

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG HIGH COURT, RETORIA)

Case Number: 29565/2011

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	☒ YES ☒ NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO	☒ YES ☒ NO
(3) REVISED.	☒
20/2/18	
DATE	SIGNATURE

20/2/18

In the matter between:

BIG SAVE HAMMANSKRAAL WHOLESALERS CC

PLAINTIFF

And

RISHAN CHETTY

1ST DEFENDANT

THORIDIUM MEDICAL GROUP (PTY) LTD

2ND DEFENDANT

JUDGMENT

Fabricius J,

1.

Plaintiff herein, according to the Particulars of Claim, is "Big Save Liquor Hammanskraal (Pty) Ltd" (formerly Big Save Hammanskraal CC). First Defendant is a Director of the Second Defendant. In the Particulars of Claim, it is alleged that "Plaintiff is Big Save Liquor Hammanskraal (Pty) Ltd, a company duly incorporated and existing under the Company Laws of South Africa, which at the time of the causes of action, set out below, was duly registered as Big Save Hammanskraal Wholesalers CC". During argument I was asked to insert the word "Wholesalers". It is further alleged that Big Save Hammanskraal Wholesalers CC, formally changed its name to Big Save Liquor Hammanskraal CC, which was duly converted to a company, being the Plaintiff.

It was then alleged that on 1 June 2008, the Plaintiff and the Second Defendant, duly represented by Mr Chetty, entered into a written agreement of lease in respect of a particular warehouse. A copy of this lease was annexed. It is said that at the time, Plaintiff was represented by Mr Jardim and the Second Defendant, by the First defendant. It was further alleged that during February 2008, Plaintiff and Second Defendant entered into an oral agreement concerning necessary renovations to be effected at the relevant property. It was pleaded that Plaintiff would obtain a quote for such renovations, that First Defendant would consider such, and that the value of such renovations be repaid by means of discounting the monthly rental payable as from 1 June 2008. The quote was obtained, and First Defendant accepted it by signing a document which was annexed to the Particulars of Claim. Accordingly, a binding agreement was concluded between the parties which was materially breached, in that Second Defendant failed to reimburse the Plaintiff for the particular improvements, as a result of which the value of the discounts that the Second

Defendant failed to grant, amounted to R597, 884.19. These were the damages that Plaintiff had suffered.

3.

This contractual claim was not proceeded with, but Plaintiff proceeded with claim 2, which was a claim based on "fraudulent/negligent misrepresentation". It was pleaded that, the conduct of First and/or Second Defendant was fraudulent, alternatively negligent, in that they had no intention to grant the Plaintiff the discount referred to, and in fact intended to sell the warehouse premises. They knew that they would obtain the benefit of the renovations without having to pay for same. First Defendant falsely represented that the Second Defendant would in actual fact grant the rental discount, knowing that it would not do so. Defendants also knew that they intended to sell the property after renovations were completed.

4.

It was further pleaded that the Defendants intended that Plaintiff would act on these misrepresentations, that Plaintiff did in fact act thereon by completing the renovations as agreed, in the *bona fide*, but mistaken, belief that it would be reimbursed by means of discounted rental, as agreed.

5.

On 18 September 2008, the Second Defendant sold the property, whilst knowing that Plaintiff would not be able to secure a discount on his rental from the new owner. This conduct was unlawful as a result of which Plaintiff suffered damages in the said amount, being the value of the renovations, as it was pleaded.

6.

Plaintiff's Counsel therefore based his claim and case on this delictual cause of action and suggested in argument that it was indeed a claim for pure economic loss.

Evidence was led on behalf of Plaintiff in the form of Mr J. Jardim and Mr Ferreira.

Mr Jardim gave the relevant evidence and emphasized that he, having dealt with Mr

Chetty before, in a contractual setting, had dealt with him again as person to person.

He gave details about the background and the previous contractual arrangements

and in respect of the particular warehouse, had testified that "Themba Big Save" had

outgrown its premises and therefore intended to expand by moving into the premises

of Second Defendant. "Themba Big Save", which was part of the "Big Save" Group,

would establish the new company to operate from the said premises. "Big Save

Themba" in fact paid for the renovations and Big Save Hammanskraal, repaid it,

either by way of cash or by the delivery of products on the basis of set-off. No

details in this respect were provided.

Defendant filed a plea which included a special plea relating to *locus standi*. With

reference to the alleged oral agreement concluded during February 2008, and the

written agreement concluded on 1 June 2008, it was pleaded that Plaintiff was only registered as a Close Corporation on 5 June 2008, this is common cause. It was denied that Plaintiff existed and was able to enter into the alleged oral agreement during February 2008, and it was denied that Plaintiff entered into the written agreement of lease, which indicates "Hammanskraal Big Save Wholesalers" as being the lessor. As a result, Plaintiff does not possess the necessary *locus standi* to be a party to this action.

9.

Having regard to the pleadings as a whole, I ruled that the special plea would not be decided *in limine* as there would be most likely an overlapping of evidence, if such was presented. As I have said, Plaintiff presented its evidence and Mr Chetty testified on behalf of Defendants. His evidence differed in material and crucial respects from that presented on behalf of Plaintiff, and these issues raised by him were never put to Plaintiff's witnesses during cross-examination. Quite apart from that, I need to note that Mr Chetty was a particularly bad witness who had difficulty

in answering even the most innocuous questions. During argument, Defendant's Counsel wisely abandoned any reliance on his evidence, and submitted that the case could be decided on the evidence presented by Plaintiff, and particularly on the basis of the special plea. According to the agreement of lease itself, the lessee is "Hammanskraal Big Save Wholesalers CC". The argument simply was that having regard to the fact that Plaintiff was only incorporated on 5 June 2008, which is common cause, no representations could have been made to it on 1 June 2008, and obviously before that. The alternative claim based on delict vested on 1 June 2008. No evidence was led in respect of any pre-incorporation agreement, and none existed. Plaintiff could therefore not have been a party to either the agreement of lease, or the renovations agreement, as it had not yet been incorporated on 1 June 2008. A misrepresentation can therefore not be made to a non-existent entity.

10.

Apart from that, Plaintiff did also not prove its damages inasmuch as the evidence was that "Themba Big Save CC" made payment for the renovations, and was later

reimbursed by the Plaintiff. No payment was proven, and where Mr Jardim relied on the annual financial statements, which in fact also did not reflect the total amount of R597, 884.19. His evidence was of a hearsay nature.

11.

During argument, Plaintiff's Counsel argued that the cause of action arose only in September of 2008, when there was a failure to have allowed the agreed-upon rental discounts. This is of course not the case as pleaded. In the context of an analysis of the Particulars of Claim, I may add that in my view, a proper case based on a delict, which resulted in pure economic loss, was not properly pleaded in any event.

See: *Law of Delict, 5TH Edition, Neethling, Potgieter and Visser at p. 268 and further, and Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality 2018 (1) SA 391 SCA at 411 par. [31]*

Inasmuch as Defendant did not rely on this point, I will not deal with it further.

Plaintiff's Counsel submitted that there was no authority in our law for the

proposition that a misrepresentation cannot be made to a non-existent entity, and that the point was new. I certainly do not agree with that contention. It is clear from *Steenkamp N.O. v Provincial Tender Board, Eastern Cape 2006 (3) SA 151 SCA at 169 par. 48* and further, that an entity such as a company (or Close Corporation I may add), prior to incorporation, is not yet in existence, and cannot perform a juristic act. Further, no one can act at that stage as its agent, because one cannot act as the agent of a non-existent principal, unless a pre-incorporation agreement was concluded which was later ratified. As I have said, there is no evidence on this topic and that point does not arise herein. It is in fact common cause that no such agreement existed.

12.

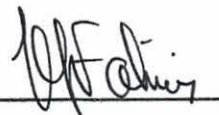
In my view, the argument tendered on behalf of Defendants is sound and it is based on facts that are not in dispute. Plaintiff simply did not exist as a legal entity at the time when the misrepresentations were made. The argument relating to the failure to prove damages is on Mr Jardim's evidence also sound. It is insufficient simply to

rely on the quote presented by "SWM Investment Holdings" dated 20 February 2008. Mr Jardim could not, and did not, present admissible evidence as to who exactly had incurred this loss, and how it was computed, when, and by whom. No reason was established why hearsay evidence should be admitted. Proof of damage is fundamental to a delictual claim.

See: *Home Talk supra* at 437 par. [93].

13.

The result of all of the above is that Plaintiff's claim as pleaded cannot succeed, and accordingly absolution from the instance is granted with costs.



JUDGE H.J. FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION