be] made by the tenant to the landlord …on or before the first day of each month without demand, free of exchange, bank charges and without any deductions or set-off whatsoever'. Clause 21.1.3 of the said Annexure furthermore provided that '[t]he tenant shall not be entitled to withhold or defer payment of any amounts due in terms of this lease for any reason whatsoever'. The lease was subject to a sole memorial clause (clause 28.1 of Annexure B thereto), which also provided that no alteration, cancellation, or variation of the lease would be of any force or effect unless it were reduced to writing and signed by both the parties.

[3] The premises were let for use as a hotel. The terms of the lease provided that the lessee would refurbish the existing premises, which in the Tudor Hotel building were already equipped for the operation of a hotel. The third floor of the Huys Heeren XVII, however, was just 'an empty shell' without even so much as a proper ceiling in place.

[4] When the respondent was given occupation of the let premises at the commencement of the lease period, the applicant retained an area on the third floor of Huys Heeren XVII in which it stored certain property. The area in question comprised approximately one third of the floor space on the third floor. The third floor constituted 19,3 per cent of the total floor space that was let in terms of the lease agreement. The respondent took occupation of the let premises, with the exception of the aforementioned space used by the applicant for storage purposes.

[5] It seems, however, that the respondent did not at any stage take the third floor area into use for the purposes of its hotel business. In April 2015, the parties entered into a written agreement, confirming an oral agreement made earlier, that the third floor of Huys Heeren XVII was to be excluded from the lease with effect from the end of April 2014. The written agreement contained no provision for a consequential adjustment of the rent determined in terms of the lease.

[6] The applicant alleged that it had cancelled the lease on 14 August 2015 because the respondent had fallen into arrears with the rental payments and had failed to purge its default after having been given the opportunity prescribed in terms of the lease to do so.

[7] The respondent denied that it was in arrears. It maintained that for the period between the commencement of the lease until the end of April 2014 (to which I shall refer as 'the first period'), it had not been given the full use and enjoyment of the let premises by reason of the applicant's use of portion of the third floor of the Huys Heeren XVII for storage purposes. It alleged that in the circumstances of the applicant's deficient performance of its obligation to make the entire area of the let premises available, the latter had not been entitled to any rental during that period. It alleged further that it had been a tacit term of the agreement in terms of which the respondent had given up any right to the use and enjoyment of the third floor that the agreed rental in terms of the lease would be reduced pro rata the diminished floor area, that is by 19,3 per cent, for the remainder of the lease period commencing 1 May 2014 ('the second period').

[8] The respondent, which had paid a substantial part of the rental in terms of the lease during the first period, contended that it was entitled to have those payments credited against its allegedly reduced rental liability during the second period. It alleged that an allocation of the payments it had made since the commencement of the lease on the basis just described demonstrated that it was in point of fact substantially in credit in respect of the rent that had been due when the applicant purported to cancel the lease.

[9] The respondent's approach to the issue of its liability to have paid rental for the premises during the first period runs counter to a line of authority established in a line of reported judgments commencing with that of Van Winsen J in *Arnold v Viljoen* 1954 (3) SA 322 (C). See also *Marcuse v Cash Wholesalers (Pvt) Ltd* 1962 (1) SA 705 (FC); *Bourbon-Leftley v Turner* 1963 (2) SA 104 (C); *Appliance Hire (Natal)(Pty) Ltd v Natal Fruit Juices (Pty) Ltd* 1974 (2) SA 287 (D); *Basinghall Investments (Pty) Ltd v Figure Beauty Clinics (SA) (Pty) Ltd* 1976 (3) SA 112 (W) at 121F; *Greenberg v Meds Veterinary Laboratories (Pty) Ltd* 1977 (2) SA 277 (T), and *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others* 1980 (1) SA 301 (D) at 310G-H. In terms of that line of authority, a lessee who takes occupation of premises which are deficient in any respect is obliged, while it remains in occupation, to pay the full rental stipulated in terms of the lease. Its remedy is to claim compensation by way of an abatement of rental and/or damages. A lessee who, having taken occupation, fails to pay the full rental is exposed to the cancellation of the lease for non-payment.

[10] The line of authority founded in the relevant respect on *Arnold v Viljoen* has been disapproved in *Steynberg v Kruger* 1981 (3) SA 473 (O) and *Ntshiqa v Andreas Supermarket (Pty) Ltd* 1997 (3) SA 60 (Tk), and doubted in *Nedcor Bank Ltd v Withinshaw Properties*

(Pty) Ltd 2002 (6) SA 236 (C) and *Thompson v Scholtz* 1999 (1) SA 232 (SCA). It has also been widely criticised by academic writers; see the writings referred to in *Thompson* supra, at p.246E. I am bound to follow it, however, unless I am able to hold that it is clearly wrong. While I find the criticism that has been directed at *Arnold v Viljoen* persuasive, I do not think that it is open to me to depart from it in the circumstances; particularly in view of my understanding of the effect of the judgment in *Ethekwini Metropolitan Unicity Municipality v Pilco Investments CC* [2007] SCA 62.

[11] *Pilco Investments* also concerned a situation in which the lessor had failed to make the entire let premises available to the lessee, which had then occupied that part that was available. Mrs Justice van Heerden, writing for the Supreme Court of Appeal, described the position of a lessee in such a situation to be as follows, at para 22 of the judgment:

> It follows that, upon taking occupation of the property in late 1994, the plaintiff [lessee] became obliged to pay rent to the defendant [lessor], as stipulated in … the lease. Of course, because the plaintiff was, until early June 1997, deprived of the use of that portion of the property which was being used by [a third party], the plaintiff would be entitled to a remission of rent over the period in question, proportional to its reduced use and enjoyment of the property. **If the amount to be remitted was capable of prompt ascertainment, the plaintiff could have set this amount off against the defendant's claim for rent; if not, the plaintiff was obliged to pay the full rent agreed upon in the lease and could thereafter reclaim from the defendant the amount remitted.** (Emphasis supplied.)

[12] The learned judge of appeal cited A.J. Kerr, *The Law of Sale and Lease* 3ed at p. 350 as authority for the proposition that set-off could be applied if the amount of rent to be remitted was capable of prompt ascertainment, but not otherwise. In the passage cited, Professor Kerr states 'If the amount remitted is not capable of prompt ascertainment the lessee is technically obliged to pay the stipulated rent and may thereafter reclaim the amount remitted'. *Lester Investments (Pty) Ltd v Narshi* 1951 (2) SA 464 (C) at 468E and *Bhima v Proes Street Properties (Pty) Ltd* 1956 (1) SA 458 (T) especially at 460 are given by Kerr as authority in support of the proposition. Neither of those judgments appears to me to be in point, save in respect of set-off of mutual liquidated claims. Both cases concerned the question whether a tenant could offset expenditure incurred in respect of repairs to the leased property against the rental. They answered the question affirmatively in favour of the lessee.

[13] Whatever the rationale for the emphasised sentence in the extract from *Pilco Investments* quoted above, however, Mr O'Dowd, the attorney who appeared for the respondent, conceded, as he had to, that I was bound by the legal position stated in para 22 of the appeal court's judgment. It follows that unless the abatement in rent to which the

respondent might have been entitled in respect of the part of the third floor of Huys Heeren XVII not made available by the applicant was capable of prompt ascertainment, the respondent was obliged to have paid the full rental during the first period.

[14] Mr *van Dugteren*, counsel for the applicant, submitted that the amount of any remission to which the respondent might have been entitled during the first period was not capable of prompt ascertainment. I think he was correct. Indeed, I did not understand Mr O'Dowd to contend to the contrary. It would not be appropriate to calculate the amount of the remission on the basis of prorating the area of floor space that was not made available against the floor space of the entire let premises. As mentioned, the third floor was just an empty shell in which the respondent would have to undertake considerable furbishment to render it fit for use, whereas the remainder of the let premises were already equipped for the purpose of operating a hotel. In any event, it is the value of the diminished use and enjoyment, rather than the diminished extent of the let premises, that is relevant to the calculation of a remission in rent. That is certainly not capable of prompt ascertainment.

[15] Thus, applying the approach stated in *Pilco Investments*, I am obliged to reject the respondent's contention that it was not obliged to have paid rental during the first period. It follows that it was not entitled to apply the rental that it did pay during that period in reduction of the amount that it was liable to pay during the second period, when the applicant was no longer in breach of the lease agreement.

[16] The respondent's alleged entitlement to pay a reduced rental in the second period depends on whether the lease agreement was amended to provide as much. The respondent's attorney argued that it had been a tacit term of the written agreement in terms whereof the respondent gave up any entitlement to the third floor that the rental would adjusted downwards in acknowledgement of the reduced size of the let premises. The obvious difficulty with that submission is that it fails to define the content of the term. It conceptualises a premise, rather than defining how the premise is to be realised. By how much was the rental to be reduced? One does not know.

[17] For the reason discussed earlier, a reduction in the rental in direct proportion to the reduction in the floor space would not make commercial sense, having regard to the very different character of the third floor of Huys Heeren XVII compared to that of the area leased in the Tudor Hotel Building. It may well be that the parties contemplated a reduction in the rental to complement their agreement on the reduction in the floor space, but it is evident that

they failed to conclude any agreement in that respect. The result was that the lease was amended in respect of the definition of the let premises, but remained unaltered in respect of its provisions as to the determination of rental.

[18] In the result it is evident from the respondent's own rental payment reconciliation schedule (annexure MS2 to the answering affidavit) that it was several hundred thousand rand in arrears in respect of the rental it had been obliged to pay in terms of the lease when the applicant exercised its right to cancel the agreement. In the circumstances it is not necessary to consider the non-deduction and exclusion of set-off effects of the provisions in clauses 10.1 and 21.1.3 of Annexure B to the lease agreement.

[19] The following order is made:

(a) The respondent and all those who hold occupation under it are directed to vacate the premises situated at 153 Longmarket Street, Cape Town, within 10 days of the service upon the respondent of this order.

(b) In the event of the respondent and all those holding under it failing to comply with the terms of paragraph (a) of this order, the Sheriff is hereby authorised, upon being provided with a writ of ejectment to be procured by the applicant from the registrar, to compel compliance by evicting the respondent and all those holding under it from the premises.

(c) The respondent shall pay the applicant's costs of suit on the scale as between attorney and client.

A.G. BINNS-WARD
Judge of the High Court