REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS FOR JUDGMENT

Case No. I 2425/2010

In the matter between:

LIDA MARIE CC **PLAINTIFF**

and

O'PORTUGA RESTAURANT CC **DEFENDANT**

Neutral citation: *Lida Marie CC v O'Portuga Restaurant CC* (I 2425-2010) [2013] NAHCMD 109 (23 April 2013)

Coram: VAN NIEKERK J
Heard: 29 and 30 November 2012
Delivered: 30 November 2012
Reasons: 23 April 2013

Flynote: **Contract** – Clause providing for consent to be given in writing – This provision entrenched by general non-variation clause – Landlord and

tenant – Lease – Alleged oral consent given for substitution of tenant - Effect

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REASONS FOR JUDGMENT

VAN NIEKERK J:

[1] These are reasons for an order made on 30 November 2012 in which I granted judgment for the plaintiff in the following terms:

'**AD CLAIM 1**

1. An order confirming the cancellation of the agreement between the parties.
2. An order ejecting defendant from the premises at Erf 1318, 312 Sam Nujoma Avenue, Klein Windhoek, Windhoek.

AD CLAIM 2

3. Payment of 359 965.64, as agreed.
4. Interest on the aforesaid amount at the prescribed rate of 20% per annum from date of judgment to date of payment.

5. Costs of suit, such costs to include the costs of one instructing and two instructed counsel.'

[2] The plaintiff is the owner of immovable property situate at Erf 1318, 312 Sam Nujoma Avenue, Klein Windhoek ('the premises'). In an action instituted against the defendant, the plaintiff alleges that on 3 March 2006 the plaintiff as landlord entered into a written lease agreement (Annexure "A" to the particulars of claim) with Higgs Seven CC as tenant; that the tenant, who conducted business on the premises under the name and style of El Gaucho Argentine Grill, alternatively Argentine Grill, ceased to do business as such and vacated the premises during about December

2008; that the defendant then took possession of the premises and commenced to do business as a restaurant under the name and style of O'Portuga; that from the time of its occupation the defendant paid a monthly rental to the plaintiff, which the latter accepted; and that a tacit lease agreement between the parties came into being. It is further alleged that on or about 9 June 2009 the plaintiff gave the defendant notice of cancellation of the tacit lease agreement and notice to vacate the premises in terms of section 32(1)(a) of the Rent Ordinance, 1977 (Ordinance 13 of 1977), on or before 30 June 2010, but that the defendant failed or refused to vacate the premises by the due date and remains in possession thereof.

[3] The plaintiff's first claim is for an order confirming the cancellation of the lease agreement and for an order ejecting the defendant from the premises. The plaintiff's second claim is for damages, plus interest, arising from the defendant's continued occupation of the premises, being the difference between the rental paid by the defendant and the market related rental for the premises.

[4] In its amended plea and amended counterclaim the defendant raises an issue regarding the identity of the tenant with whom the plaintiff concluded Annexure "A", alleging that the tenant was actually Higgs Eight CC, but that the parties, as a result of a common error, wrongly described the tenant as Higgs Seven CC. In its counterclaim the defendant claims rectification of Annexure "A" to reflect the correct name of the tenant. The plaintiff admits that the tenant is incorrectly described and that it should actually be Higgs Eight CC, but raises a special plea to the counterclaim, alleging that the defendant does not have *locus standi* to claim rectification.

[5] At the start of the trial, Mr *Frank*, assisted by Mr *Dicks*, applied on behalf of the plaintiff that legal argument be heard on a point, which, if upheld, would determine the outcome of plaintiff's first claim without the need for evidence. The defendant agreed to the application, which was granted in the interests of shortening the proceedings. The application was heard on the basis that the tenant with which the

plaintiff first concluded annexure “A” was indeed Higgs Eight CC. Counsel referred to the summary judgment application brought by the plaintiff in respect of the first claim earlier in the litigation between the parties. He drew attention to paragraph 4.1 of the opposing affidavit deposed to on behalf of the defendant by its managing member, Mr Pinguinhas, in which the latter states that Annexure “A” at all times prevailed in respect of the premises. In paragraphs 4.4 – 4.6 of the opposing affidavit he states, *inter alia*, that he since purchased the full membership in Higgs Eight CC and became its sole member; that prior to the membership sale the premises were used as a restaurant under the name and style of El Gaucho Restaurant; that since the sale of membership this restaurant ceased to operate and was replaced with the O’Portuga Restaurant; that the name of Higgs Eight CC was later changed to O’Portuga CC; that the defendant is in fact the same entity, albeit with a different name, as the entity mentioned as the tenant in Annexure “A”; that a tacit lease agreement did not come into being as alleged by the plaintiff; and that the lease is in fact still governed by Annexure “A”. (I note, however, that the defendant is actually O’Portuga Restaurant CC and not O’Portuga CC).

[6] Mr *Frank* pointed out that essentially the defendant’s defence was that only a name change had occurred. This defence was echoed in paragraphs 5.2(a), (b) and (c) of the defendant’s plea where it is alleged that the name of the tenant under Annexure “A”, Higgs Eight CC, was later changed to O’Portuga Restaurant CC, the defendant. However, after discovery took place, the defendant amended its defence as pleaded. The defence no longer amounted to a mere name change. Instead, the defendant alleges in paragraphs 5.2(a), (b) and (c) of its amended plea that, during the currency of Annexure “A” the membership of Higgs Eight CC was sold to Mr Pinguinhas, who then substituted the tenant, Higgs Eight CC, with the defendant; that the substitution was done with the prior knowledge, consent and cooperation of the plaintiff; that the aforesaid sale and substitution were effective from close of business on 1 June 2008 and that the defendant opened its doors to the public on 18 June 2008.

[7] The defendant also amended its counterclaim to reflect the allegation that a substitution as aforesaid occurred. In response to a request for further particulars by the plaintiff, defendant *inter alia* pleaded that the word 'substituted' is used to mean that the defendant took the place of and replaced Higgs Eight CC in Annexure "A"; that the substitution was oral; that the substitution was done with the oral authorization and consent of the plaintiff and Higgs Eight CC; and that the terms of the substitution were that the defendant took the place of and replaced Higgs Eight CC in Annexure "A".

[8] Mr *Frank* submitted that the alleged substitution in this case, whereby the defendant took the place of and replaced the former tenant, in fact amounts to an assignment. In this regard he relies on the following extract from A J Kerr, *The Law of Sale and Lease*, (2004) at p. 453, where the learned author states:

> ' "[A]n assignee", in the words of Wessels J in *Rolfes Nebel & Co v Zweigenhaft* [1903 TS 185 at 189], "is a person who enjoys the benefits and takes over the obligations of the lessee." On a later page [at p190] the learned judge explained the position more fully:
>
> > If the lessee parts with all his rights to the lease, and the [assignee] undertakes to perform all the obligations, and if the lessor consents to accept the [assignee] in the place of the lessee, then there is a complete delegation and the [assignee] steps into the shoes of the lessee.'

[9] Mr *Frank* pointed to paragraph 2a of the Schedule of Conditions to Annexure "A" which stipulates, *inter alia*, that the tenant shall not cede or assign the lease or place anyone else in occupation of the premises without the written consent of the landlord (the plaintiff) first being had and obtained. As the defendant's case, as pleaded, is that the plaintiff gave oral authorization and consent for the assignment/substitution, the latter therefore falls foul of the express terms of the lease agreement.

[10] Counsel further referred to paragraph 9a of the Schedule of Conditions to Annexure "A", which provides that no alteration or variation of the lease shall be of any force or effect unless it is recorded in writing and signed by both the landlord and the tenant, and to paragraph 9c of the Schedule of Conditions to Annexure "A", which provides that the lease sets out the entire agreement. He referred to the following passage from Christie's *The law of contract in South Africa* (6th ed), p. 464 where the following is stated:

> 'When a non-variation clause appears in a contract it creates a situation in which the same argument of freedom of contract or *pacta sunt servanda* can lead to two opposite conclusions. It can be argued that the original contract must be respected and a subsequent agreement that is not in writing must be ignored. Or it can be argued that the subsequent agreement, made *animo contrahendi*, must be respected and the non-variation clause ignored. After some controversy the Appellate Division chose the former of these two irreconcilable views in *SA Sentrale Ko-op Graanmpy Bpk v Shifren* 1964 4 SA 760 (A), and *Shifren* was confirmed after full argument in *Brisley v Drotsky* 2002 4 SA 1 (SCA). Any attempt to agree informally on a topic covered by a non-variation clause (including cancellation, and an extension of time for payment, if covered by such a clause) or to vary informally a contract containing a non-variation clause must therefore fail.'

(The *Shifren* matter was followed in *Namibia Beverages v Amupolo* 1999 NR 303 (HC) at 305E-F and *Brisley v Drotsky* was applied in *Mushimba v Autogas Namibia (Pty) Ltd* 2008 (1) NR 253 (HC) at 260G-H).

[11] Counsel submitted that, therefore, any oral substitution of the tenant would be invalid. In fact, if evidence were presented of oral substitution, same would be inadmissible on the basis of the parol evidence rule. It would also be no use for the defendant to allege that the plaintiff orally amended the lease agreement to allow for the oral consent to the substitution because the non-variation provision in paragraph 2a is entrenched by the non-variation clause in paragraph 9a.

[12] In conclusion counsel submitted that the defendant's defence to claim 1 must fail and moved for judgment.

[13] Mr *Corbett*, who appeared for the defendant with Mr *Wylie*, submitted firstly that the parol evidence rule has no application to the substitution of the defendant for Higgs Eight CC in Annexure "A". The reason is, he submitted, that the rule does not apply to evidence tendered to identify the parties to the contract because such evidence does not contradict or vary the terms of the contract. In this regard he relies on the following extract from S J Cornelius, *Principles of the Interpretation of Contracts in South Africa*:

> 'It has also been said that evidence to identify the parties or things concerned or referred to in the contract, is admissible and is not affected by the parol-evidence rule. Again, the reason is that such evidence does not contradict or vary the terms of the contract. The evidence concerned is only presented to apply the terms of the contract to the facts of a particular case and not to determine the extent or meaning of the terms. As a result, this is also not a true exception to the parol-evidence rule.'

[14] Mr *Corbett* submitted that defendant is not seeking to lead evidence to establish a variation of a term of the contract, but simply to say that the party who is the tenant has been substituted by another party. However, I agree with Mr *Frank* that the evidence about the substitution will not be evidence to identify the party with whom the plaintiff contracted. Clearly it will be evidence about the variation of an essential term of the contract, namely the identity of the tenant. Therefore the parol evidence rule applies.

[15] As far as the non-variation clause is concerned, it was submitted on behalf of the defendant that the following statement by the author, Christie (*op.cit*, at p465), applies to this case:

> ‘It is inherent in non-variation clauses that one party may feel aggrieved when the other party agrees to an informal variation of the contract but then relies on a non-variation clause to nullify the informal variation.’

[16] In *Brisley v Drotsky* the majority observed that the courts have often in the past rescued a party from the grip of a non-variation clause, sometimes on doubtful grounds. One of the recognized grounds is fraud (*per* Cameron J in *Brisley v Drotsky supra* at 34F; see also the majority judgment at 14C). However, counsel for the defendant made it clear that the defendant’s case is not based on fraud. Instead he submitted that the plaintiff’s reliance on the non-variation clause is unconscionable and against public policy and in such circumstances the Court may and should allow a departure from the principle in *Shifren’s* case. In support of this submission he relied, *inter alia*, on *Gray v Waterfront Auctioneers (Pty) Ltd and Another* 1996 (2) SA 662 (WLD) at 668H-J where the following is stated:

> ‘Even if the non-variation clause had been relevant because the parties' conduct amounted to a variation of the lease, the applicant may well have been precluded from praying it in aid because, as it is put by Christie in *The Law of Contract in South Africa* 2nd ed at 535, 'a party whose conduct is "fraudulent, or unconscionable, or a manifestation of bad faith"' (referring to *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1962 (3) SA 565 (C) at 571F, *per* Rosenow J) 'will not be permitted to rely on a non-variation clause' (referring to *Leyland (SA) (Pty) Ltd v Rex Evans Motors (Pty) Ltd* 1980 (4) SA 271 (W) at 272H-273A).’

[17] However, in *Brisley v Drotsky, supra*, at 16 F-H the majority of the Supreme Court of Appeals of South Africa was critical of the *Resisto Dairy* case mentioned in this extract in so far as it was relied upon to bolster an argument that *Shifren* should not be applied if such application would be contrary to the norm of *bona fides* in the contractual context. This probably explains why the passage in the second edition of Mr Christie’s book, to which Wunsch, J refers in the *Gray* case, was omitted from later editions of this work. What was stated in the *Resisto Dairy* case at 571F is:

> 'The plaintiff Company agreed in advance to a condition which is hard and onerous, and it seems to me that unless it can be shown that it would, indeed, in the circumstances of this case, be fraudulent, or unconscionable, or a manifestation of bad faith, to rely on this condition, effect should be given to it. (*Wells v South African Alumenite Co.*, 1927 AD 69 at p. 73; *Zuurbekom Ltd v Union Corporation Ltd.*, 1947 (1) SA 514 (AD) at p. 537).'

[18] The majority in *Brisley v Drotsky* pointed out that *Resisto Dairy* was decided before *Shifren*. Furthermore, it was overruled on appeal and it is evident from the judgment on appeal that the matter was in fact concerned with estoppel (and not *bona fides*) (see *Resisto Dairies (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A) at 642F-643G). The majority further stated that it was more important to consider the authorities to which Rosenow J referred (which, as I understand it, turn out not to be authority for the view he expressed in relation to *mala fides*). The *Zuurbekom* judgment *loco citato* dealt with the *exceptio doli generalis* (which was held in *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 (3) SA 580 (A) not to be part of South African common law). In the other case, *Wells v South African Alumenite Co.*, Innes CJ stated:

> 'No doubt the condition [a provision that the buyer may not rely on a misrepresentation] is hard and onerous; but if people sign such conditions they must, in the absence of fraud, be held to them. Public policy so demands.'

[19] Clearly the *Wells* case merely re-affirms the established principle that fraud by a party seeking to rely on, e.g. a non-variation clause, is an exception to the rule that a party to a contract is bound to its terms.

[20] Furthermore, counsel for the defendant sought support for their argument in a passage from Prof. Dale Hutchison's article ((2001) 118 SALJ 720 at 720) quoted with approval in *Brisley v Drotsky, supra,* at p26G-J, but overlooked the fact that they

were dealing with the minority judgment by Olivier JA. The majority judgment clearly states that the apparent point of departure in the said article that a court has a general discretion to either enforce an entrenchment clause or not to do so is clearly incorrect (at p12I). In principle a court has no discretion to refuse to enforce a valid contractual provision (of which entrenchment clauses are merely an example). The majority also found that it is incorrect to state that a court can refuse to uphold reliance on an entrenchment clause if this would amount to a breach of the good faith principle (at p13A).

[21] In my view the defendant's reliance on the so-called 'unconscionable' conduct by the plaintiff is nothing but a futile attempt to resurrect the *exceptio doli*.

[22] As far as the defendant's reliance on public policy is concerned, counsel referred to the following statement by Cameron JA, who concurred with the majority in a separate judgment in *Brisley v Drotsky, supra* (at p34G):

> 'The jurisprudence of this Court has already established that, in addition to the fraud exception, there may be circumstances in which an agreement, unobjectionable in itself, will not be enforced because the object it seeks to achieve is contrary to public policy.' [*Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) para [22].]

[23] Applying *Sasfin,* the majority the court was of the view that this principle should be sparingly applied and limited to cases where the enforcement of the entrenchment clause would be so unfair that it could be described to be "inimical to the interests of the community' (at p18D) (see also *Brummer v Gorfil Brothers Investments (Pty) Ltd* 1999 (3) SA 389 (SCA) at 419G-J; *Old Mutual Life Assurance Company (Namibia) Ltd V Symington* 2010 (1) NR 239 (SC); *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia and Others* 2009 (2) NR 596 (SC) at [27]. *Prima facie* it seems to me that the defendant is unlikely to pass the stringent test for the application of the principle of public policy to the facts of this

case. However, as Mr *Frank* pointed out, it is not necessary to decide this issue. The problem for the defendant is that this is not the case it has pleaded.

[24] The same answer counters Mr *Corbett's* alternative submissions, namely that the defendant can rely on a waiver to the plaintiff's benefit or on estoppel. Counsel for the defendant indicated that the defendant reserved its right to still apply for leave to amend its pleadings while presenting evidence. However, at this late stage without an actual application for leave to amend on the table, I was not inclined to indulge the defendant, especially in light thereof that, in terms of the case management rules, the issues to be resolved at the trial had already been agreed upon on the basis of the existing pleadings. I also bear in mind that, in any event, paragraph 8 of the Schedule of Conditions to annexure "A" contains an anti-waiver provision.

[25] In the result I made the order on claim 1 as set out in paragraph [1] *supra*.

[26] As far as the second claim is concerned, the plaintiff then proceeded to lead evidence by its expert witness, Mr Wilders, a property valuator and sworn appraiser, who expressed the opinion that the market related monthly rental for the premises amounts to N$50 090.00. His evidence was not put in issue in any meaningful way. The parties eventually agreed that, based on his valuation, the plaintiff's damages are to be calculated at a total figure of N$359 965.64.

[27] The result is, then, that I made the order set out in sub-paragraphs 3 and 4 in respect of claim 2 as appears in paragraph [1] *supra*. I also ordered in respect of both claims that the plaintiff should be paid its costs of suit, as set out in sub-paragraph 5 of paragraph [1] *supra*.

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K van Niekerk

Judge

APPEARANCE

For the plaintiff:	Adv T J Frank SC (with him Adv G Dicks) Instr by Ellis Shilengudwa Inc
For the defendant:	Adv A W Corbett (with him Adv T Wylie) Instr by Neves Legal Practitioners