

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

15/5/15
Case Number 21316/13

In the matter between

BEAUX LANE (SA) PROPERTIES (Pty) Ltd

and

THE MINISTER OF PUBLIC WORKS N.O.

THE EXECUTIVE AUTHORITY OF THE DEPARTMENT OF PUBLIC WORKS

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED
2015/5/15
DATE SIGNATURE

Plaintiff

First Defendant

Second Defendant

JUDGMENT

BAM J

(Appearances: For the plaintiff: Adv I Miltz SC

For the Defendants: Adv J A Motepe.)

1. The plaintiff instituted action against the defendants for contractual damages in the amount of 7,5M. The main issue turned upon the allegation that the Defendants are liable for damages upon a certain leased property, after termination of the lease agreement, not having been timeously, free and undisturbed, restored to the plaintiff.
2. The parties were ad idem that the matter should be before the court in the form of a stated case. However, initially the parties seemed to have disagreed whether the totality of the merits should be adjudicated upon and whether only part of it, and the quantum, should be separated. In terms of the plaintiff's notice of application for separation in terms of Rule 33(4), the only question the plaintiff wanted to be adjudicated was whether the leased property, in terms of the agreement, had been restored to the plaintiff, to have free and undisturbed possession. During argument Mr Motepe contended that the defendants actually agreed that the merits should be disposed of in totality, leaving only the quantum. This was subsequently conceded by Mr Miltz. Accordingly only the issue of quantum had to be separated and an order in terms of Rule 33(4) separating the merits from the quantum is therefore made.

3. From the stated facts and the concessions made during argument, the following is common cause.

The dispute in this matter arose from a written lease agreement entered into on 14 September 2000 between Leopont 163 Properties (Pty) Ltd and the Department of Public Works, (the "*Department*"), (the First Defendant is the responsible minister and the second defendant cited in its representative capacity).

On 3 August 2007 the plaintiff purchased the property and the rights and obligations of Leopont, the former proprietor, were ceded to the plaintiff.

In terms of the agreement the date of termination was 31 August 2010. The occupiers however remained in occupation and the plaintiff continued to raise rental charges to the Department. The Department continued to pay the rent.

The termination date was later by agreement between the parties extended to December 2010.

The purpose for which the premises, consisting of, amongst others, "*flat units*", was leased by the Department, was stated to be "*Official Residence*".

The Department then utilised the premises providing for residence for officers of the Department of Correctional Services, ("*D.O.C.*").

The Department paid the monthly rent to the plaintiff.

During late 2009 the D.O.C. decided not to renew the lease and gave its officers notice to find alternative accommodation.

On 7 December 2010 the D.O.C. gave notice to its officers to vacate the property by 16 December 2010. A number of the occupants failed to comply. On 24 December 2010 the Department notified the D.O.C. that the agreement would terminate on 31 December 2010 and that the property should be vacated by that date. Upon inspection by the Department on 20 January 2011 it was found that large number of the D.O.C.'s officers was still in occupation of the flats. The Department again requested the D.O.C. to have the property vacated by not later than 21 January 2011. It was of no avail.

The Department still continued to pay the rent to the plaintiff.

On 24 January 2011 the plaintiff sold the property to Midnight Storm Investments 399 (Pty) Ltd. The purchase price was R40M. It was a term of the contract that vacant occupation and possession of the property would be given to the purchaser on 11 April 2011, failing which, Midnight Storm would have the right of cancellation. The latter date was extended to 11 May 2011. On 12 May 2011 the plaintiff and Midnight Storm agreed that vacant occupation would be given on 1 June 2011.

In the meantime, on 29 March 2011 the plaintiff gave the Department one month's written notice of the termination of the lease agreement, effective from 30 April 2011.

On 24 May 2011 the plaintiff obtained an eviction order against the Department and the D.O.C. occupiers to vacate the property within 7 days.

On 28 June 2011 the D.O.C. occupiers intervened and obtained a court order setting aside the eviction order. The intervening parties alleged that they were involved in an unresolved labour dispute with the D.O.C. concerning the vacation of the flats. They further alleged that the procedure provided for in the Prevention of Illegal Eviction from and Unlawful

Occupation of Land Act, Nr. 19 OF 1998, ("P.I.E") had to be followed before they could be evicted.

On 26 July 2011, whilst about 54 or 58 of the flats were still occupied by officers of the D.O.C. the plaintiff and Midnight Storm concluded a further agreement with the specific term that Midnight Storm would take possession of the property, whilst the Department remained in occupation of the property, subject to the condition that the purchase price would be reduced to R32,5M. The purchase amount was subsequently paid by Midnight Storm and the property was transferred in its name.

On 11 April 2014 the plaintiff issued the summons.

4. The plaintiff's claim for damages in the amount of R7,5M -- the difference between the initial purchase price of R40M and the purchase price of R32,5M paid by Midnight Storm -- is based on an alleged material breach of the agreement by the Department in failing to procure the departure of the occupiers timeously.
5. In defending the action it is contended by the defendants that the Department's notice to the D.O.C. to have its officers vacate the property constituted a discharge of any liability it had towards the plaintiff.
6. In terms of the initial agreement the Department was contractually bound to vacate the premises on the termination date, end of December 2010, which date was, at least tacitly, extended on several occasions. The reason being that the occupiers refused to vacate the property. To that end the Department relied on notices directed to the D.O.C. which did not have the required effect. This eventually led to the formal notice of 29 March 2011 notifying the Department to vacate the property, followed by the application for the eviction of the Department and the D.O.C. occupiers.
7. The Department was contractually obliged to comply with the terms of the agreement in ensuring that at the day of termination of the agreement the property is restored to the plaintiff, "*free and undisturbed*." In this respect the defendants relied on the Departments conduct by notifying the D.O.C. that it had to ensure that it's officers vacate the property. At all relevant times the Department was well aware of the problems concerning the reluctant occupiers and therefore that it, the Department, would not have been in a position, to restore the property as it was obliged to do, without the occupiers vacating the property. There is no indication, before the plaintiff applied for the eviction order, that the Department, well aware of the attitude of the recalcitrant occupiers, employed any other lawful means, eg an application for eviction under the common law, or steps in terms of PIE to ensure that the property be vacated in accordance with the agreement. This, objectively,

is what would have been expected from the Department who was under the obligation to perform in accordance with the agreement. This is not a matter where the Department's obligations in terms of the contract became impossible to perform caused by some or other supervening impossibility to perform. The Department therefore cannot rely on the intervention of the occupiers and the consequential setting aside of the eviction order to evade its obligation in terms of the agreement to have the property vacated. See *Transnet Ltd v Owner of MV Snow Crystal* 2008(4) SA 111 SCA, pars[28] to [30].

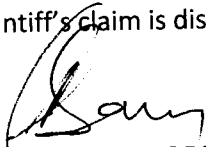
8. Accordingly there is no lawful reason why the Department failed to comply with the terms of the agreement.
9. The Department was the lessee in terms of the agreement. The responsibility, and obligation, to ensure that the property be restored to the plaintiff, unencumbered, rested on the Department and nobody else. It follows that the Department was indeed in breach of the agreement.
10. It was contended by Mr Miltz, with reference to authorities, where the lessee has failed to fulfil his obligations the lessor has a claim for damages. In this case, Mr Miltz argued that the damages sustained by the plaintiff naturally and generally flowed from the breach of the agreement, and that the damages were within the contemplation of the parties. At all times, argued Mr Miltz, there was a realistic and foreseeable possibility that the plaintiff will suffer damages in the case of a breach.
11. What therefore remains to be considered, as contended on behalf of the defendants, are the following:
 - (i) That the plaintiff has suffered damages.
 - (ii) That there is a causal link between the breach and damages.
 - (iii) That the loss was not too remote; and that it was within the contemplation of the parties that such damages would probably result from the breach.
12. In distinguishing between general and special damages, the Court in *Transnet v MV Snow Crystal*, at par[35], stated, firstly referring to general damages, that to determine whether damages flowed naturally and generally from breach of contract, it must be considered whether it "can be said to have been reasonable foreseeable as a realistic possibility."

13. In respect of special damages, the Court in *Transnet* stated that it is those damages ordinarily regarded in law as being too remote to be recoverable, unless the parties, in concluding the agreement actually or presumptively contemplated that the damages would probably result from the breach. The foreseeability of the damages will in such matters depend on the existence of special circumstances known to the parties at the time they entered into the agreement.
14. I am not persuaded, as argued by Mr Motepe, that the plaintiff is claiming special damages. In my view damages of this nature are general damages that may be foreseeable in given circumstances. Accordingly the test to be applied is whether it can be found that in this case the alleged damages have been reasonable foreseeable as a realistic possibility within the contemplation of the parties. See *Shatz Investments (Pty) Ltd Kalovyrrnas* 1976(2) SA 545 (A); and, *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977(3) SA 670(A).
15. Both plaintiff and the Department, after termination of the agreement became aware of the apparently uncompromising attitude of the occupiers who refused to vacate the property, and that the problem could only be resolved in terms of lawful steps taken against the occupiers. There is however no indication, or even a suggestion, that this situation was reasonably foreseeable by either of the parties at the time the agreement was entered into. In this regard I am mindful of the fact that the purpose of the agreement clearly was the furnishing of accommodation by the Department to employees of another state department, the D.O.C.
16. Despite the plaintiff's awareness of the existing problem, which clearly can lawfully be resolved in favour of the plaintiff, it entered into the sale agreement with Midnight Storm, at first for R40M and subsequently, apparently when the issue with the occupiers remained, temporarily, unresolved, for the reduced purchase price of R32,5M. In this respect it is remarkable that there is no stated fact, or concession made by the defendants, explaining why, and on what basis, the plaintiff was prepared to accept the lower offer, and for that matter that the defendants, or the Department were informed of the reason for the negotiations regarding the purchase price between the plaintiff and Midnight Storm.
17. This situation clearly concerns the causal link between the damages claimed and the breach. It therefore also begs the question how it can be said, in the circumstances of the case, that the selling of the property at a so called "reduced" price could have been reasonable foreseeable as a realistic possibility.

18. Accordingly it has to be found there is no fact before this Court substantiating a causal link between the breach of the agreement and the damages claimed.

Order.

Plaintiff's claim is dismissed with costs.

A handwritten signature in black ink, appearing to read 'A J Bam', written over the printed name.

A J BAM JUDGE OF THE HIGH COURT

14 May 2015