



**IN THE HIGH COURT OF SOUTH AFRICA,
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: AR 368/16

In the matter between:

**BIANCA BERNADIS-LARRATT
LANCE LARRATT**

**FIRST APPELLANT
SECOND APPELLANT**

and

CUSTOM CAPITAL (PTY) LTD

RESPONDENT

JUDGMENT

Delivered on: 27 June 2017

MNGADI AJ

[1] This is an appeal against the judgment of the magistrate Mrs P Kitchener, sitting at Durban Magistrate's Court, dated 13 July 2015 in favour of the respondent for:

- 1.1 Payment in the sum of R1 589.98 in respect of arrear rental;
- 1.2 Interest thereon at the rate of 6% above the prime lending rate from due date to date of payment;
- 1.3 Payment in the sum of R29 414.63 in respect of future rentals for the period 1 February 2014 to 28 February 2017;
- 1.4 Interest thereon at the prevailing rate from date of judgement;
- 1.4 Cost of suit on an attorney and client scale with such costs to include Counsel's fees.

[2] On 15 February 2012 the appellants, who were married to each other and practising attorneys entered into a written lease agreement with the respondent, a private financing company in terms of which the appellants leased a new Samsung PABX office serve 7070 with one 38n button DS keyset, one economic keyset, 8 single line telephones, one voicemail auto attendant channel, a lightning protector and a battery backup (the equipment) for a period of sixty months at a monthly rental of R794.99 from the respondent. The first rental was payable on 1 March 2012 and the last due on 28 February 2017. The equipment was supplied and installed by SAMCOM Telecommunications (SAMCOM).

[3] The appellants, in the court *a quo* and in their plea dated 18 March 2013, admitted being indebted to the respondent for the arrear rental and tendered payment thereof together with costs on an attorney and client scale.

[4] They denied liability for future rental and alleged that:

- 4.1 The lease agreement was cancelled with effect from 31 January 2013 and subsequent to the cancellation, the leased equipment was returned to SAMCON, the respondent's duly authorised agent and accepted by the respondent in April 2013.
- 4.2 The respondent was obliged to mitigate its contractual damages by taking reasonable measures such as selling or leasing out the equipment but failed to do so.
- 4.3 The contractual terms on which the claim for future rentals were based was *contra bones mores* and unenforceable.

[5] In terms of the rental agreement the appellants agreed:

- 5.1 To pay the rental monthly, in advance, on or before the first day of each succeeding month thereafter.
- 5.2 That in the event of them breaching any of the terms and conditions of the agreement or failing to pay any amount payable in terms of the

agreement on due date, then the respondent would have the right to, *inter alia*, without terminating the agreement, to treat as immediately due, owing and payable, all rentals which would otherwise have become due and payable under the unexpired period of the agreement and to claim and recover from the appellants, the aggregate amount of such rentals.

- 5.3 That the respondent shall retain the right pending payment of such rentals to take possession of the equipment and to retain possession thereof on condition that against full payment, the respondent shall return the equipment to the appellants who shall not be entitled to any rebate or abatement of rentals or other amounts by reason of any loss of possession and enjoyment while the equipment was in possession of the respondent.

[6] Mr Scrimgeour, the respondent's legal manager testified that the respondent provides finance for office equipment rental. SAMCOM introduced the appellants to the respondent. Once the financing arrangement had been agreed to, SAMCOM invoiced the respondent for the equipment and upon payment, installed the equipment. On 24 April 2013 he was advised that the appellants had vacated the premises in which the equipment had been installed. He then arranged for the removal and safe keeping of the equipment. The equipment was sold as second hand on 13 February 2014 for R1 000.00.

[7] The first appellant testified that she and the second appellant ran their legal practice until 30 November 2012 and on 1 December 2012 merged their partnership with another firm. In April 2013 she advised the respondent through SAMCOM that they had let out the premises in which the equipment had been installed with effect from 1 May 2013 and that the new tenant was not prepared to take over the equipment. She requested that the equipment

be removed and sold as second hand or hired out as the respondent would hold the appellants liable for rental for the full period of the lease.

[8] The appellants, having admitted the terms of the rental agreement and the performance by the respondent of its obligations, attracted the onus to establish their defence as regards the future rentals on a preponderance of probabilities.

[9] The court *a quo* found that there was no merit in the applicant's defences and did not consider the mitigation of loss independently of the provisions of the Conventional Penalties Act 15 of 1962.

[10] The issue was raised in the plea and the *court a quo* was required to consider it. In that regard the court *a quo* misdirected itself. The appellants', even if so inclined, could not raise a defence that the terms of the lease agreement imposed a burden on them and was therefore unenforceable. In **BANK OF LISBON AND SOUTH AFRICA LTD v DE ORNELAS AND ANOTHER**¹ Joubert JA held that the *exceptio doli generalis*, a common law defence enabling a party to avoid the consequences of a contract on the basis that it resulted in burdensome obligations which were unfair was held not to form part of our law.

[11] The appellants' anchored their case on the ground that the respondent was bound to mitigate its damages by either selling the equipment or leasing it out at an early stage and therefore it acted unreasonably in failing to do so. It was common cause that the equipment was returned after 10 months in a lease agreement of 60 months. The equipment was kept and it was only sold by the respondent on 13 February 2014 for R1 000-00.

[12] The appellants submit that:

¹ 1988(3)SA 580 (A) at 607 A-B

- 12.1 If the equipment was sold earlier, more than R1 000-00.00 would have been realised for it.
- 12.2 There is no evidence of any measures taken by the respondent to sell the equipment earlier.
- 12.3 A reasonable person in the position of the respondent would have sold or hired out the equipment at an early stage.

[13] The respondent submits that:

- 13.1 The claim is for contractual damages and it was not necessary for it to have mitigated the damages in a contractual claim.
- 13.2 Even if the respondent is required to mitigate its damages, there is no evidence that it acted in an unreasonable manner.
- 13.3 It was not bound to accept the repudiation of the contract by the appellants and it immediately reminded the appellants of their obligations in terms of the contract.
- 13.4 The contract stipulated that the respondent remained the owner of the equipment and, therefore, it cannot be expected that an owner should sell his property as an act of mitigating damages for the defaulting party.
- 13.5 The contract provided that despite the return of the equipment to the respondent, on payment of the full amount outstanding, the appellants were entitled to have the equipment returned to them.
- 13.6 There is no evidence that the respondent did not act in a reasonable manner, it was not in the business of hiring out movable assets nor in the business of selling second hand equipment, and that it was notoriously known that there was no market for the second hand equipment and this was pointed out to the appellants at an early stage.

[14] It is necessary to determine whether the principles of mitigation of damages apply. If so, which party bears the onus and the nature of the onus, and then to examine the evidence presented before the court *a quo*.

[15] In the particulars of claim the respondent seeks relief for damages following from the breach of contract. The contract provided for the method of calculation of damages in the event of a breach of the contract.

[16] An action for damages originating from a breach of contract does not arise *ex contractu* in the sense that it is primarily created by agreement between the parties to a contract. It is a secondary obligation created by breach of the primary contractual obligation causing damage. In view of this, there is no material difference between damage claims based on breach of contract and claims based on delict as far as their origin is concerned.²

[17] In **SMITH v WEEKS**³ Stratford J held that the principle that a lessor is obliged to mitigate its damages can have no possible application when it has elected to enforce the contract instead of accepting repudiation and claiming damages. In that case the appellant, who was the lessor, leased a house to the respondent at £8 per month on a monthly tenancy, commencing at the beginning and terminating at the end of each calendar month. The appellants alleged that the respondent vacated the house on 1 October, without giving proper notice, that the house had been untenanted since that date and that he had consequently suffered damages to the extent of £16. The respondent pleaded that he notified the appellant that he was vacating the premises before noon on 1 October 1921, that the premises had been untenanted due to the appellant's fault; that he (respondent) found a tenant for the appellant at the same rental, but that the appellant had increased the rental by £1 per month.

[18] Stratford J held that the appellant was entitled to claim the rental for October because the respondent did not treat the lease as cancelled during October and the uncontradicted evidence was that the house keys were not

² See Van Aswegen Sameloop 313 quoted in footnote 73 Potgieter *et al* in Visser & Potgieter Law of Damages 3ed Para 1.5.5, Page 8

³ 1922 TPD 235

delivered to him until towards the end of October. He found that for November the appellant accepted and took possession of the keys. He issued summons on 18 November before the rent for that month was due. He held that:

Therefore, his action is for damages and then the rule as to his obligation to mitigate damages, so far as he reasonably can applies ... the landlord must mitigate damages if he can reasonably do so.

This rule is of modern growth and has been expressly and frequently recognised in our Courts (see **VICTORIA FALLS POWER CO. v CONSOLIDATED LANGLAAGTE MINES**, 1915, A.D. 1) It is a rule of course applicable to all cases of breach of contract and has been so applied both in England and in this country. Nowhere can I find that an exception has been recognised in the cases of an action for damages by the lessor against his tenant who has broken his contract of lease by abandoning the property and refusing to pay rent... the rule is clearly stated... in the following words:

"The damages for the abandonment of a lease by the tenant are measured by the difference between the rent agreed to be paid and the sum the landlord could have realised from the premises by the use of diligence after they came into his possession. That paragraph, I think, admirably states our law as well (see also **TOS v ANGELO OUTFITTING STORES**, 1915, T.P.D. 22). It is difficult, if not impossible, to state in general terms what are the exact efforts which a lessor is bound to make, it is a question of fact in each case".⁴

[19] It is clear that Stratford J found that the appellant had not acted unreasonably in holding the respondent liable for the October rental. *In casu* it follows that there is no merit in the argument that because the respondent is claiming contractual damages, the principle of the mitigation of loss does not apply.

[20] The respondent, despite the lease agreement, remained the owner of the leased equipment. The appellants returned the equipment to the respondent and the respondent accepted it. The appellants advised the respondent, with no objection from the respondent, that the equipment was of no use to them. The appellants were unable to find somebody to take over the lease. The equipment was returned to the respondent for the respondent to

⁴ At 237 - 238

lease out or sell to reduce the appellant's liability to the respondent. The respondent, through SAMCOM undertook to endeavour to find another company to take over the system. It is clear that the appellants placed the respondent in a position to take whatever measures deemed appropriate to mitigate its loss. The respondent did not respond to the plea when it was alleged that it failed to take reasonable measures to mitigate its loss.

[21] The essence of the mitigation of loss is that the respondent's unreasonable failure to mitigate its damages after the event is a ground for reducing its recovery. The respondent will not be compensated for such portion of his loss as could have been avoided by taking reasonable steps. The failure to mitigate consists in the omission of taking reasonable measures to minimise damage already caused or to avert further harm. When a contract has been breached, the innocent party is not entitled to sit back and allow damages to multiply.⁵ The issue is whether the respondent took any reasonable measures to mitigate its loss.

[22] The applicability of the provisions of the Conventional Penalties Act 15 of 1962 was not raised in the pleadings. However, with the leave of the court *a quo*, it was raised for the first time in argument. The court *a quo* found that the acceleration clause was a penalty clause but found that it was not shown that it was not in proportion to the loss suffered by the respondent. The issue is not raised in the grounds of appeal by the appellants and is thus not before this court.

[23] The onus is on the appellants to prove that the respondent has unreasonably failed to take measures to mitigate its loss. The duty arises only after the respondent has proved that it suffered damages. Where the appellants prove an unreasonable failure to mitigate, it is for the respondent to

⁵ See Boberg The Law of Delict Volume 1 Pages 403, 436, 479, 493, 541, 622, 625 - 627

prove what its damage would have been if it had mitigated, that is, what sum it is entitled to recover from the appellants.⁶

[24] Scrimgouer testified that when the equipment was collected from the appellants by SAMCOM in April 2013, SAMCOM kept the equipment and was supposed to find somebody to take over the lease. In September 2013 he enquired from SAMCOM whether the equipment was still with them. They confirmed that it was still with them and asked what should they do with the equipment. In April 2014 he collected the equipment from SAMCOM and sold it for R1 000.00. Scrimgouer's evidence indicates that they were in constant contact with various suppliers of similar equipment and who were in turn in contact with the users of the equipment.

[25] It is fair to conclude that his evidence was to the effect that the respondent took no measures to lease out the equipment although it was in a position to do so. It did not make it known in any manner that such equipment was available to be leased out. The respondent has accordingly failed to take any reasonable measures to lease the equipment which could have resulted in a reduction of its damages.

[26] The respondent bears the onus of proving both the fact and the quantum of its damages it is entitled to recover from the appellants. It is accepted that it may be difficult to prove quantum. Likewise it may be difficult to prove the amount with which respondent's claim would have been reduced if the respondent had taken reasonable measures to mitigate its loss. In **ESSO STANDARD SA (PTY) LTD v KATZ**⁷ Diemont JA stated:

It has long been accepted that in some types of cases damages are difficult to estimate and the fact that they cannot be assessed with certainty or precision will not relieve the wrongdoer of the necessity of paying damages for his breach of duty....Not only is the principle not a novel one but the English precedents which have given some

⁶ **KRUGELL v SHIELD VERSEKERINGS-MAATSKAPPY BK** 1982 (4) SA 95 (T) at 99G;
JAYBER (PTY) LTD v MILLER 1980 (4) 280 (W) at 285 – 6 [noted with approval by *AJ Kerr* (1981) 89 SALJ 306]

⁷ 1981 (1) SA 964 (A) at 969 H – 970 E

guidance on the problem have gone so far as to hold that the court doing the best it can with insufficient material may have to form conclusions on matters on which there is no evidence and to make allowances for contingencies even to the extent of making a pure guess... Whether or not a respondent should be unsuited depends on whether he had adduced all the evidence reasonably available to him at the trial.

[27] The court *a quo* failed to take into account that:

- 27.1 The appellants returned the equipment to the respondent.
- 27.2 The respondent could have had the equipment valued.
- 27.3 The respondent bought the equipment from the supplier and had all the details relating to the cost of the equipment.
- 27.4 The respondent, being in the business of financing similar equipment, knew what would be a reasonable rental for such equipment.
- 27.5 The respondent when it desired to sell the equipment, readily sold it.
- 27.6 It did not have the equipment valued or sold by soliciting the highest offer for the equipment.

[28] The respondent refused during the trial to disclose how much it paid for the equipment and how the rental was calculated. The appellants placed before the court the total of the accelerated rentals which was claimed from them, although they were not using the equipment and it had been returned to the respondent. The court *a quo* misdirected itself in failing to take this into account. There was no other evidence that could be forthcoming from the side of the appellants. The appellants had the use of the equipment from December 2012 to April 2013. They continued to pay rentals up to December 2013 which was an effort to afford the respondents a reasonable period to take measures to mitigate its loss.

[29] I am of the view that to hold the appellants liable for the accelerated rental is disproportionate to the benefit they obtained from the rental agreement. Further, for the respondent to receive payment of the full amount of the accelerated rental whereas the equipment was returned to it after only

10 months of the lease of 60 months is disproportionate to its expense. If the respondent had made it known that there was such equipment at half the rental there might have been persons or entities interested in leasing the equipment. It would in the least have resulted in the appellants being liable for a reduction in the total amount of the accelerated rental. It is not required that the appellants establish with certainty what would have happened if the respondent had taken reasonable measures to mitigate its loss. I consider a reduction of 50% of the accelerated rental after the R1 000.00 had been deducted to be appropriate in the circumstances. Accordingly the appellants should be liable for 50% of R29 414.63 less R1 000.00, that is, for R14 207.31.

[30] The costs of instituting action and appealing the matter has far exceeded the amount claimed. Both parties believed they were correct and this Court in arriving at its decision had to take into account various considerations and is of the view that it would be just and equitable that each party pays their own costs. Further, the appellant's tendered the arrear rental in their plea and should thus only be responsible for interest on the arrear rental from date hereof.

[31] I propose the following order.

1. The appeal is upheld.
2. The judgement of the court *a quo* is set aside and replaced with the following:
 - 2.1 The appellants are directed to make payment to the respondent as follows:
 - 2.1.1 In the sum of R1 589.98.
 - 2.1.2 Interest thereon at the rate of 6% above the prime lending rate from date of judgment to date of payment.
 - 2.1.3 In the sum of R14 207-31 in respect of future rentals for the period February 2014 to 28 February 2017.

2.1.4 Interest thereon at the prevailing rate from date of judgement to date of payment.

2.2 Each party to pay his own costs.



MNGADI AJ

I agree and it is so ordered.



BALTON J

APPEARANCES

Date of hearing: 13 March 2017

Date of judgment: 27 June 2017

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