IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 231/2002
REPORTABLE

In the matter between :

SHOPRITE CHECKERS (PTY) LTD	Appellant
and	
BUMPERS SCHWARMAS CC	First Respondent
RUDOLF JACOBUS KLOPPER	Second Respondent
MADELAINE JOHANNA KLOPPER	Third Respondent

CORAM : MARAIS and CLOETE JJA and HEHER AJA

DATE : 20 MAY 2003

DELIVERED : 30 MAY 2003

Summary: The court below erred on the facts in granting rectification.

JUDGMENT

CLOETE JA/

CLOETE JA :

[1] The essential question in this appeal, which comes before this court with the leave of the court below, is whether that court was correct in granting the rectification sought by the respondents. The judgment is reported in 2002 (6) SA 202 (C) and the references which follow will be to that report.

[2] It is unnecessary to repeat the facts in any detail as they are exhaustively set out in the judgment of the court below. For present purposes it suffices to emphasize the following. In terms of a written agreement the appellant, represented by Van Tonder, sold a business undertaking as a going concern to the first respondent, a close corporation represented by the second respondent. It is this agreement which the respondents sought to rectify. The terms of the rectification appear from 206C-E: in essence, the respondents sought to have inserted in the agreement of sale an obligation on the part of the appellant to negotiate a

lease for the first respondent with the owner of the premises where the business was conducted; and the respondents averred that the terms of that lease were to be the same as the lease which the owner had previously concluded with its previous tenant Palmer, save for the period and the rental.

[3] The crux of the finding of the court below is to be found at 217J-218F. That court considered the 'essential question' in the dispute to be 'which party was obliged to arrange for the conclusion of the lease'. In adopting that approach, the court failed to appreciate the significance of both the terms of the lease for which the respondents contended and the evidence of Hirschfield and Fine, both of whom testified on behalf of the appellant.

[4] Hirschfield was a representative of the owner of the premises where the business which the first respondent purchased from the appellant, was conducted. Van Tonder and the second respondent went to see Hirschfield immediately before the second respondent signed the

agreement of sale. The meeting took place at the insistence of the second respondent, who was concerned to ensure, before he signed the agreement of sale, that the owner of the premises would grant a lease to the first respondent. The Palmer lease was available at the meeting and was discussed. That lease contained a clause which read as follows:

'Die Verhuurder verleen ook aan die Huurder die reg om na verstryking van die opsieperiode in die jaar 2004, die bestaande huurperseel te koop indien die Verhuurder bereid sou wees om dit te doen. Indien die eiendom herontwikkel word, kom die partye ooreen dat die Huurder ook 'n opsie verkry om die nuut ontwikkelde perseel te bekom op terme en voorwaardes soos mettertyd ooreengekom.'

At the risk of stating the obvious, I point out that the clause conferred an (unenforceable) option on the tenant to acquire the leased premises were the building to be renovated; it did not, and nor did any other clause, oblige the tenant to vacate the leased premises either temporarily or permanently should such renovation take place.

[5] Hirschfield, on his version which was supported in this regard by Van Tonder, said that he had made it quite clear to the second respondent during the meeting that there would be two differences between the previous lease with Palmer and any lease with a new tenant: firstly, the rental would be increased; and secondly, there would be a 'development clause'. According to Hirschfield, he stressed this latter aspect because it was potentially contentious.

[6] On Hirschfield's evidence, he indicated to the second respondent that the 'development clause' which the owner of the premises would require, would be a clause which would oblige the tenant, on twelve months' notice, to vacate the premises for several months should the premises be renovated; and he gave some indication to the second respondent that the tenant would be given an option to continue the business in a shop forming part of the redevelopment, once it was completed. Such an option was, however, not included in the 'development clause' in the lease ultimately

submitted on behalf of the owner to the second respondent. That clause was in the following terms:

'6.1 Should the LANDLORD elect to redevelop the building, the LANDLORD shall at its sole discretion be entitled to terminate the agreement of lease provided that the LANDLORD has given the TENANT 12 (TWELVE) MONTHS written notification to vacate the premises.

6.2 Should the LANDLORD terminate the agreement of lease as aforesaid, then the TENANT shall have not [sic] claim of any nature whatsoever against the LANDLORD as a result of such termination.'

[7] If accepted, Hirschfield's evidence would constitute an insuperable obstacle to the respondents' case because neither of the representatives of the parties to the agreement of sale of the business Van Tonder and the second respondent could have had the common continuing intention, much less have agreed, that it would be a term of the sale agreement that the lease to be obtained by the appellant for the first respondent from the owner of the premises, would be the same as the Palmer lease (save only

for the period and rental). Both Van Tonder and the second respondent would have been aware before the sale agreement was concluded by them that the owner of the premises required a 'development clause' obliging the tenant, the first respondent, to vacate the premises should they be renovated.

[8] Hirschfield's evidence was not rejected by the court below. Counsel representing the respondents on appeal correctly conceded that a perusal of the record does not justify its rejection. That evidence does conflict with the evidence of the second respondent, who said that there was no mention of or discussion about a 'development clause'. There is, however, no room for either being mistaken and no conceivable reason why Hirschfield would lie on this aspect. None was suggested to him in evidence. On the contrary, the probabilities point the other way: the property was bought as an investment and with the intention of redeveloping it, and without a 'development clause' no development would

have been possible for the duration of the lease (which the second respondent wished to endure for a period of five years with an option to renew for a further period of five years).

[9] Hirschfield's evidence was, as I have already said, supported by Van Tonder. The court below roundly rejected Van Tonder's evidence for reasons the adequacy of which is debatable, but it is unnecessary to make a firm finding in this regard. As I have said, the evidence of Hirschfield was not, nor could it justifiably have been, adversely commented upon by the trial judge.

[10] Hirschfield's evidence also fits with the evidence of Fine, another representative of the owner of the premises, who said that he caused a lease to be drawn up which incorporated the development clause which I have already quoted and that he had confirmed *inter alia* the terms of this clause with the second respondent before doing so. According to Fine, the second respondent had no comment on the terms of the clause. This

evidence, if accepted, is similarly destructive of the respondents' version, and for the same reason: it establishes that the second respondent was content to accept a lease containing the 'development clause' in the form ultimately presented to the second respondent to sign on behalf of the first respondent, and not a lease similar to the Palmer lease which contained no such clause. The second respondent denied that he had had any discussion with Fine at any time. The respondents' counsel was constrained on appeal to submit that Fine had not told the truth. But no credibility finding adverse to Fine was made by the court below and none is justified on appeal.

[11] Counsel representing the respondents on appeal pointed to a contradiction between the evidence of Hirschfield, who said that Fine had negotiated the terms of the lease with the second respondent; and that of Fine, who said that he had been given the terms of the lease by Hirschfield and had merely confirmed the identity of the tenant, the amount of the

rental and the terms of the 'development clause' with the second respondent. The contradiction is, however, more apparent than real. What obviously happened is that neither negotiated with the second respondent: Hirschfield told Fine what he wanted included in the lease and Fine conveyed these terms to the second respondent.

[12] When the evidence of Hirschfield and Fine, the significance of which was evidently not appreciated by the court below, is taken into account, it cannot in my view be said that the respondents discharged the onus of proving that the sale agreement should be rectified in the terms sought: on the appellant's version, which is no less probable than that of the respondents, Hirschfield told the second respondent and Van Tonder that the lease would be different from the Palmer lease *inter alia* in that it would contain a 'development clause'; Fine informed the second respondent what the wording of that clause would be; and the second respondent accepted both. It is true that the 'development clause' as drafted did not

contain a provision that the tenant would be entitled to occupy premises in the renovated building as Hirschfield had indicated to the second respondent it might; but the fact remains that on the appellant's case the second respondent (and, for that matter, Van Tonder) knew that the owner of the premises would require a 'development clause' to be inserted in the lease and that the lease would in that regard differ from the Palmer lease.

[13] Of course it was important to the purchaser of the business, the first respondent, as the court below stressed (at 218D-E), that it have security of tenure in respect of the premises at which the business was to be conducted; and the second respondent realised that. But the respondents cannot escape from the fact that, on the evidence of Hirschfield and Fine, there cannot have been a common continuing intention on the part of Van Tonder and the second respondent, much less an agreement between them, that the terms of the lease to be granted to the first respondent would

be the same as the Palmer lease (save only for the period and the rental) and that there would be no ‘development clause’.

[14] The other fact taken into account by the court below (at 218E-F) as a major probability in favour of the respondents, namely, the efforts made by the appellant’s representatives to secure a lease for the first respondent, is of no probative significance on the above analysis. The conduct of the appellant’s representatives may be consistent with the existence of an obligation of the appellant to secure a lease for the first respondent. But such conduct is equally explicable on the basis that, as the appellant’s representatives testified, it was in the appellant’s interests that the business continue to be conducted by the first respondent at the premises in terms of the franchise agreement it had (in addition to the agreement of sale) concluded with the first respondent. This conduct does not throw significant light on the answer to the fundamental question as to what the terms of the lease were to be.

[15] Counsel representing the respondents moved for amendments to the respondents' counterclaim to incorporate in the alternative other prayers for rectification. These prayers suffer from the same defect as the existing prayer in that they also allege that the terms of the lease to be obtained by the appellant for the first respondent were (save for the period and rental) to be the same as the Palmer lease. The amendments must accordingly be refused.

[16] The appellant was obliged to apply for condonation for the late filing of the notice of appeal. The delay was caused by the non-availability of the judgment granting leave to appeal. The application for condonation, which was not opposed, was granted. It was agreed that the costs of the application should be costs in the appeal.

[17] The following order is made:

1. The costs of the appellant's application for condonation for the late filing of the notice of appeal are made costs in the appeal.

2. The respondents' application for amendments to the counterclaim is dismissed, and the respondents are ordered to pay the appellant's costs in connection therewith jointly and severally.

3. The appeal is upheld, with costs, and the respondents are ordered to pay the appellant's costs of the appeal jointly and severally.

4. The order of the court below is set aside and the following order substituted:

'1. The defendants' prayer for rectification of the sale agreement, annexure A to the defendants' counterclaim, is dismissed;

2. The defendants are ordered to pay the plaintiff's costs of the hearing jointly and severally.'

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T D CLOETE
JUDGE OF APPEAL

Concur:
Marais JA
Heher AJA

MARAIS JA:

[1] I concur in the judgment of Cloete JA. Regrettably, it is necessary to address an issue which has nothing to do with the merits of the case but everything to do with appropriate decorum in the courts. We live in an egalitarian age and modes of speech in court proceedings which are less than refined are to be expected. But there are limits to what should be tolerated in a court of law. If public respect is to exist for institutions such as courts of law which are vital to the functioning of a free and democratic constitutional state, the use of coarse and lavatorial language in court proceedings will contribute nothing towards earning and preserving that respect.

[2] Freedom of speech is a valuable constitutional right but it does not extend to the use of obscene language in courts of law. (Obviously, I am not here referring to accounts given in court proceedings of language used extra-curially where the giving of such evidence is relevant to the

proceedings. That must be tolerated because of its relevance to the issues in the case.)

[3] The rot in this case started when a witness chose to use the expression ‘Stuff you’ and it went unremarked. The expression ‘gatvol’ was also used. Yet another witness, despite his professional standing, chose to say that he wished to ‘bullshit’ the lessor into believing in a certain state of affairs. Thereafter, the word was employed again by the witness, by counsel who appeared then, but not on appeal, for the respondent, and echoed by the trial judge. None of them has the excuse of a limited vocabulary.

[4] An appellate court is instinctively loath to criticise the manner in which a trial judge allows proceedings to be conducted. Allowance has to be made for differences of personality and personal preference. And where the trial judge is as conscientious and industrious as Davis J, the temptation to turn a blind eye is great. But I would be shirking my duty if I

did not say that the use of this kind of language should not have been countenanced. Permissiveness of this kind reflects poorly upon the image of the High Court of South Africa and the fact that the judgment of the court *a quo* has been reported in the law reports, replete with quotations from the evidence in which this offensive language was employed, aggravates the damage.

[5] It is, of course, not necessary when problems of this kind crop up, to fulminate and call down fire and brimstone upon the user of such language. All that is necessary is a calm reminder to the witness that he or she is in a court of law, that the solemnity of judicial proceedings is not consistent with the use of language of that kind, and that it should not be repeated. If the witness is so inarticulate that he or she cannot readily find a less obnoxious substitute for the expression or word used, the court should assist in providing one. Where counsel are responsible for the introduction of

objectionable language the response may of course be less measured; counsel are expected to know better.

[6] The next matter requiring comment is this: the appellant sought leave to appeal in the court *a quo* to the Full Bench and not to this Court. Nonetheless, leave to appeal to this court was granted. If it was not an oversight on the part of the trial judge, it is a decision to be deprecated. If it was, it is to be deprecated no less. Whatever a party or the parties may prefer, it remains the duty of the trial judge to consider what court is the more appropriate in the circumstances of the case. The issue was purely one of fact; no controversial legal principle was involved; and the sums of money involved are by today's standards not so great as to justify the decision. The inappropriate granting of leave to appeal to this court increases the litigants' costs and results in cases involving greater difficulty and which are truly deserving of the attention of this court having to compete for a place on the court's roll with a case which is not.

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R M MARAIS
JUDGE OF APPEAL

CLOETE JA)
HEHER JA) CONCUR