THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 793/2016

In the matter between:

TUDOR HOTEL BRASSERIE & BAR (PTY) LTD **APPELLANT**

and

HENCETRADE 15 (PTY) LTD **RESPONDENT**

Neutral citation: *Tudor Hotel Brasserie & Bar (Pty) Ltd v Hencetrade 15 (Pty) Ltd* (793/2016) [2017] ZASCA 111 (20 September 2017)

Coram: Navsa ADP, Leach and Swain JJA and Molemela and Mbatha AJJA

Heard: 4 September 2017

Delivered: 20 September 2017

Summary: Lease – agreement to pay rental in advance without deduction – exclusion of reciprocity – landlords failure to grant full beneficial occupation of entire leased premises – tenant obliged to pay rent.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Binns-Ward J, sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Swain JA (Navsa ADP, Leach JA, Molemela and Mbatha AJJA concurring):

[1] The respondent, Hencetrade 15 (Pty) Ltd, successfully brought an application before the Western Cape Division, Cape Town (Binns-Ward J) for the eviction of the appellant, Tudor Hotel Brasserie & Bar (Pty) Ltd, from premises located at 153 Longmarket Street, Cape Town, used by the appellant to conduct the business of a hotel.

[2] The right to occupation of the premises by the appellant was based upon a written lease agreement concluded between the parties on 29 June 2012. The eviction was granted on the basis that the respondent had validly cancelled the lease after the appellant had fallen into arrears with the rental payments. Despite the respondent having afforded the appellant the requisite notice to cure its default, it had failed to do so.

[3] The appellant admitted that it had not paid the rental in terms of the lease agreement, but denied that any was due, on the basis that its obligation to make payment was suspended as a result of the failure by the respondent to afford to the appellant, ‘vacant occupation or beneficial use of the entire leased premises’. It was

common cause that at the time that the appellant was given occupation of the premises, the respondent had retained a portion of the third floor to store property.

[4] The legal basis for the argument of the appellant was the *exceptio non adimpleti contractus.* (the '*exceptio'*). The appellant submitted that this raised the legal question of whether the *exceptio* was available to a lessee who received only partial occupation of leased premises, but did not cancel the lease.

[5] The court a quo pointed out that the appellant's approach to the issue of its liability to make payment of the rental ran counter to a line of authority commencing with *Arnold v Viljoen* 1954 (3) SA 322 (C) and stated (at para 9) that:

'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.'

[6] The court a quo then referred to the decision in *Ethekwini Metropolitan Unicity Municipality (North Operational Entity) v Pilco Investments CC* [2007] ZASCA 62; [2007] SCA 62 (RSA) para 22, where the following was stated:

'It follows that, upon taking occupation of the property in late 1994, the plaintiff became obliged to pay rent to the defendant, as stipulated in clause 1 of 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 the person making pre-cast fencing, 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.'

[7] The court a quo applied this principle and concluded in para 13 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.'

Finding that any remission in rental to which the appellant might have been entitled was not capable of prompt ascertainment, the court a quo decided that the appellant was in arrears in respect of the payment of rental, when the respondent validly exercised its right to cancel the agreement. An order evicting the appellant from the leased premises was accordingly granted.

[8] The respondent by way of supplementary heads of argument, relied upon the unreported decision in *Baynes Fashions (Pty) Ltd t/a Gerani v Hyprop Investments (Pty) Ltd* [2005] JDR 1382 (SCA), for the submission that an interpretation of the provisions of clauses 10.1 and 21.1.3 of the lease agreement is dispositive of the appeal. The court a quo found it unnecessary to consider the effect of these clauses upon the right of the appellant to withhold payment of the rental.

[9] In *Baynes Fashions* at para 4 the following relevant clauses in the lease agreement provided as follows:

'6.2 All rentals payable by the TENANT in terms hereof shall be paid monthly in advance without any deduction or set-off . . .

. . .

25.4 The TENANT shall have no claim against the LANDLORD for compensation, damages, or otherwise by reason of any interference with his tenancy or his beneficial occupation of the premises occasioned by any . . . repairs or building works as herein before contemplated. . .'

[10] With regard to the interpretation of these clauses, the following was stated at para 5:

'[7] With respect to clause 6.2 it is contended on behalf of the appellants that the word "payable" confers a right on the lessor to claim payment only when it has performed in terms of the contract by granting beneficial occupation to the lessee. As the respondent has failed to grant beneficial occupation to the first appellant, thereby failing to perform in terms of the contract, so the argument proceeded, the rent was not "payable".

[8] There is no warrant for this construction. The clause imposes an obligation on the lessee to make payment of rent "in advance". This means that the payment of rent by the lessee is not contingent upon prior performance by the lessor. In any event, the first appellant continues to trade and therefore does have beneficial occupation of the premises. The appellants' real complaint is that the renovations effected by the respondent have interfered with the first appellant's right to occupy the premises beneficially in a manner that has led to the first appellant suffering a substantial loss to its monthly turnover. This loss, contends the appellants, entitles the first appellant to deduct the rent which is "payable" to the respondent. The simple answer to this complaint is that clause 25.4 in express terms, precludes the reduction of rent in these circumstances.

[9] It can hardly be clearer that clauses 6.2 and 25.4 are intended to prevent any deduction of rent by the lessee where the renovations that are undertaken by the landlord in terms of clause 25.1 interferes with the lessee's right of beneficial occupation. The appellants signed the agreement that contained these clauses and cannot now seek to extricate themselves from its consequences.'

[11] The agreement that the rent was payable 'monthly in advance' had the effect of altering the usual position, that in the absence of contractual provisions, rent is payable in arrear at the end of each period in the case of a periodical lease, after the lessor has fulfilled his obligation.[1] The lease agreement therefore altered the reciprocal nature of the obligations of the lessor and the lessee. The obligation of the lessee to make payment of the rent was no longer reciprocal to the obligation of the lessor to grant beneficial occupation of the premises to the lessee.

[12] The application of the principle of reciprocity to contracts is a matter of interpretation. It has to be determined whether the obligations are contractually so

[1] A J Kerr *The Law of Sale and Lease* 4ed (2014) at 427; *Ebrahim, N O v Hendricks* 1975 (2) SA 78 (C) at 81E-F.

closely linked that the principle applies. Put differently, in cases such as the present the question to be posed is whether reciprocity has been contractually excluded.[2]

[13] In *Baynes Fashions*, the interpretation the court placed upon the provision that the rent was payable 'in advance', namely that 'payment of rent by the lessee is not contingent upon prior performance by the lessor', necessarily involved a finding that the principle of reciprocity was excluded by the terms of the lease.

[14] The conclusion in *Baynes Fashions* that the lessee was not entitled to a 'reduction of rent', caused by interference with the lessee's right of beneficial occupation, was based upon the provisions of clause 6.2 that the rent was payable 'without any deduction or set-off', and clause 25.4 that the tenant would not have any claim against the landlord 'by reason of any interference with his tenancy or his beneficial occupation of the premises', caused by repairs or building works.

[15] The relevant clauses in the present lease agreement must be interpreted against the background set out above. Clause 10.1 provides that:

'All payments in terms of this lease to be made by the tenant to the landlord shall be made on or before the first day of each month without demand, free of exchange, bank charges and without any deductions or set off whatsoever – '

[16] Clause 21 of the lease agreement provides for the 'Landlords Limitation of Liability' in the following terms:

'21.1 The tenant shall –

21.1.1 . . .

21.1.2 not have any claim of any nature whatsoever against the landlord whether for damages, remission of rent or otherwise, for any failure of or interruption in the amenities and services provided by the landlord, any local authority and/or other service provider to the leased premises, building and/or property unless such failure or interruption is caused by the

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[2] *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 418B-D.

negligent or wrongful act or omission by the Landlord or its agent or representative, notwithstanding the cause of such failure or interruption;

21.1.3 not be entitled to withhold or defer payment of any amounts due in terms of this lease for any reason whatsoever;'

[17] The provision that the rental was to be paid 'on or before the first day of each month' had the effect that it was to be paid in advance by the appellant. The obligation of the appellant to pay the rental was accordingly not reciprocal to the obligation of the respondent to provide beneficial occupation of the entire premises. Additionally clause 21.1.2 precluded the withholding of rental as a result of a 'failure of or interruption in the amenities and services provided by the landlord.'

[18] The terms of the lease therefore precluded suspension of the payment of rental by the appellant, as a result of the failure by the respondent to afford the appellant beneficial use of the entire leased premises. As a result, the cancellation of the lease by the respondent was justified, the appellant being in arrears with the rental payments.

[19] Counsel for the appellant, however, referred to the following dictum in *Poynton v Cran* 1910 AD 205 at 227-228, in support of his submission that the appellant was entitled to withhold payment of the rent, as a consequence of the failure of the respondent to grant beneficial occupation of the entire premises to the appellant:

'It remains to consider whether the evidence discloses any circumstance which would deprive the tenant of the legal right which he exercised. I do not think that the clause in the lease providing for the payment of rent on a certain day "without any deduction whatever" has that result. That provision cannot relieve the landlady of her obligation to place the leased property in repair, or deprive the tenant of the remedy, which the law gives him in respect of her initial default. That default afforded *pro tanto* a defence to the claim for rent. And I entirely agree with the learned Judge when he says that "*it is only the rent due which can be stipulated to be paid without deduction*.' (Emphasis added.)

[20] In *Poynton* the plaintiff let a hotel to the defendant for a year and 11 months at a rental of £540 per annum 'without any deduction whatever', with certain rights of renewal. The plaintiff sued the defendant for £90 being two months arrears of rent.

The defence was that the plaintiff had failed to put the hot water apparatus in proper repair and that after due notice to the plaintiff, the defendant had effected the repairs himself, the cost of which he set off against the rent due. The highlighted portion of the judgement that, ‘it is only the rent due which can be stipulated to be paid without deduction’, must be read in the context of the absence of any reference in the judgement to the monthly rental being payable by the defendant on the first of the month, ie in advance. The usual position accordingly prevailed and the rent was payable by the defendant, as the tenant, in arrear at the end of each month, after the plaintiff, as the landlady, had performed her obligations. On this basis the rent only became ‘due’ and therefore payable by the defendant, after the plaintiff had performed her reciprocal obligations. It was only at this stage that the defendant was obliged to make payment of the rent ‘without deduction’ to the plaintiff. The case is accordingly distinguishable on the facts from the present case where the rental was payable in advance. Moreover it does not appear that there was a clause such as clause 21.1.2.

[21] The appeal against the order of the court a quo evicting the appellant from the premises must accordingly fail. This conclusion renders it unnecessary to deal with the statement by the court a quo, that any abatement in rent to which the appellant may have been entitled was not capable of prompt ascertainment, with the result that the appellant was obliged to make payment of the full rental.

[22] The following order is granted:

The appeal is dismissed with costs.

K G B Swain
Judge of Appeal

Appearances:

For the Appellant:	S Rosenberg SC
	Instructed by:
	Jason Freel Attorneys, Cape Town
	McIntyre & Van der Post Attorneys, Bloemfontein
For the Respondent:	P White
	Instructed by:
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