

IN THE HIGH COURT OF SOUTH AFRICA**(EASTERN CAPE, PORT ELIZABETH)**

CASE NO: 3637/09

Date Heard: 08 November 2011

In the matter between:

Date Delivered: 24 April 2012

ROWAN TREE 1169 CC

PLAINTIFF

And

COWSTA BELEGINGS (PTY) LTD

DEFENDANT

JUDGMENT

DAMBUZA J:

[1] In February 2009 the plaintiff and the defendant purported to conclude an agreement of lease in respect of premises located at the Humerail Shopping Centre in Port Elizabeth (the premises). Subsequent thereto and in April 2009 that lease agreement was declared by this court to be null and void *ab initio*. As a result of that court order the plaintiff had to vacate the premises and it now claims damages suffered as a result thereof.

[2] The plaintiff is a close corporation that, until 2008, conducted business of a

restaurant and pub known as Tapas Al Sol, at The Brookes Hill Pavillion in Humewood, Port Elizabeth. It is represented in these proceedings by its main shareholder Donovan Noyle (Noyle). Noyle represented the plaintiff when the lease agreement relating to the premises was concluded. He also was the manager of the plaintiff's business at the Brookes Hill Pavillion.

[3] The defendant is a company registered with limited liability according to the company laws of South Africa. It conducts a business of leasing commercial properties to businesses in Port Elizabeth. The defendant was represented in the negotiations and conclusion of the lease agreement Dr J Narshai.

[4] The background undisputed facts are that during 2008, whilst the plaintiff was conducting business at the Brookes Hill Pavillion the Brookes Hill Pavillion was sold and the new owners wanted to renovate it. Consequently the tenants in the building at the time were given due notice that their lease agreements would not be renewed when they expired. In respect of the plaintiff the arrangement was that it would vacate the premises at the end of January 2009. In the first half of 2008 Noyle then started to look for alternative premises for the plaintiff. .

[5] It is not in dispute that the plaintiff ultimately concluded a lease agreement with the defendant regarding the premises in question. The lease agreement was signed, on behalf of the plaintiff on 13 February 2009 and on behalf of the defendant on 20 February 2009. It is also not in dispute that subsequent to conclusion of the agreement, the plaintiff commenced with renovations on the premises. Whilst the renovations were underway, a third party Umami Properties (Pty) LTD intervened as the Landlord in a head

lease agreement with the defendant in respect of the humerail Shopping Centre. Ummi then instituted the proceedings in which it challenged the validity of the lease agreement between the plaintiff and the defendant. The court found that in terms of the head lease agreement, consent had to be obtained from Ummi in respect of any lease agreement concluded between the defendant and a tenant. Such consent had not been sought from Ummi and the plaintiff had to vacate the premises.

[6] The damages claimed by the plaintiff relate to improvements effected on the premises, loss of profit over the period of the lease and retrenchment of staff. In the summons the plaintiff's claims that the defendant, through Narshai, gave a warranty that no person with a title superior to that of the defendant would evict the plaintiff from the premises. Alternatively that the defendant misrepresented to the plaintiff that the latter would enjoy undisturbed possession of the premises, or that the plaintiff was entitled to effect the improvements to the premises. It was common cause at the trial that the required consent would have had to be given by Kenneth Denton of Ummi Properties.

[7] The defendant pleaded that the plaintiff was aware that Denton's (or Ummi's) consent was a pre-requisite for the validity of the lease agreement and that Noyle knew from the start that Denton had refused to grant the necessary consent, so says the defendant.

[8] At the start of the trial counsel for the parties brought to my attention an agreement reached between the parties and recorded in a Rule 37 Minute, that issues emanating from certain averments made by the defendant be separated from issues relating to the quantum damages suffered by the plaintiff. I then granted an order

accordingly.

[9] The allegations made by the defendant were that:

i During 2008 Noyle approached Venter, an agent specializing in the letting of commercial properties, to inquire whether premises were available for rental;

ii Venter approached Denton to negotiate a lease for the premises

iii Denton informed Venter that the premises were a subject of a lease agreement concluded between Ummi and the defendant;

iv he also advised him that Ummi's (or Denton's) consent was required for a valid agreement of lease with the defendant; and that

v he (Denton) was not prepared to grant the necessary consent;

vi Noyle was advised accordingly nevertheless proceeded to negotiate and ultimately concluded a lease agreement with the defendant (through Narshai) in the hope that Denton could be persuaded to give consent.

[10] Venter testified regarding his attempts to secure the premises for the plaintiff, starting from meeting Noyle through Warrick Taag, a candidate broker with the firm of commercial property agents for which Venter also worked.. This was in about August or September 2008. At the first meeting which was held at the plaintiff's old premises at the Brookes Pavillion Noyle showed Venter plans that he already had for the proposed premises. Thereafter, as I have stated Venter met Denton. Denton informed Venter that the premises were in fact subject of a long lease between Umami and the defendant. It is at this stage, according to Venter, that Denton informed Venter that his (Denton's) consent was necessary for a valid lease between the defendant and anyone. Denton further told Venter that he was not prepared to grant consent because, firstly, on the plans presented by Venter (from Noyle) there was an encroachment on the adjoining property; further, there would be a serious "parking issue" with the neighbouring Virgin Active Fitness Club, and more importantly, he did not want a third tenant of "that nature" because this would affect his tenants. Venter then told Warrick about the meeting between Denton and himself and Warrick was to relay the information to Noyle. Warrick reverted with a message from Noyle as a result of which Venter approached Narshai to inform him that the plaintiff was interested in the premises.

[11] According to Venter, at the first meeting with Noyle, he had proposed two alternative premises, one located in Walmer and the other at Dolphin's Leap; however Noyle rejected the proposal saying those premises would not be suitable for his business.

[12] When Venter told Narshai about Noyle's interest in the premises, Narshai encouraged Venter to pursue the proposed lease agreement with the plaintiff. He also told Venter that he would deal with Denton himself.

[13] In November 2008, Venter and Taag met Noyle for the second time and Venter advised him to prepare a letter of intent to Narshai, setting out what would ultimately be the main terms of the intended lease agreement. Venter also told Noyle about his meeting with Denton and the remarks by Denton, particularly that Denton would not consent to the proposed lease agreement. Noyle remained intent on securing the premises and agreed to submitting the letter of intent to Narshai. But when Venter sought to submit the letter of intent to Narshai, Narshai told him that he had not been authorized to obtain a letter of intent from Noyle and that he was communicating directly with Noyle about the proposed lease agreement. This is where Venter's involvement with the lease agreement ended.

[14] Denton's evidence was that he first became aware of the agreement between the parties after being alerted to renovations that were being effected by the plaintiff to the premises. He became concerned that the renovations might be encroaching on his (or Umami's) adjoining property, which turned out to be true. He also had been told about the concerns from the nearby Paxton Hotel regarding possible disturbance to the hotel patrons from "*these late night venues*". He then sought legal advice from his attorney, Mr Gerald Friedman who advised him of the existence of the clause in the lease agreement between the defendant and Umami which required that consent be obtained

from Ummi prior to conclusion of sub-leases at the premises. Prior to the advice by Mr Friedman, Denton had not been aware of the clause requiring his consent.

[15] Denton met with Narshai and expressed his concerns about the plaintiff's impending occupation of the premises. Narshai undertook to cancel the sub-lease agreement. Subsequent thereto Narshai confirmed with Denton that the lease agreement had been cancelled. But a few days thereafter when Denton visited the premises the renovations thereon were in progress. Denton was made to understand that the lease agreement had been cancelled but another one had been concluded in its place.

[16] According to Denton, Venter had approached him trying to secure a lease agreement for the plaintiff at other premises (formerly the "Lobster Pot" restaurant) also located at the Humerail Shopping Centre. However Denton was not interested in leasing those premises to the plaintiff as he was then negotiating with the Ocean Basket Franchise group regarding their occupation of the Lobster Pot premises. Further he thought that there were enough businesses of the same type as the plaintiff's at the Humerail Shopping Centre at that stage.

[17] Kevin Slattery, an industrial and commercial property broker, testified that he was also approached to secure a lease agreement for the plaintiff at the Humerail Centre after Noyle's wife, Lauren, had expressed concern and frustration to Slattery's wife, Zahn, about Noyle's inability to secure a lease agreement with Narshai. Lauren and

Zahn worked at Pagden's attorneys at the time. Slattery met Noyle and they discussed the difficulties he was experiencing in securing premises from Narshai. He also became aware that other agents, namely, Taag and Venter were or had been also involved in the same project. He then phoned Venter and advised him about his own involvement in the project. This, according to Slattery, was "to clear the air" in case commission would be paid in the end. During that telephone conversation Venter warned him that he (Slattery) would "never get it right, under any circumstances", as Narshai would not allow alcohol to be sold on the premises. Venter also informed Slattery that he wanted nothing further to do with that project.

[18] Narshai authorized Slattery to negotiate the lease agreement with Noyle. The only concerns that Narshai had about the agreement were that the well being of the defendant's other tenants, a medical doctor and a pharmacist and that the plaintiff would have to understand that the defendant would not pay for the renovation costs to the premises that were to be leased by the plaintiff. Indeed the lease agreement was concluded in the early part of 2009 and the plaintiff then proceeded with the renovations to the premises. Indeed the lease agreement was ultimately concluded.

[19] The first time Slattery became aware that there were problems regarding the agreement was when Noyle phoned him advising that Denton was at the premises and was not happy with the renovations as the renovations which encroached on his adjoining property.

[20] Noyle's evidence was that whilst he was looking for premises for the plaintiff's

business he became aware that Café del Mari, the pub and bar business that was conducted at the premises, was struggling. He contacted Leonora Haslow, the owner of Café del Mari who indicated that she was interested in transferring the lease agreement in respect of the premises to someone else. In June 2008 the plaintiff, through its attorneys, wrote to Narshai whom as he was told by Haslow, was the Landlord in respect of the premises. He did not get a response; instead in August 2008 Haslow wrote to Noyle that he should deal with her regarding his interest in the premises, and not directly with Narshai. Towards the end of the same month (or in September) Noyle enlisted the assistance of Taag. Still there was no progress with the lease negotiations and Noyle. Taag then asked Venter to assist; he (Venter) indicated that Narshai is a difficult person but he “knew how to handle him”. But there was still no progress regarding the lease agreement, until Slattery came into the picture. Slattery was able to facilitate the drawing up of a draft lease agreement by 14 November 2008 and the final lease agreement by 13 February 2009.

[21] Renovations on the premises then started. Whilst were underway, in March 2009 the plaintiff wrote to Ummi (Denton) requesting to utilize, at a cost, a vacant piece of land adjoining the premises. It is subsequent to this letter that Denton came to the premises and complained about the encroachment. Thereafter the issue of consent was raised. According to Noyle this was the first time that the issue of Denton’s consent to the sub-lease was brought to his attention. Later on, in a letter addressed to the plaintiff’s attorney, Mr Kent Williams, Ummi referred to the concerns raised by management of the Paxton Hotel and Virgin Active. At some stage the plaintiff and the defendant decided, through their legal representatives, that the renovations to the

premises be suspended, the lease agreement that was concluded in February 2009 be cancelled, Denton's consent be obtained, thereafter a new lease agreement be concluded and the renovations resume. All this was done, save that Denton never gave consent. A new lease agreement was, however, concluded and the renovations resumed with Narshai's approval. But in the end the plaintiff was never able to take occupation of the premises and the renovations that had been effected to the premises became part thereof. Hence the claim for unjust enrichment.

[22] The evidence leaves me with mainly two mutually exclusive versions as to whether the plaintiff can rely on the guarantee to undisturbed possession of the leased premises. The main aspects on which these versions differ are that, on Venter's version (on which the defendant relies) when he (Venter) was requested to assist in securing a lease agreement for the plaintiff in respect of the premises, he approached Denton who immediately informed him that Ummi's consent was required for a valid lease agreement and that he was not going to give the required consent. This was then communicated to Noyle at a second meeting between Noyle and Venter. Therefore the plaintiff was aware of the consent requirement. On the plaintiff's version Venter was never requested to approach Denton about the premises. The issue of consent only surfaced subsequent to the letter written on behalf of the plaintiff to Ummi in March 2009.

[23] At the trial, the parties were not in agreement on the question of *onus*. Mr

Buchanan SC who appeared on behalf of the defendant submitted that, although primarily the issue of knowledge of the consent requirement was raised by the defendant as a special plea, and in that sense the onus could be said to be on defendant, the averments by the plaintiff in the summons, that the defendant misrepresented to it that it would be given undisturbed possession of the premises, placed a burden on the plaintiff to prove such misrepresentation.

[24] The writers Schwikkard and Van De Merwe, in *Principles of Evidence*¹ refer to the approach set out in **Pillay v Krishna**² in which the following was held:

“If one person claims something from another in a court of law, then he has to satisfy the Court that he is entitled to it. But there is a second principle which may always be read with it; Where the one person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded, quod that defence, as being the claimant; for his defence to succeed, then he must satisfy the court that he is entitled to succeed on it.....But there is a third rule which Voet states.....as follows: ‘He who asserts proves and not he who denies, since a denial of a fact cannot naturally be proved

¹ Revised 3rd edition at 572

provided that it is a fact that is denied and that the denial is absolute'...the onus is on the person who alleges something and not on his opponent who merely denies it".³

[25] My view is that ordinarily and as the pleadings stand, the plaintiff would bear the onus to prove the allegations set out in the summons and particulars of claim. Of essence are the allegations regarding, *inter alia*, the existence of the lease agreement, that the plaintiff took occupation of the premises on 1 February 2009, that alterations were effected by the plaintiff to the premises and , most importantly that:

*"the defendant warranted that no person with superior title would disturb the plaintiff in his use and enjoyment to the premises during the period of the subsistence of the lease."*⁴

However all these averments are admitted in the defendant's plea. All that is pleaded as the defendant's defence is that the plaintiff may not rely on the warranty because of its awareness of the required consent.

[26] I agree with the submission on behalf of the plaintiff that the defendant bears the onus to prove that Noyle was aware of the required consent.

³ See also *Malherbe v Britstown Municipality* 1949(1) SA (C) at 287; *Obotseng v Labone and Others* 1994 (4) SA 88 (BG) at 94

⁴ As pleaded in the plaintiff's particulars of claim

[27] For the same reasons I also agree that the onus remains on the defendant even on the plea to the alternative claims of misrepresentation and unjust enrichment.

[28] As to whether evidence led discharges the onus on the defendant Mr Buchanan submitted that Venter was not partisan when giving evidence. Indeed nothing in his evidence indicates that he was more biased towards one of the parties than the other. And I agree that his evidence was consistent some of the other evidence that was led. But that was on very limited and immaterial aspects of the totality of the evidence led. Venter's evidence was consistent with Denton's only in so far as Denton testified that Venter did approach him regarding premises for the plaintiff. But according to Denton this was in respect of the Lobster Pot premises. I do accept that the reasons for rejection of the plaintiff's proposal by Denton, as per Venter's evidence, were the same as given by Denton himself when he testified. But that does not add significant value to the defendant's version.

[29] On the other hand Noyle's evidence was consistent with uncontested objective evidence that was led. Uncontested documentary evidence shows that Noyle was aware from the start that the Landlord in respect of the premises was Narshai. He started communicating with Narshai as early as June 2008. By November 2008 there was a draft lease agreement in place. There is no explanation as to why he would still be signing a letter of intent as contended on the defendant's version. In this context the defendant's version does not accord with the probabilities. And as it was submitted on behalf of the plaintiff it is difficult to understand why Noyle would instruct Venter to approach Denton when, to Noyle's knowledge the landlord was Narshai. Regarding Slattery's evidence it is not in dispute that by November 2008 Slattery was already in

the picture and things were decidedly moving towards conclusion of the agreement. Slattery was criticized for being vague on the question of whether or not he discussed commission with Venter over the phone. In my view, whether Slattery and Venter discussed commission or not in the telephone conversation does not, in my view, detract from the value of the undisputed facts in Slattery's evidence. In the end the submission, on behalf of the defendant, that it is not improbable that Noyle would have signed the letter of intent and therefore did meet Venter in November 2008 is not persuasive in the context of the other evidence on the history of the matter.

[30] In the end I am unable, on the evidence before me to find that Noyle was informed of the consent requirement regarding the lease agreement. And my view is that even if I were to find that in November 2008 Noyle became aware of this requirement that would not take the defendant's case any further. I hold the view that the relevant time to determine the state of mind of the parties regarding the terms of an agreement is at the time of the conclusion thereof. It happens all the time that during negotiations preceding the conclusion of a contract the position of the parties and the surrounding circumstances change. And on Venter's own version, Narshai undertook to deal with Denton and presumably resolve the problem about the consent. Thereafter he gave the warranty. In my view, when the warranty was given, at the time of the conclusion of the agreement, that the plaintiff would be given undisturbed possession of the premises the plaintiff was entitled to rely thereon. Therefore the question of whether there was a second meeting between Venter and Noyle is not necessarily decisive of the matter.

In the result the order I grant is that:

- 1 The defendant is liable for such damages as the plaintiff may prove to have suffered as a result of its eviction from erf 446 Port Elizabeth.
- 2 The defendant is ordered to pay the plaintiff's costs of suit.

N. DAMBUZA

JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff: Adv. R.W. Parker Instructed by Pagdens Attorneys, Central, Port Elizabeth

For the Defendant: Adv. Buchanan Instructed by Lexicon Attorneys, Central, Port Elizabeth .