THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number : 625/05

In the matter between :

YARRAM TRADING CC
t/a TIJUANA SPUR **APPELLANT**

and

ABSA BANK LTD
RESPONDENT

CORAM : **MPATI DP, MTHIYANE, BRAND JJA, MALAN *et* THERON AJJA**

HEARD : **22 NOVEMBER 2006**

DELIVERED : **30 NOVEMBER 2006**

Neutral citation: This judgment may be referred to as *Yarram Trading v Absa* [2006] SCA 160 (RSA)

SUMMARY: Collective Investment Schemes Control Act 45 of 2002 – immovable

property registered in name of trustee for collective scheme – *locus standi* of trustee to seek ejectment of lessee from the property – authority of trustee or manager of scheme to demand rental and cancel lease – whether factual disputes regarding alleged breach of lease determinable on the papers – application of Shifren clause.

JUDGMENT

BRAND JA/

BRAND JA:

[1] The appellant conducts a restaurant under the name Tijuana Spur from leased premises on the first floor of the Bryanston Shopping Centre ('the property') in the province of Gauteng. The respondent is the registered owner of the property. Its case is that the lease had been duly cancelled for the appellant's breach of its terms. The appellant disputed the validity of the cancellation, which resulted in an application for its eviction in the Johannesburg High Court. In response to the application the appellant raised a number of defences, all of which were dismissed by the court *a quo* (Willis J). Consequently, the eviction order sought was granted. The appeal against that order is with the leave of the court *a quo*.

[2] Of the various defences raised in the court *a quo*, the appellant persisted in only three on appeal. They were:

(a) The respondent had no *locus standi* to bring the eviction application.

(b) The lease agreement had not been validly terminated in that the letters of demand and cancellation, which were written by attorneys, had not been authorised by the proper authority.

(c) There were disputes of fact concerning the appellant's alleged breach of its obligations in terms of the lease agreement, which rendered the matter incapable of being decided on its merits in motion proceedings.

[3] The issues arising from these three defences will best be understood against the following background. The lease agreement was concluded on 29 June 2003 with 1 November 2003 as its commencement date. The original parties to the agreement were the appellant, as lessee, and Bryanston Hobart (Pty) Ltd who was the owner of the property at the time, as the lessor. On 29 August 2003 and pursuant to an agreement of sale between Bryanston Hobart and the respondent, transfer of the property was registered in the name of the latter, according to the deed of transfer, in its capacity as 'the trustees for the time being of the Allan Gray Property Trust Collective Investment Scheme, in terms of the provisions of the Collective Investments

Schemes Control Act, No 45 of 2002'.

[4] The parties to the lease agreement contemplated the property being sold. In that event, clause 21.01 provided, '*the lessee shall not be entitled to elect not to be bound to the new lessor and this lease shall continue in full force and effect, binding the lessee to the new lessor*'. The terms of the lease, at least *prima facie*, therefore created a contractual link between the appellant and the respondent when the latter became the owner of the property. One of the disputes raised by the appellant was that the respondent did not become the lessor. As it turned out, however, this dispute is not of any consequence. The respondent's case is that the appellant had breached the lease agreement between them in two respects:

(a) by failing to pay rental due, and

(b) by failing to submit statements of its monthly turnover, as it was obliged to do.

[5] Clause 22.01 of the lease provided that, if the lessee should commit any breach of its terms and fail to remedy that breach within seven days after being called upon to do so, the lessor would be entitled to cancel the lease and to seek eviction of the lessee from the premises. Pursuant to these provisions, a firm of attorneys, Christelis Artemides ('the attorneys') wrote a letter to the appellant on 15 July 2004 demanding that it should remedy the two breaches complained of within seven days. The appellant's response to the letter, in a way similar to its answer in the eviction application, consisted mainly of a denial that it was in breach of the lease in any respect. I will return to the resulting factual disputes presently. The consequence of the appellant's attitude was, however, that on 2 August 2004 the attorneys wrote a further letter to the appellant in which they formally cancelled the lease.

[6] I now turn to the facts that are pertinent for considering the appellant's first defence, based on the respondent's alleged lack of *locus standi*. The Allan Gray Property Trust Collective Investment Scheme ('the scheme'), for which the respondent acts as trustee, is a collective investment scheme in property as envisaged in the Collective Investment Schemes Control Act 45 of

2002 ('the Act'). The Act provides that such a scheme should have both a 'manager' and a 'trustee'. The manager of the scheme is Allan Gray Property Trust Management Ltd ('Allan Gray'). As prescribed by s 97 of the Act, the relationship between the respondent as trustee and Allan Gray as manager, is governed by a written agreement described in the Act as 'a Deed'.

[7] According to its original formulation the appellant's attack on the respondent's *locus standi* was based on the proposition that the appellant was not the owner of the property, as it professed to be. According to this proposition the real owners of the property are the investors in the scheme. That proposition turned out to be ill-founded. The property was registered, in accordance with a long-standing practice in the Deeds Office, in the name of 'the trustee for the time being' of the particular trust. In such event, it has been held, ownership of the trust property depends on the terms of the trust instrument (see *Mkangeli v Joubert* 2002 (4) SA 36 (SCA) para 9; Honoré's *South African Law of Trust* 5ed (by Cameron, De Waal & Wunsh) 274). In the present context the trust instrument, in my view, comprised of the Deed and the relevant provisions of the Act.

[8] The Deed is quite clear. Clauses 1.3 requires the manager to 'deposit' the underlying assets of the scheme which, by definition, includes immovable property, with the trustee. The trustee is then required, by clause 1.4, to take custody of these assets and to hold them on behalf of the investors in the scheme by virtue of clause 24. Clause 2.1.29 pertinently provides that the trustee will acquire 'legal ownership' of the underlying assets of the scheme. The interest of the investors, on the other hand, is governed by clause 38.3. They do not acquire ownership in any of the underlying assets of the scheme, but of a participatory interest in an investment portfolio.

[9] What the appellant in effect contended for, is that this pattern is disturbed by the provisions of the Act. Support for this argument was sought in s 71 of the Act, which incorporates by reference, the provisions of the Financial Institutions (Protection of Funds) Act 28 of 2001. The provisions of the last mentioned Act particularly relied upon by the appellant were ss 4(4)

and 4(5). In terms of s 4(4) the trustee is obliged to keep trust property separate from its own assets in its books of account while s 4(5) provides that trust property does not form part of the assets of the trustee.

[10] I do not think that these sections purport to change the law relating to ownership of immovable property held in trust. On the contrary, in my view they are to be understood with reference to common-law principles. Thus construed, s 4(4) – which mirrors s 11 of the Trust Properties Control Act 57 of 1988 – is based on the common-law premise that trust assets form a separate estate in the hands of the trustee, provided they are identified as trust property and kept separate from the trustee's personal assets (see Honoré *supra* para 353 at 571). Section 4(5) – which mirrors s 12 of the Trust Properties Control Act – in turn confirms the common-law rule with reference to ownership – trusts that the trustee is not the beneficial owner of trust assets. His title is usually described as 'bare ownership' ('*nudum dominium*') – sometimes also called 'legal ownership' – while 'beneficial ownership' ('*utile dominium*') is said to vest in the beneficiaries of the trust (see eg *The Master v Edgecombe's Executors and Administrators* 1910 TS 263 at 274-275; *Braun v Blann and Botha NNO* 1984 (2) SA 850 (A) 859-860; Honoré *op cit* para 170 at 288). In short, the provisions of the Act and the Deed are, in my view, quite clear: upon registration in its name, *qua* trustee, the respondent became the 'legal owner' of the property and holds it in trust for the investors as 'beneficial owners'.

[11] During the course of the appellant's argument in this court, it somehow changed its focus. The different proposition then contended for was that, even if the respondent can be said to have acquired ownership of the property, it was deprived of all the normal incidents of ownership, including the authority to seek the appellant's eviction, by the provisions of the Act and the Deed. In support of this contention the appellant primarily relied on ss 2, 4 and 5 of the Act which impose the duty on the manager to 'administer' the collective scheme to the exclusion of everyone else. This, the appellant pointed out, is to be read with the wide definition of 'administration' which essentially includes every aspect of control of the scheme. As far as investment schemes in

property are concerned, so the appellant argued, the principle is underscored by s 48 of the Act, which renders it an offence for anybody other than the registered manager or its authorised agent to administer the scheme.

[12] The position of the trustee, on the other hand, the appellant's argument proceeded, is no more than that of a watchdog. According to this argument, it is particularly apparent from a proper analysis of s 70 of the Act that the trustee has no power of control over the assets of the scheme. It merely holds these assets in order to protect the interests of the individual participants. This division of duties provided for in the Act, the argument continued, is followed through in the Deed. Thus, clauses 15.1, 15.5 and 22 provide that Allan Gray, *qua* manager, is to administer the property held by the respondent as trustee, while the latter is again relegated to the position of a watchdog protecting these assets, in terms of clauses 23 and 24.

[13] This line of argument should, in my view, again be considered in the light of the common-law. One of the common-law incidents of ownership is that the owner 'may claim his property wherever found from whomsoever holding it' (see eg *Chetty v Naidoo* 1974 (3) SA 13 (A) 20A-E). This applies even where the owner only holds legal ownership or bare dominium in the property. A trustee in whom ownership vests accordingly has standing to apply for ejectment and to vindicate the property even though it is not beneficially interested therein (see *Moluele v Deschatelets* NO 1950 (2) SA 670 (T) at 678). In fact, this holds true, so it seems, even where the trustee is not entitled to retain possession of the property at all, but seeks to vindicate it or eject the lessee solely in order that he may put the beneficiaries in possession of it (see *Mackenzie NO v Basha* 1950 (1) SA 615 (N) at 620; Honoré *supra* para 163 at 270).

[14] It is clear that the provisions of the Act and the Deed do not expressly deprive the trustee of its common-law *locus standi* to vindicate the property held by it in trust. In accordance with the presumption against alteration of the common-law, the question is therefore whether these provisions must be understood to do so by necessary implication (see eg *Casserley v Stubbs*

1916 TPD 310 at 312; *Stadsraad van Pretoria v Van Wyk* 1973 (2) SA 779 (A) at 784D-H). I think the answer is no. I agree that the provisions of the Act and the Deed relied upon by the appellant confer exclusive power of control over the property of the scheme on the manager. I do not believe, however, that exclusive control of the property by the manager is incompatible with the trustee's *locus standi* to recover possession of the property – by way of vindication or ejectment – from a third party, albeit for the sole purpose of restoring it to the manager's control.

[15] I believe this is borne out by clause 23 of the Deed which imposes the duty on the trustee 'to exercise all the powers necessary to protect the interests of investors'. This seems to indicate that, however wide the powers of control conferred upon the manager may be, the trustee did retain at least some of the common-law powers associated with ownership. Having regard to the trustee's duty to protect, I think the most prominent among these retained powers would be the power to vindicate the property from the unlawful possession of third parties. It follows, in my view, that the appellant's first defence was rightly dismissed by the court *a quo*. In consequence, it is not necessary to consider the respondent's further argument that, *qua* lessor, it in any event derived *locus standi* from the lease agreement itself to seek the appellant's eviction from the property.

[16] The second defence persisted in on appeal is based on the proposition that the letters of demand and cancellation – respectively dated 15 July and 2 August 2004 – had not been mandated by the proper authority. It is not in dispute that these letters were written by the attorneys on the instructions of Broll Management (Pty) Ltd who acted as managing agent of the property. Broll contends that it received its mandate to give these instructions from Allan Gray, who in turn relies on authority conferred upon it by certain individuals acting on behalf of the respondent.

[17] Based on these facts, the appellant raised a twofold argument in the alternative. Its main argument departed from the premise that if the respondent is found to have had the power to evict, it must also have been

the proper authority to demand the rental and to cancel the lease. For the next step in its argument, the appellant relied on what it contended to be a proper analysis of the facts presented by the respondent, including the various resolutions annexed to the respondent's papers, from which it appears, so the appellant contended, that those who professed to have mandated Allan Gray, were not properly authorised by the respondent to do so. The appellant's alternative argument was that, if Allan Gray, *qua* manager, is held to have been the proper authority to demand the rental and to cancel the lease, its instructions to the attorneys – *via* Broll – were invalid because it acted *qua* representative of the respondent and not *qua* manager of the scheme when it issued those instructions.

[18] The respondent's first answer to both the main and the alternative argument was that clause 20.08 of the lease precludes any reliance by the appellant on any lack of authority on the part of Broll. This clause provides:

'The parties hereby acknowledge that Broll . . . is the agent of the lessor for the purposes of this lease and that Broll and/or its duly authorised employees may exercise on behalf of the lessor all the lessor's legal rights and claims in terms of this lease.'

[19] What is more, the respondent pointed out, the appellant's whole defence on the merits depends – as will presently appear from my discussions under that rubric – on an oral agreement between it and Broll. In these circumstances, the respondent's argument concluded, Broll's authority cannot be raised as an issue between the parties.

[20] I agree with the respondent's answer. I also hold the view that Broll's authority had been established, both by prior agreement and by the subsequent conduct of both parties. However, I believe in any event, that there is no merit in this defence. The Act and the Deed conferred control of the property on Allan Gray, *qua* manager, or its duly appointed agent. That must include the power to demand payment of rental and to cancel the lease. The contention that, if the respondent retained the power to evict, it must be the only authority that could cancel the lease, amounts to a *non-sequitur*. As I

have said before, I find no inherent conflict in the notion that the owner retains its common-law power to vindicate, despite the fact that control of the property is vested in someone else. On the common cause facts, Allan Gray then appointed Broll to administer the property on its behalf. That is the end of the matter. The fact that Allan Gray may have thought that it acted *qua* representative of the respondent when it instructed Broll is, in my view, of no consequence.

[21] The third defence persisted in on appeal is based on the proposition that the disputes of fact concerning the appellant's alleged breach of the lease agreement rendered the matter incapable of being decided in motion proceedings. For purposes of this defence I revert to the facts. The first breach relied upon by the respondent was that the appellant had been in arrears with the payment of rental. With regard to the amount of rental due, it was common cause that when the lease was entered into, the premises consisted only of an inside seating area. An outside seating area was, however, also contemplated. The monthly rental provided for in the lease started at R23 000 for the inside and R10 000 for the outside seating area. Clause 14 stipulated, in effect, that failure to complete the construction of the outside area by 1 October 2003, which was one month before the commencement of the lease period, would render the lessor liable for a penalty of approximately R12 000 per month.

[22] It is common cause that the construction of the outside seating area had not been satisfactorily completed by the stipulated date. It is likewise common cause that on 13 February 2004 there was an oral agreement between the appellant and the managing agent, Broll, that the penalty in clause 14 would be increased for the period after the end of February 2004 during which the outside seating area was not available for occupation. A further fact which is not in dispute is that since the commencement of the lease on 1 November 2003 until the end of July 2004, the appellant made only two rental payments in a total amount of less than R50 000.

[23] Apart from this limited area of agreement, there are numerous factual

disputes on the papers regarding the appellant's liability for rental. The end result is quite dramatic. On the respondent's version, the appellant's indebtedness as at the end of July 2004 amounted to R293 916,14. The appellant's version, on the other hand, is that it is not indebted to the respondent at all. In fact, it averred that having regard to the accumulation of penalties orally agreed upon, it has a counter-claim against the respondent for nearly R70 000.

[24] It is clear that the exact amount of rental owing by the appellant cannot be established on the papers. Equally apparent, however, is that for present purposes the exact amount need not be determined. As long as the respondent succeeded in establishing that some rental had been owing, it was entitled to cancel the lease. The respondent's contention that it has discharged this onus, turns on the oral agreement of 13 February 2004. Though the conclusion of this agreement is not in dispute, the conflicting versions regarding its terms cannot be resolved. If the respondent's version is to be accepted, it is clear that some rental was owing at the cancellation date. This is even more so if no regard is had to the oral agreement at all, because even on the respondent's version the appellant was entitled to some increased penalty. The respondent's argument that the oral agreement should indeed be disregarded, is based on a non-variation clause in the agreement of lease. It essentially provides that no variation of the agreement shall be of any force and effect unless it is recorded in writing and signed by both parties. This type of clause has become known in our law as a Shifren clause. The name derives from *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A) in which this court held that, as a matter of policy, a non-variation clause should in principle be recognised as enforceable and that it effectively entrenches both itself and all the other provisions of the contract against oral amendment (see also eg *Brisley v Drotsky* 2002 (4) SA 1 (SCA) paras 6-9; *Telcordia Technologies Inc v Telcom SA Ltd* [2006] SCA 139 (RSA) para 11).

[25] Alive to the problem created by the Shifren clause, the appellant attempted to construct a written amendment from the correspondence

between it and Broll. This attempt must, in my view, be marked unsuccessful. What the correspondence shows is that while the existence of an oral agreement was common cause, the terms of this agreement were never confirmed. On the contrary, from the very first letter they were in dispute. Other attempts by the appellant to circumvent the effect of the Shifren clause – by relying on waiver, estoppel etc – fell foul of other clauses in the lease precluding reliance on these defences.

[26] In this court, counsel for the appellant also relied on the judgment of Harms JA in *Telcordia (supra)* which he admittedly had not seen before. I cannot find any statement in *Telcordia* that supports the appellant's case at all. What Harms JA said (in para 12) with regard to the Shifren principle, is that :

'The principle does not create an unreasonable straitjacket because the general principles of the law of contract still apply, and these may release a party from its workings. One of these would, for instance, be the rule that a party may not approbate and reprobate. This would mean . . . that a party may not rely on a non-compliant variation (for instance, in its pleadings) and subsequently invoke the non-variation term in order to avoid the effect of the amendment.'

[27] The situation referred to by Harms JA never arose in this matter. At no time did the respondent rely on the oral agreement as part of its case. On the contrary, its stance from the outset was that any reference to the terms of the oral agreement would be precluded by the Shifren clause. The purpose for which the clause is relied upon by the respondent in this case is one which was expressly sanctioned as a legitimate object in *Shifren* (at 776H), namely, to avoid disputes of fact regarding the terms of an oral agreement which are difficult to resolve and which, I may add, in a case such as this, can be drawn out indefinitely while the tenant stays in occupation of the leased premises.

[28] Therefore, ignoring any reference to the terms of the oral agreement as we must, it has been established on the facts which are common cause, that the appellant was in arrears with its rental on the cancellation date. It follows, that the respondent was entitled to cancel the lease. This conclusion renders

any reference to the appellant's further breach relied upon by the respondent of no consequence. Nevertheless, I hold the view that the respondent had succeeded in establishing that breach as well. In the circumstances, I will motivate this conclusion only in the broadest outlines.

[29] The second breach relied upon by the respondent was based on the appellant's alleged failure to provide Broll with a monthly statement reflecting its turnover during the preceding month, as it was required to do in terms of the lease. Since the letter of demand was written on 15 July 2005, the only relevant dispute is that which relates to the statement for June 2004. In its founding affidavit, the respondent contended that the appellant had never provided Broll with the June statement. In the appellant's answering affidavit this was denied. A factual dispute thus arose which, on the face of it, appears incapable of resolution on the papers. However, in response to the letter of demand, the appellant had written on 27 July 2004 that 'turnover figures for the months January to May 2004 were provided to your client on 30 June 2004'. This is corroborative of the respondent's version that no statement had been provided for the month of June. But this is not the end of the matter. On 1 September 2004 appellant's attorneys responded as follows to the letter demanding turnover statements:

'Our client provided such figures incorporating up until May 2004, as the turnover figures, a copy of which we have on file. Should your offices require a copy same can be transmitted to [you].'

[30] As appears from the well known statement by Corbett JA in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634E-635C, there are recognised exceptions to the general rule that essentially favours acceptance of the respondent's version in a factual dispute, where final relief is sought in motion proceedings. As an example of such exception, Corbett JA gave the following (at 635C):

'Where the allegations or denials of the respondent are so far-fetched and clearly untenable that the court is justified in rejecting them merely on the papers.'

The appellant's denial of the allegation that it had failed to furnish the June 2004 statement, in my view, qualifies for this exception. In the light of the correspondence I have referred to, this denial is so far-fetched and clearly untenable that it can be rejected merely on the papers. In consequence, it must be accepted that the appellant never provided the June statement which entitled the respondent to cancel the lease as and when it did.

[31] As to the matter of costs, the lease agreement provides that in the event of litigation resulting from the appellant's breach of its terms the appellant will be liable for costs on the attorney and client scale. On the basis of this clause, the respondent submitted that its costs of appeal should be awarded on that higher scale. The appellant's counsel expressly conceded that he had no answer to this submission.

[32] In the result, the appeal is dismissed with costs. These costs are to include the costs of two counsel and shall be on the scale as between the attorney and client.

.....

F D J BRAND
JUDGE OF APPEAL
Concur:

Mpati DP
Mthiyane JA
Malan AJA
Theron AJA