IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: EAST LONDON

CASE NO. 1057/2017

ECD:2557/2017

In the matter between:

YOUMESSI TRADING CC **Plaintiff**

and

KHAKA SIPHUNZI **Defendant**

JUDGMENT

JOLWANA J:

Introduction

[1] The plaintiff's main claim against the defendant is for arrear rentals allegedly owed by the defendant to the plaintiff in the sum of R936 611.00 for the months of April 2015 to August 2017, a period of more than two years. The plaintiff also claims other ancillary relief also related to the main claim. The plaintiff's claims arose out of an alleged oral lease agreement in respect of certain premises situated at no.59 Buffalo Street in East London (the premises). On the other hand, the defendant has, in addition to filling an amended plea in which his defence in denial of liability is set out, also filed a counterclaim to the plaintiff's claim.

The pleadings

[2] In its particulars of claim the plaintiff pleads that on or about the 1 April 2015 it entered into an oral lease agreement (the lease) with the defendant. The lease was apparently a necessary appendage and ancillary to the sale of business agreement between the same parties for the sale of Hartwick Technical College entered into in writing on 25 March 2015. The terms of the said lease were that the plaintiff would let an immovable property situated at no.59 Buffalo Street, East London where the subject matter of the sale of business agreement, Hartwick Technical College (the college) was apparently situated.

[3] Some of the material terms of the alleged lease as pleaded by the plaintiff were that the defendant would pay to the plaintiff R30 000.00 per month in advance until the sum of R400 000.00 being part payment of the purchase price for the college due on the 1 April 2015 was paid. After the sum of R400 000.00 would have been paid the monthly rental was to be reduced to R25 000.00 per month. The said rental would escalate at the rate of 10% per annum. It is further alleged that the defendant took occupation of the premises on the 1 April 2015 and has been in occupation since then. What can be gleaned from some of the pleaded material terms of the lease is that the lease was inextricably linked to the sale of business agreement.

[4] Because of the interconnectedness and the intertwined nature of the evidence relating to the lease and the sale of business agreement I shall interchangeably refer to either or both agreements. I quote hereunder the purchase consideration clause of the

written sale of business agreement in which some of the intended lease terms are also foreshadowed. It reads:

"4.1 The purchase consideration for the sale of the Business is: R700 000.00.

4.2 The purchaser will satisfy the purchase consideration by:

4.2.1 making payment to the Seller as follows:

R400 000.00 on the 1 April 2015;

R100 000.00 on the 30 June 2015;

R100 000.00 on the 31 August 2015;

R100 000.00 on the 30 September 2015;

4.3 Pending payment of the balance of the purchase consideration, ownership in and to the Sale Assets will remain vested in the Seller.

4.4 The parties place on record that:

4.4.1 the purchaser is already leasing the premises on which the school is doing business from the Seller and is in arrears with rent, water and electricity in the amount of R121 611.40. The parties will entered into a further agreement regarding the payment of this amount.

4.4.2 the purchaser will after paying the initial R400 000.00 be allowed to pay R25 000.00 rent per month. (Reduced from R30 000.00 pm)."

[5] The defendant pleads that the business, the college was sold to him as a going concern. Furthermore, it was agreed orally between himself and Mr Youmessi on 1 April 2015 that the plaintiff would cause to be ceded to the him the main lease of the premises by the landlord and only thereafter would he start honouring the lease. The plaintiff failed to have the main lease ceded to the defendant and instead insisted on

demanding rentals which the defendant refused to pay without the main lease between the landlord and the plaintiff being ceded to him.

[6] The defendant has also filed a counterclaim in which he claims that the college was sold to him as a going concern and the plaintiff failed to perform its obligations pertinent thereto. In light of the defendant's failure to perform the terms pertinent to the sale of the business as a going concern and income earning activity as agreed, he seeks the nullification of the contract for the sale of the college. He also seeks full restitution of the purchase consideration in the sum of R700 000.00 which he paid to the plaintiff. The defendant further pleads that one of the material terms of the sale of business agreement was that the school was accredited and/or licensed with the Department of Higher Education to operate as an independent college. The defendant pleads that the school was in fact not registered or licensed and therefore the plaintiff could not and in fact did not deliver registration licences for the school to the defendant. The plaintiff also failed to cede, assign such licences to the defendant as part of the business assets as agreed.

[7] In a worryingly terse plea to the very detailed counterclaim, the plaintiff basically admits that the business was indeed sold as a going concern. However, it denies everything else and pleads for the dismissal of the counterclaim. As indicated hereinbefore the amount claimed by the plaintiff is in respect of arrear rentals mainly. It follows that the main issue in the first instance is whether an oral lease was agreed to and if so the terms thereof.

The evidence

[8] For some incomprehensible reason the parties agreed in the pre-trial conference minute that it is the defendant that would start to lead evidence. The plaintiff's counsel insisted on this being the case as agreed between the parties with the rider that the defendant would lead all his evidence both in respect of the counterclaim and the defence in the main case. That is how the evidence evolved with the defendant being the first to take the witness stand as agreed between the parties.

[9] The defendant testified that early in 2015 he met a certain Mr Baguma who worked for the plaintiff. Mr Baguma told him that the college was being sold. At that stage he had just started his firm as an attorney and this looked like a good business opportunity to supplement the income of his practise with another income stream. At the time coincidentally, he already knew the owner of the college, Mr Youmessi who confirmed that indeed he was selling the college. He was taken to the place of business of the college and in the premises there were some desks and a reception area. He was impressed with what he saw and thought it to be a good opportunity which he did not want to miss.

[10] After some negotiations he and Mr Youmessi agreed on a purchase price of R700 000.00 for the college and the payment terms. One of the express terms of the agreement during those negotiations was that the college was sold as a going concern and income generating activity. He looked at the terms of the written agreement presented to him by Mr Youmessi focusing on the purchase price and the payment terms and thereupon signed the sale of business agreement. Indeed he paid the

purchase price as agreed. His understanding was that the college was licensed to operate as a college and registered with the Department of Higher Education.

[11] After he signed the sale of business agreement, Mr Youmessi presented to him a lease agreement which he was required to sign. He refused to sign the lease. He told Mr Youmessi that he would not sign it because his understanding was that the sale of business as a going concern also meant that the lease was to be assigned to him. The lease presented to him reflected an entity called Silver Solutions CC as the landlord. He also demanded to be furnished with the lease agreement between the plaintiff and the landlord or owner of the premises which Mr Youmessi failed to do. He refused to be a sub-tenant of Mr Youmessi who did not own the premises.

[12] The plaintiff insisted that he should be his sub-tenant but eventually they agreed that the plaintiff would engage with the landlord. While they were still discussing the issue of the lease he continued to honour his obligations and paid the purchase price in full as he was really excited about the business opportunity. Towards the end of 2015 which was after he had paid the purchase price in full he enquired about the transfer of the operating licences for the college. Mr Youmessi indicated that he would look for the licences as he was not sure where they were. At some stage he went to the Department of Education in Mdantsane to verify if the school was registered or not. He was surprised to learn that in fact it was not registered. He was concerned about this development as it meant that he would have to run the school illegally if he continued with it. He would be faced with a situation in which the school could be closed down by the Department of Education for want of registration. The plaintiff failed to comply with the agreement in that he failed to transfer licences for the school as provided for in the

sale of business agreement. The college therefore could not have been sold to him as a going concern as it was unlicensed and could not operate legally. He never intended to agree to buy an unlicensed business that could not operate legally. It was for this reason that he filed a counterclaim for the cancellation of the sale of business agreement and the restitution of the purchase consideration.

[13] Under cross-examination the defendant conceded that when he ultimately realized that the college was not licensed he never cancelled the sale of business agreement. He testified that he always thought that the plaintiff would be able to sort out the problem of the licences. He denied that he bought the college knowing that it was not licensed to operate as a school with the Department of Education. He also denied that what he had agreed to buy was in fact a computer training business that did not require to be registered with the Department of Education. The case for the defendant was thereafter closed.

[14] Before Mr Youmessi who testified for the plaintiff started with his evidence, counsel for the plaintiff sought to introduce through an application, what she said was a computer licence or certificate which had not been discovered. There was no explanation why it was not discovered. Worse still, the trial had started and proceeded until the defendant concluded all his evidence and closed his case. Only after the defendant had testified and had been cross examined at length and the plaintiff was about to lead his evidence on the second day of the trial was it sought to introduce this document. There was no explanation for this disregard of the discovery procedural rules in which it was also sought to introduce a document contrary to trial procedures. I

dismissed this application in the absence of any plausible explanation for this flagrant violation of trial procedures.

[15] The plaintiff called Mr Hobbs, the owner of the premises which are the subject matter of these proceedings in respect of the lease. His evidence was that his company entered into a written lease agreement with Mr Youmessi on the basis that he would become the main tenant and could sublet the premises. Their relationship has been in existence since about 2002. They had no objection to the college using the premises. He testified that since 2006, their lease agreement with Mr Youmessi had been renewed several times and each renewal referred to the original lease whose terms were binding on the parties.

[16] That original lease is dated 23 January 2006 and is between Mr Hobbs' company, Hysalsea Properties CC on the one hand and Amos Youmessi, Hortence Nono, Viviane Laure Nguetchou and Joseph Alex Buffet Tchapjou on the other hand. Under cross-examination Mr Hobbs was referred to clause 7 of that lease agreement which reads:

> "That the Lessee shall not have the right to cede or assign this lease or to sublet the whole or any portion of the property hereby let without the written consent of the Lessor first had and obtained, which consent shall not be withheld unreasonably, in the case of sub-letting only."

[17] Mr Hobbs confirmed that he had not given any written consent to Mr Youmessi to sublet the premises to the defendant. His arrangement with him was that Mr Youmessi would pay a single rental to them for the whole property and could sublet it to various tenants. He said that Mr Youmessi never conveyed the desire of the defendant to rent directly from them instead of being a sub-tenant. His attention was drawn to the email

dated 26 August 2016 from Mr Youmessi in which Mr Youmessi said; "*the guy who is renting the school upstairs (Khaka Siphunzi), he wants to rent the place straight from you. How do you see that?*" He could not remember if he responded to that specific email. However, he was certain that the response would have been negative as they did not want to have any direct relationship with subtenants. Furthermore, he knew from Mr Youmessi that the defendant was not paying rentals.

[18] Mr Youmessi also testified on behalf of the plaintiff. His evidence was that he has lived in south Africa for 23 years. He was born in Cameroon but is also a South African citizen. He entered into the written sale of business agreement for the college with the defendant on 25 March 2015. The agreement was that the defendant would buy the business from him but he would need to rent the premises from him as he was a managing agent for the premises. He received the first payment in respect of the purchase price in the sum of R400 000.00 on 01 April 2015. At that stage he had already told the defendant that he would need to rent the premises from him.

[19] He gave a written lease agreement between himself representing Silver Solutions 956 CC to the defendant to sign. However, the defendant refused to sign the said lease but did not tell him his reasons for refusing to sign it. This surprised him because when the sale of business agreement was entered into the agreement was that rentals of R25 000.00 would be paid to him for the premises. He also confirmed that the defendant raised with him the issue of his desire to lease the premises from the landlord much later when they went to the magistrates' court for the first time. He complied with the sale of business agreement provisions for the delivery, ceding, assigning and transferring of the assets of the business and licences to the defendant.

[20] He testified that he had a certificate for the school only in respect of computer training. His agreement with the defendant was that the defendant would himself apply for the other necessary certificates or licences. That computer training licence gave him the authority to train students. The discussion between himself and the defendant took place in the presence of Eddie who was his manager for the school. That licence was already at the school hanging on the wall. He never handed the licence over to the defendant physically. The keys to the business were with the school manager who was also going to be the defendant's partner.

[21] Under cross-examination he confirmed that the business was an educational institution. He conceded that he never had any certificate of registration for the college or any certificate to admit learners and cause them to write examinations. However, he had informed the defendant that he did not have those certificates. He had told the defendant that the college was not registered with the Department of Education.

[22] He testified that the unsigned lease was prepared for him by his attorney Mr Deon Stander as a standard lease which he then adapted for the defendant. He gave the lease to the defendant for his signature about two days after the sale of business agreement was signed. However, the defendant did not accept it saying he did not want to sign it but he did not tell him any reason for his refusal to sign the lease agreement. He testified that it was only in 2016 that he learned that the defendant did not want to sublet the premises from him but wanted to have a lease agreement directly with the actual landlord, Mr Hobbs. He insisted that in 2015 when he presented the draft lease to the defendant the defendant never told him that he wanted to lease directly from Mr Hobbs and did not want to be his sub-tenant.

[23] He also gave evidence the essence of which was that the rental he would collect from the defendant would have been more than the actual rental due to Mr Hobbs. He would collect more and pay over to Mr Hobbs less than he collected. There was a mark-up from his actual rental obligation to Mr Hobbs as he put it, "*so that he could eat*". He also confirmed that he never obtained a written authority from Mr Hobbs to sublet the premises to the defendant as required by the original 2006 lease between Mr Hobbs and himself and his partners.

[24] He further testified that he established the college in January 2014 when it had its first intake of students. He was offering matric rewriting and computer training. When students failed matric, and wanted to repeat it they would come to the college. Thereafter the plaintiff's case was closed.

The analysis

[25] The common cause facts are that a business sale agreement was entered into between the plaintiff and the defendant on 25 March 2015 in writing for the purchase of the college by the defendant. The purchase price was R700 000.00 which was paid in full in terms of that agreement by the 30 September 2015. A written lease agreement was presented by Mr Youmessi to the defendant shortly after the sale of business agreement was entered into. The defendant refused to sign the said lease agreement. The defendant never paid any rental whatsoever for the premises.

[26] The sale of business agreement also reflected arrear rentals of R121 611.40 which amount is described in vague terms as being for rent, water and electricity with an indication that as at the date of the conclusion of the sale of business agreement the

purchaser was already leasing the premises. This is just one of many aspects of the plaintiff's case that is confusing, if not concerning and the evidence did not help to clarify many of those aspects as will be shown later. Even more confusing is the fact that the agreement having been entered into on 25 March 2015 which date according to the agreement itself was also the effective date of the sale of business agreement, the amount owing in April 2015 started with an opening balance of R149 310.40. This amount appears as an opening balance from annexure B to the particulars of claim which is the plaintiff's breakdown of the amount owing since April 2015 to August 2017. However, how the amount of R121 611.40 arose was not explained by Mr Youmessi when he testified.

[27] During his main evidence Mr Youmessi was taken through the breakdown contained in annexure B by his counsel. However, no attempt at all was made to explain this opening balance. In fact giving evidence on this amount was completely ignored. This is rather strange considering that that document, annexure B to the particulars of claim was intended to substantiate and provide a breakdown of the total amount claimed being R1 015 179.90. The other amounts are different monthly rentals and service amounts. Again there was no evidence of invoices having been sent to the defendant for any of the amounts claimed at any stage in respect of any of the months from April 2015 to August 2017. The only evidence of a demand having been made to the defendant was a letter of demand sent by the plaintiff's attorneys on 31 July 2017 which was shortly before the summons was issued. There was no real evidence of meetings having taken place between the parties in which the escalating rental situation was discussed and undertakings for payments made for a period of over two years.

Throughout all this period, if the evidence of Mr Youmessi is anything to go, the defendant was in occupation of the premises and running the school. This is also strange considering that Mr Youmessi did not own the premises and had rental obligations to Mr Hobbs.

[28] There was also no clear evidence of a hand over of the premises to the defendant having taken place. Considering that the business was sold as a going concern, there was no evidence of Mr Youmessi having called a meeting of his employees to tell them that the business was under new ownership. There was no handover of books or even accounting records, financial statements, student rolls or even the staff roll. There was no evidence of the defendant being introduced to the stake holders of the business, the parents, the students and most importantly the staff or even a list of debtors for outstanding fees.

[29] Even in respect of the formal documentation for the college, there are a lot of disjunctures and disconnections about which the plaintiff did not give any evidence to try and clarify them. For instance there was not a single document reflecting the existence of the college. The entity under which the college was allegedly run is Youmessi Trading CC a registered close corporation whose sole member was Mr Youmessi. Indeed the sale of business was done under the name of the close corporation which is the plaintiff in these proceedings. However, the claim is not for the payment of the purchase price which was in any event paid in full. The claim is in respect of rentals said to be owing by the defendant. However, there is no relationship between the plaintiff and the premises in the sense of a lease agreement with the owner of the premises. The main lease agreement is between the owner and the four individuals

mentioned earlier. In fact there was no evidence of the plaintiff having had any dealings with the owner of the premises, not even rental invoices. One would have expected this relationship to exist for many reasons but especially because according to the evidence of Mr Youmessi the plaintiff was a rental agent for the owner of the premises to whom rentals were paid by tenants and in turn paid over by him to the owners. There was neither documentation nor oral evidence in this regards.

[30] This is, in my view, hugely problematic in that it begs the question whether the plaintiff had any premises to rent out or sublet to anybody including the defendant. There was no evidence in this regard at all. At the very basic level, there were no invoices issued, even for a single month by the plaintiff to the defendant. No demands were made save for the letter of demand in July 2017. If the plaintiff had no premises to rent out or even sublet it is difficult to understand how the plaintiff could have even a sublease agreement with the defendant about which the plaintiff's evidence was, at best extremely poor and at times downright misleading. There was unbelievable paucity of the evidence of the oral lease having been entered into.

[31] There are many other problems in the plaintiff's case. Mr Youmessi admitted that the unsigned lease agreement discovered by defendant is a correct document which he presented to the defendant for signature. That draft lease agreement reflects as parties thereto Silver Solutions 956 CC t/a Kombou Guard Service and Property and the defendant. This entity is not the plaintiff nor a party in these proceedings. This agreement was presented to the defendant for signature shortly after 25 March 2015 according to Mr Youmessi. The defendant refused to sign that lease agreement as, according to the defendant's evidence he wanted to be the tenant of the owners of the

premises and not Mr Youmessi's or the plaintiff's sub-tenant. On the other hand Mr Youmessi's evidence was that the defendant never stated his reasons for refusing to sign the lease agreement. This is particularly also hugely problematic and in fact improbable because at that stage the sale of business agreement had just been signed. The parties were still happy with one another with a substantial part payment in the sum of R400 000.00 scheduled to be made on the 01 April 2015, within a week after the 25 March 2015. Indeed that payment was made to Mr Youmessi.

[32] Leaving that aside, the rental clause on the draft lease reflects rental amounts of R5000.00 for October 2014 and R30 000.00 each from November 2014 to March 2015, R25 000.00 from 01 April 2015 to August 2015, R27 500.00, from September 2015 to 31 August 2016, R30 250.00 from 01 September 2015 to 31 August 2017. This is also hugely problematic because it is common cause that the sale of business agreement was entered into in March 2015. Most confusing is also the fact that the term of the lease was intended to be reckoned from 01 October 2014 to 31 August 2017. In an attempt to get clarity for some of these confusions and the contradictory evidence of the plaintiff, I asked Mr Youmessi when he established the college. His evidence was that he opened the school in 2014. This means that in less than a year in October 2014, if the draft lease is anything to go by, the school was already in the hands of the defendant. The basis on which the defendant would have taken over the premises in October 2014 were not dealt with at all by Mr Youmessi considering that the business was only sold in March 2015.

[33] The relationship between Silver Solutions and the plaintiff is unclear in as much as there was no evidence of who the members of Silver Solutions were. It is unclear how

and if the plaintiff ever came into the picture in respect of the rentals if the rental agency was under the name of Silver Solutions, the entity through which Mr Youmessi intended to enter into a lease agreement with the defendant. Again, there was no evidence of the existence of a relationship between Silver Solutions and the owners of the premises on the one hand and the tenants to the premises being those four individuals mentioned earlier and Silver Solutions on the other hand.

[34] The bigger question in my view is whether the college, which was the subject matter of the sale of business agreement and the catalyst to the oral lease even really existed when it was sold. Beyond the plaintiff's mere say so, there was no evidence at all of the college being in existence. For instance, one would expect a school to have documents of its enrolment of students from 2014 when it was established. There was none. The evidence of the existence of teachers or even contracts of employment for any person who may have served as a teacher or even a cleaner for the school or even security personnel. These type of employees would have necessitated the registration of those employees with the South African Revenue Services and the Labour Department for tax and Unemployment Insurance Fund purposes.

[35] The business itself would have been required to make annual declarations of income and expenditure and would be assessed for tax in respect of income generated. There was no evidence on any of these issues, documentary or otherwise. There was no evidence of even bank statements showing money in respect of fees being deposited into the school account and salaries for teachers and even stationery or other normal requirements for a school, none whatsoever. There was no evidence of the bank details and signing authorities having been changed to reflect the defendant. This

is important because the college was sold as a going concern. There was no evidence that Mr Youmessi notified the tax authorities that he no longer owned the college especially after the purchase price was paid in full. This would have been necessary so that tax liability for the business which had been sold as a going concern shifted to the defendant.

[36] It is equally troubling that Mr Youmessi did not bring evidence even from a former employee of the school, a former parent whose child received tuition from the college or even a former pupil of the school. Mr Youmessi's evidence was that the school was run by a principal or as he put it "someone like a principal." Why this person was not called to testify on any of the issues so that he would shed some light on the existence of the school or even of it being handed over at some point to the defendant and run by the defendant. I am resorting to the questions around these issues because the evidence of the plaintiff was that the college was not registered with the Department of Education. Mr Youmessi's evidence was, at some stage, that some of the grade 12 pupils who were his students did obtain grade 12 certificates. He later changed to say that what he offered was a matric rewrite presumably for those who would have failed grade 12.

[37] Again applying some measure of benevolence to his evidence it might very well be that he did not have to register them with the Department of Education as the students might do that themselves as private candidates. However, the fact that there was no evidence of any pupil, teacher, parent, employee or anyone or even the registration of the college as a business with this country's tax authorities all point to the possibility of an empty shell or a sham. The evidence of the college's existence is non-existent not even insufficient. On a preponderance of probabilities the college that was sold did not

exist, was probably a sham or even fraudulence on Mr Youmessi's part. What is troubling was his audacity to come to this Court to enforce a lease agreement based on a possibly fraudulent transaction of a sale of a business that did not exist for premises that were probably never occupied or really handed over for occupation to the defendant.

[38] The definition clause of the sale of business agreement refers to the "*Effective Date of Accounts*" which itself refers to financial statements of the seller for the period ending on the day immediately preceding the effective date. No evidence of any financial statements being or having been given to the defendant nor was evidence of their existence proferred. Reference is also made to "fixed" assets. These are defined as "fixtures and fittings, furniture, office equipment and motor vehicles of the business as set out in the schedule attached hereto as Annex "A"". However, the schedule was not attached to the agreement nor was there evidence of any of these assets being handed over or their inventory given either to the defendant or even evidence of their existence tendered during trial. It is difficult to avoid the suspicion that the sale of business agreement was deliberately designed to give credence to the existence of the college that was sold as a going concern and to hide the fact that it was possibly a fraudulent vehicle true which the defendant, despite being an attorney was duped into parting with R700 000.00 for nothing, exploiting his gullibility.

[39] It is hugely significant that the business that was sold to the defendant was described as being a going concern. The term "*going concern*" received the attention of the Constitutional Court in *National Education Health and Allied Workers Union v*

University of Cape Town and Others 2003 (3) SA 1 (CC) at page 27 para 56. In that case Ngcobo J stated:

> "The phrase 'going concern' is not defined in the LRA. It must therefore be given its ordinary meaning unless the context indicates otherwise. What is transferred must be a business in operation 'so that the business remains the same but in different hands'. Whether that has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction. In deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction. A number of factors will be relevant to the question whether a transfer of a business as a going concern has occurred, such as the transfer or otherwise of assets both tangible or intangible, whether or not workers are taken over by the new employer, whether customers are transferred and whether or not the same business is being carried on by the new employer. What must be stressed is that this list of factors is not exhaustive and that none of them is decisive individually. They must all be considered in the overall assessment and therefore should not be considered in isolation."

[40] The non-performance of all or any of the obligations and undertakings referred to above is not only the evidence of the sale of business as a going concern not having occurred but, most importantly in this case, it is also the evidence of the non-existence of the business that was being sold. If it did not exist, it could not be sold at all. The belief of the defendant as to its actual existence and his entering into the contract on the basis of the misrepresentations by the plaintiff about the actual state of affairs is irrelevant in my view, to the question whether in fact the business so sold actually existed.

[41] There is yet another feature of the plaintiff's case that is bewildering. The leased premises are simply referred to as No. 59 Buffalo Street, East London. This is not at all a description of the property intended to be let to the defendant. It is common cause

that in that address there were various tenants for various portions of the property. The question then is whether the description of the portion intended to be let to the defendant was stated and agreed upon. There is no evidence in this regard. None of the documents or the evidence even vaguely define the square meterage intended to be let to the defendant. This is significant because according to the original lease the agreement between Hysalsea Properties CC and Mr Youmessi and his partners was for "*a portion of the building (approximately 400 m^2) situated on second floor at 59 Buffalo Street, East London*." Nowhere are the premises actually occupied by the college properly defined in the draft lease or even pleaded. This is just one of the many problems confronting the plaintiff's claim which he sought to enforce in these proceedings. His evidence did nothing to deal with any of these issues at all. Again, all of this goes to the question whether it can be said, even with some benevolence, that there was a valid agreement of lease.

[42] As regards the misrepresentations in respect of the sale of business agreement for which the defendant, through a counterclaim seeks restitution, I find a principle set out many centuries ago to be absolutely apposite. In *Wiley v African Reality Trust Ltd* 1908 TH 104 at 111-112 the court quoted the said principle from *Redgrave v Hurd* (1881) 20 Ch D 1 13 as follows:

> "If a man is induced to enter into a contract by a false representation it is not sufficient answer to him to say, 'if you had used due diligence you would have found out that the statement was untrue'. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them'."

[43] This dictum is eminently applicable in this case in which the defendant is after all an attorney whose naivety in how he failed to do basic due diligence like simply asking for

a tax clearance certificate for the business he was acquiring is shocking to say the least. He could easily have also insisted on some proof that the school legally existed beyond the presence of some desks and a reception area before parting with R700 000.00 which no doubt, is a substantial amount of money. However, all of that does not disentitle him to restitution of the amounts paid. The plaintiff's case was, both in respect of his claim for arrear rentals and in respect of the plea to the counterclaim badly pleaded. Mr Youmessi's evidence in respect of both the main claim and the counterclaim was not only so inadequate as to be non-existent and connived. It was also founded on falsity craftily designed to cover the possible rental fraudulence he sought to enforce in these proceedings or the fleecing of the defendant which was done with near perfection.

[44] The process of assessing the evidence and the conclusions reached based on that assessment is founded on our litigation principles and jurisprudential underpinnings of our law of evidence which are largely trite. In this regard I can do no better or give no better elucidation thereof than refer to *Stellenbosch Farmers' Winey Group Ltd v Martell et Cie* 2003 (1) SA 11 (SCA) para 14-15 in which Nienaber JA said:

> "The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability, and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular

> aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b) a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In light of the assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the later. But when all factors are equipoised probabilities prevail."

[45] The onus was obviously on the plaintiff to prove the existence of the oral lease alleged on a balance of probabilities. He could not point to a single incident or fact that would support the contention that the lease was entered into. For instance payment of rentals for some months would have supported the assertion of the parties having entered into an oral lease agreement. It is clear from the manner in which the purchase price was paid that the defendant was not in any financial difficulties during that period. The purchase price was paid on the agreed terms. Even after the purchase price was paid in full with the last instalment being paid on the 30 September 2015 in the sum of R100 000.00, not a single rental amount was paid by the defendant. All of this is just one of the many factors which show the improbability of the lease agreement having been entered into orally or otherwise.

[46] Mr Youmessi's employee and manager of the school was one Eddie about whom he gave very little information, strangely opting instead to create a distance of sorts between himself and Eddie while suggesting some form of proximity and even alleging a non-existent partnership between Eddie and the defendant. This was also one of the

many improbabilities or even worse, misleading evidence given by Mr Youmessi. In my view, on a balance of probabilities the school or college did not exist when it was sold.

[47] The last thing that I consider it necessary to deal with is the fact that the business was not registered as a school as required by the legal framework. Mr Youmessi could not register the school as it simply did not exist. Again if he had registered it, that would have helped to establish the *de facto* and the *de jure* existence of the school. Running or establishing a college without it being registered is not permitted by the Further Education and Training Colleges Act 16 of 2006. Section 29 of this Act reads:

> "An application for registration as a private college must be made to the registrar in the manner determined by the registrar and must be accompanied by the prescribed fee."

[48] Section 30 provides:

> "(1) The registrar must register an applicant as a private college if the registrar has reason to believe that the applicant –
>
> (a) is financially capable of satisfying its obligations to prospective students; and
> (b) with regard to all its further education and training programmes –
> (i) will maintain acceptable standards that are not inferior to standards at comparable public colleges;
> (ii) will comply with the requirements of Umalusi; and
> (iii) complies with any other reasonable requirement prescribed by the Minister"

[49] None of these provisions were complied with by Mr Youmessi when he allegedly established the college. When he testified he vacillated between the school being a college that rendered computer training or being there to offer "matric rewrites" as he called them. On the other hand the name Hartwick Technical College creates the impression of some subjects of a technical nature being offered by the school.

However, Mr Youmessi could not even state what subjects were offered by the school. He then boldly testified that there was no requirement for registration which is obviously not true. If the college was intended to offer training or tuition outside the framework of the Further Education and Training Colleges Act then the school had to be registered under the South African Schools Act 84 of 1996.

[50] Section 46 of this Act provides:

> "(1) No person may establish or maintain an independent school unless it is registered by the Head of Department.
>
> (2) The Member of the Executive Council must, by notice in the Provincial Gazette, determine the grounds on which an independent school may be granted or withdrawn by the Head of Department.
>
> (3) A Head of Department must register an independent school if he or she is satisfied that –
>
> (a) the standards to be maintained by such school will not be inferior to the standards in comparable public schools;
>
> (b) the admission policy of the school does not discriminate on the grounds of race; and
>
> (c) the school complies with the grounds for registration contemplated in subsection (2).
>
> (4) Any person who contravenes subsection (1) is guilty of an offence and upon conviction liable to a fine or imprisonment for a period of three months."

[51] All of these provisions in both pieces of legislation are very stringent legislative requirements carefully designed to eliminate the proliferation of illegal schools or colleges that offer unaccredited certificates or diplomas. In some cases, unsuspecting parents are swindled of their hard earned money through bogus schools or colleges.

The formal registration of training institutions is very important especially in this country in which many parents are desperate for the education of their children and will send them to any school that is conveniently within reach. Some of them simply do not have the wherewithal of checking if the institution is registered or not. The legislative framework is very clear, for a school or college to be established, it must be registered failing which it is an illegal operation, designed to exploit the ordinary people's unquenchable thirst for the education of their children. Clearly the defendant was a victim of Mr Youmessi's craftiness who sold him a school or college that did not exist, at least legally and therefore it could not be sold as a going concern.

[52] As I said before Mr Youmessi has failed to discharge the onus of establishing that an oral lease agreement was entered into between the plaintiff and the defendant. The defendant gave very clear and candid evidence and testified about his desire to venture into business. He saw the business being sold by Mr Youmessi as a good vehicle for that. However, he did not do even the very basics of due diligence and Mr Youmessi exploited, unlawfully, the defendant's gullibility and naiveté. In the process the defendant carelessly lost R700 000.00 in return for nothing and now seeks, in his counterclaim, restitution thereof. The purported sale of business agreement was as bogus as the object of the sale itself, the college and the defendant is entitled to restitution. It is, in my view, in the interests of justice that the said agreement be nullified and the plaintiff be ordered to repay to the defendant the amount of the purchase price which the defendant was hoodwinked into paying to the plaintiff.

[53] On the dicta of Goldin J in *Musgrove & Watson (Rhodesia) v Rotta* 1978 (2) SA 918 (R) at 925 C – E, when a person such as the defendant is fraudulently deceived into

signing a document buying a non-existent school or a school that did not exist in law, no valid contract comes into effect and the defendant is entitled to the restitution of the amount paid as purchase price for something that did not exist. On consideration of all probabilities the defendant must succeed in his counterclaim for the restitution of the amount paid. The plaintiff having failed to prove the existence of the oral lease for which he came before this court claiming to have entered into with the defendant in order for the latter to run, in those premises, a school or college that did not exist, the plaintiff's claim for arrear rentals and other amounts claimed must fail.

[54] In the result the following order shall issue:

1. The plaintiff's claim for arrear rentals and other amounts claimed is dismissed with costs.

2. The defendant succeeds in his counterclaim.

3. The purported agreement for the sale of Hartwick Technical College entered into on 25 March 2015 is declared invalid and of no force or effect.

4. The plaintiff is ordered to repay to the defendant the sum of R700 000.00 being in respect of the purchase price for the sale of the business referred to in 3 above together with interest thereon at the legal rate from the date on which the said amount was paid to date of payment.

5. The plaintiff is ordered to pay all costs of suit in respect of the counterclaim.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Counsel for the plaintiff: MS VAN VUUREN

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EAST LONDON

Last heard on: 17 September 2020

Delivered on: 19 January 2021