FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 4336/2010

In the matter between:-

ROYAL ANTHEM INVESTMENTS 16 (PTY) LTD Plaintiff

and

THE MEC: FREE STATE DEPARTMENT OF PUBLIC WORKS AND RURAL DEVELOPMENT Defendant

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HEARD ON: 14-17 AUGUST & 8-12 OCTOBER 2012

DELIVERED ON: 19 FEBRUARY 2013

JUDGMENT

MOCUMIE, J

[1] The plaintiff, Royal Anthem Investments 16 (Pty) Ltd, is a company registered in terms of the South African law. The plaintiff has properties in the Free State and leases same to different entities including government departments. The defendant is the Member of Executive Council ("MEC") for the Free State, Department of Public Works & Rural Development ("the department"). The plaintiff claims from the defendant certain amounts under three heads. Claim 1 is for payment of R361 500,00 plus interest and costs. Claim 1 has previously been settled and paid. Only Claim 2 and 3 are of relevance. Claim 2 is for cancellation of the lease agreement,

in the alternative, confirmation of the cancellation of the lease agreement; payment of the sum of R 806 075,56 plus interest at 15, 5% pa *a tempore morae* and costs. Claim 3 is for payment of R1 426 720,00 plus interest and costs.

[2] The following issues had to be determined by this Court:

> "[1] Whether the lease contract has been extended between the parties for the further option period as alleged by the plaintiff;
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> [2] secondly whether the defendant was entitled to cancel alternatively to repudiate the contract;
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> [3] thirdly whether the defendant is liable for the alleged damages to the property; and
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> [4] lastly the *locus standi* of the plaintiff."

[3] Two witnesses Messrs Jacque Faure ("Faure") and Johan Wolmarans ("Wolmarans") testified on behalf of the plaintiff. They are both directors and shareholders in the plaintiff company. Both testified that on 12 October 2005 the plaintiff entered into a written lease agreement with the department in respect of the 1st, 2nd, 3rd and 4th floors of the Old Saambou Building situated at the corner of Maitland and Aliwal Streets in Bloemfontein, Free State ("the leased property"). In terms of this agreement, the commencement of the lease agreement was 1 August 2005 and the termination date was 31 July 2008. A copy of the lease agreement was appended as Annexure "BB". When the lease agreement was concluded the plaintiff was represented by both Messrs Faure and

Wolmarans whilst the Department was represented "by the Head of the Department in the alternative a duly authorized employee".

[4] They further testified that the department took occupation of the property on 1 August 2005. During 2007 the department complained about some defects which the plaintiff repaired in the same year. In February 2010 the department moved out of the leased property. When it moved out, its employees left without handing over the keys as per agreement and without leaving the leased property in the same condition they found it at the commencement of the lease. As a result of leaving the building without any security systems put in place to safeguard the property or informing Faure/Wolmarans of the exact date of departure, the leased property was left unsecured and consequently got vandalised by unknown people. After the vandalism Faure/Wolmarans identified a number of items on each floor, i.e 1st to 4th floor, which they alleged were damaged by the department and its employees during the occupation of the property. They also included the 6th floor. The 6th floor was originally not included in Annexure "BB". It was not in dispute that the department also occupied part of 6th floor. Photos depicting the damage after the vandalism were handed in as Bundle "A" and "C".

[5] Faure/Wolmarans sought quotations from service providers and stores selling *inter alia* tiles, ceilings, toilet sets, burglar doors floor mats, window panes, blinds in order to claim such damages from the department. The quotations indicated how much it would cost to return the leased property to the

condition and the state it was in at the commencement of the lease agreement.

[6] They testified further that during May 2008 they approached the department for a renewal of the lease agreement. They met with Mr DM Kgosietsile *("Kgosietsile")* the then Director of Directorate Property Administration who, on behalf of the department, exercised the option to extend the lease agreement for a further three years following the lapse of the initial lease term of three years on 31 July 2011. A copy of the alleged written acceptance and confirmation of the renewal of the lease agreement by the parties, dated 28 May 2008, was appended as Annexure "CC" to the papers. This renewed lease agreement would have commenced on 1 August 2008 and terminated on 31 July 2011.

[7] Subsequently in a letter dated 17 February 2010, Annexure "DD", the department notified the plaintiff in writing of its intention and decision to repudiate the extended lease agreement with three months notice as the initial agreement, Annexure "BB", stipulated. The department also paid the monthly rental due and payable by it to the plaintiff up and until May 2010. On 22 July 2010, the plaintiff, demanded payment by the department of all arrear rentals to the amount of R 241 000,00 for the months June and July 2010, which the department refused to pay. The plaintiff accepted such failure to constitute a breach of the terms and conditions of the lease agreement and thus a repudiation of the extended or re-newed lease agreement. The plaintiff

thereafter elected to terminate the lease agreement with effect from August 2010 as per Annexure “FF”. The arrears were calculated to include August 2010, which brought the whole amount to R 361 500,00. As indicated earlier on, this amount was subsequently settled between the parties and paid by the department.

[8] During cross examination Faure and Wolmarans were constrained to admit that they had not seen Kgosietsile’s authority to act on behalf of the department to extend the disputed lease agreement. It also became clear that contrary to clause 4.2 and 5.3 of Annexure “BB” the plaintiff did not inform the department in writing of the rental payable for the option period i.e. for another three years. Neither did the plaintiff give the department a written notice of the tenant exercising the option to extend the lease agreement for an optional period of three years. As they said they had been working with the department and took Kgosietsile’s word that the lease agreement would be extended. They were also constrained to admit that they were not sure that Annexure “CC”, the letter which contained the agreement to exercise the option which they wrote was ever delivered to or received by the department or brought to its attention by fax or email as they alleged. Instead they gave contradictory evidence on this aspect. Faure testified that the letter was in one instance either emailed or faxed and in another instance the same letter was left with a secretary in Kgosietsile’s office and she undertook to put it on his desk. Wolmarans on the other hand testified that he personally took the letter and pushed it under

Kgosietsile's office door. They were again constrained to agree that without expert evidence led on the assessment of the reasonableness of the alleged damages in the sum of R806 075,56 under the head "Diverse Costs" it could not be said with conviction that such damages were reasonable. Moreso the usual wear and tear deductions were not included. They also could not explain how and when the plaintiff became the owner of the leased property. Neither did they produce any documentary proof to the Court about the alleged registration of the plaintiff which would entitle the plaintiff to institute these proceedings.

[9] At the close of the plaintiff's case, the defendant, in terms of Rule 39(6) of the Rules of Court Practice, applied for absolution from the instance on the basis that the plaintiff on whom the burden of proof was to establish its case that the defendant was liable for any damages or that all the facts set out above, had failed to do so.

[10] It is trite that the test to be applied by the Court at this stage of the trial is: Whether there was evidence upon which a Court might reasonably find for the plaintiff. (See **Gordon Lloyd Page & Associates v Rivera and Another** 2001 (1) SA 88 (SCA) 92H - 93A.) Another approach is to enquire whether the plaintiff had made out a prima facie case. (See **Gascoyne v Paul & Hunter** 1917 TPD 19; **McCarthy Ltd v Absa Bank Ltd** 2010 (2) SA 321 (SCA) 328H.)

[11] In my view absolution from the instance must be granted in favour of the department on the following grounds:

11.1 The plaintiff failed to prove that it was a registered company in terms of the laws of South Africa. A company comes into existence on incorporation. It is only after proper incorporation that a company becomes a body corporate capable of exercising all the functions of an incorporated company. The Registrar must issue a certificate of incorporation signifying the fact of proper incorporation. The certificate of incorporation, upon its mere production, is made conclusive evidence that all the requirements of the Act for registration have been complied with and that the company is a company duly incorporated under the Act.[1] At the end of its case, the plaintiff had not put proper documentary proof before the Court. On this leg alone absolution from the instance in favour of the department ought to be granted;

11.2 The plaintiff failed to prove its claim for "Diverse costs" excluding reasonable wear and tear for *inter alia* carpets, blinds, and painting of walls by leading expert evidence on what percentage should be subtracted for wear and tear from the claimed amount. Both Faure and Wolmarans acknowledged that they were no experts in that area thus, making it virtually impossible

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[1] **LAWSA (1st Re-issue)** Vol 4, Part 1, par 58.See also **Schmidt: (Bewysreg, 4de Uitgawe),** 345.

for any court to make a calculated assessment of the alleged damages. These damages are capable of precise calculation. In such a case, it is incumbent upon a plaintiff to produce sufficient evidence substantiating the exact amount of his or her damages. (See **Hersman v Shapiro** 1927 TPD 367.) As **Tindall, J** in **Mkwanazi v Van der Merwe and Another** 1970 (1) SA 609 (AD) at 631F - H aptly stated:

" …when a plaintiff is in a position to lead evidence which will enable the Court to assess the figure he should do so and not leave the Court to guess the amount…";

11.3 The plaintiff failed to prove that Kgosietsile was authorised to act on behalf of the department to enter into the option lease agreement either for the further three years or for the rental allegedly agreed upon for the option period especially taking into account that Kgosietsile was an administrative officer of no higher appointment to bind the provincial government in a contract of such magnitude.[2] The departmental procurement procedure provides a more stringent and accountable process for contracts in this bracket to be signed off by an officer of much higher status than Kgosietsile. The plaintiff failed to produce documentary

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[2] "A party who wishes to rely on an agency must allege and prove the existence and scope of the authority of the alleged agent, whether express or implied. The fact that the alleged agent purported to act as agent does not assist in proving an agency. A denial of authority must be specifically and unambiguously pleaded. The authority of an agent is a question of fact-i.e. I must be actual. If reliance is placed on an ostensible authority ,the elements of estoppel must be alleged, including a representation by the alleged principal and the necessary causation…"(**Harms: Amler's Precedents of Pleadings** (6th ed,21-22)

proof that Kgosietsile was authorised to act as Faure purported that he did. Neither did the plaintiff lead the evidence of Kgosietsile, despite an indication earlier that Kgosietsile was available to give evidence. Compounding the matter further, the plaintiff did not even rely on estoppel;

11.4 The plaintiff failed to prove that the defendant breached any of the terms and conditions of the lease agreement which entitled it to cancel the agreement. Annexure “BB” (clause 16) provided that in the event that the plaintiff wished to cancel the agreement it was obliged to give a tenant which failed to comply with any provision of the lease, written notice of the alleged breach and of the landlord’s intention to cancel the lease because of such failure and only if the tenant after receiving such notification, is still in default thirty days after receipt of the notice, the landlord shall be entitled to cancel the lease in writing. It was not in dispute that the plaintiff did not do so. It is trite that if the contract lays down a procedure for cancellation, that procedure must be followed failing which the cancellation would be ineffective[3]. It goes without saying then that the department ,due to failure on the part of the plaintiff to comply with the procedure for cancellation, was entitled to repudiate the lease agreement under the circumstances highlighted; and

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[3] **Christie: Law of Contract in South Africa** (6th ed,562)

11.5 Lastly, the agreement between the parties was clear that Annexure "BB" contained the whole or all of the terms and conditions of the lease agreement entered into between the parties and any amendment thereof shall be in writing and signed by both parties thereto. It is trite that a non-variation clause is binding and enforceable. Oral variation of the lease would be of no legal effect.[4] Faure and Wolmarans' contradictory evidence on how or even whether the department ever got to know about the option purportedly exercised on its behalf by Kgosietsile ever reached the department failed to pass the test that there was an amendment to Annexure BB and in writing, if there ever was one;

[12] The issues that had to be determined must then be answered as follows:

> "[1] Whether the lease contract has been extended between the parties for the further option period as alleged by the plaintiff. A: No.
>
> [2] Secondly, whether the defendant was entitled to cancel alternatively to repudiate the contract. A: Yes
>
> [3] Thirdly, whether the defendant is liable for the alleged damages to the property. A: No
>
> [4] Lastly, the *locus standi* of the plaintiff. A: The plaintiff had no *locus standi* to institute this action."

[13] When judgment was reserved, it was reserved with the proviso that both parties file Heads of Arguments within

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4 **Cooper: Landlord & Tenant** 2nd ed, 76.

specified dates ending October. The defendant filed Heads of Argument and the plaintiff failed to do so up until the date of delivery of this judgment without any explanation. Except that in October 2012, the plaintiff's instructing attorneys withdrew as attorneys of record. The Notice was brought to the Court's attention in January 2013 upon enquiry why Heads of Arguments were not filed. This inevitably caused more delay to dispose of the matter speedily. This is an old age standing practice rule which is hardly ever ignored deliberately or overtly by any party.

[14] In the result I make the following order:

ORDER

"Absolution from the instance is granted with costs against the plaintiff."

B C MOCUMIE, J

For the plaintiff: Adv D M Grewar
Instructed by: Vermaak & Dennis
Bloemfontein

For the defendant: Adv JY Claasen, SC
Instructed by: State Attorney
Bloemfontein

BCM/sp