

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

Case No: 13481/2010

In the matter between:

OLD MUTUAL ASSURANCE COMPANY

Applicant

and

TYCOON TRADING ENTERPRISE CC trading as

COPPER CHIMNEY RESTAURANT

Respondent

JUDGMENT

Delivered: 14 December 2012

MBATHA J

INTRODUCTION

[1] The Applicant in this matter is Old Mutual Life Assurance Company (South Africa) Limited, registration no. 1999/004643/069 registered and incorporated in terms of the laws of the Republic of South Africa. It is the owner of an extensive portfolio of immovable properties, including the Gateway Theatre of Shopping located on the Umhlanga Ridge, Umhlanga, KwaZulu-Natal.

[2] The Respondent is Tycoon Trading Enterprise CC, registration number 2002/035020/23, a close corporation duly incorporated and registered in accordance with the laws of the Republic of South Africa. It trades as Copper Chimney Restaurant at shop G010, Gateway Theatre of Shopping, Umhlanga Ridge, Umhlanga. It is represented in these proceedings by Mohammed Abdul Sattar Merchant, who holds a 60% interest in the business. The other 40% interest is held by his brother, who is referred to as Imran.

The Applicant approached this Court seeking an order of ejectment of the Respondent from the premises at Shop G010, Gateway Theatre of Shopping, Durban. This application is opposed by the Respondent.

[3] A Brief history to this matter is as follows:

3.1 This matter came before Swain J on 1 February 2011; Ntshangase J on 17 May 2011 and Steyn J on 8 June 2011. It was referred for oral evidence by Madam Justice Steyn and adjourned to 21 to 23 September 2011. The matter was heard before me on the 28th to 30th of September 2011 and 16 March 2012, when it was adjourned for the parties to file their arguments in writing by not later than the 16th of April 2012. They later on extended the date to the 14th of May 2012.

3.2 Subsequently thereafter, an application to re-open the hearing was brought by the Respondent. The Applicant also lodged an application to

compel the Respondent to file its argument in writing. These applications were simultaneously heard on 05 June 2012. The written arguments were finally filed with the Court on the 11th of June 2012.

[4] A brief summary of the nature of the matter before this Court is as follows:

4.1 This matter was referred for oral evidence on the issue “as to whether an oral agreement of lease as contended by the Respondent was in fact concluded”. The onus of proof therefore shifted to the Respondent to prove the oral agreement. The parties are *ad idem* on this aspect of evidence.

4.2 The issue to be decided is whether Ms Kemraj also known as “Nisha”, representing the Applicant and Mr Merchant, representing the Respondent entered into any oral agreement and if Exhibit “K” was the proposal sent by “Nisha” to Merchant, in line with the alleged oral agreement.

[5] The parties had concluded a Written Agreement of Lease on the 3rd of May 2005 which was to terminate on the 30th of June 2010. This lease agreement which was subsequently terminated in 2008 at the instance of the Applicant. The Applicant obtained in the Verulam Magistrates’ Court under case no. 5112/08 a judgment for the payment of R63 332.64 and an order for ejectment against the Respondent. Pursuant to the Default Judgment the

Respondent furnished a written undertaking, whereby *inter alia*, it agreed to hand over vacant occupation of the premises to the Applicant on the 30th of June 2008.

[6] By then the Applicant had a prospective tenant to take over the premises leased to the Respondent. When the prospective tenant failed to conclude the contract with the Applicant, the Respondent was allowed to remain in the premises on a month to month basis, subject to one calendar months' notice.

[7] The Respondent remained in occupation thereof up to the time that it was given notice to vacate the premises by the Applicant, which was by no later than the 31st of August 2010. This notice was preceded by a telefax dated the 26th of May 2010 from the Respondents' attorney contending that an oral agreement had been reached in terms of which his client would lease the premises for further period of five (5) years, when the current lease expires. The Applicant's version is that the "current written lease" had long been cancelled and this was within the knowledge of the Respondent's representatives. Applicant also disputes that an oral agreement was entered into between itself and the Respondent.

[8] The Respondent opposes the application on the basis that he has an oral agreement for a period of five (5) years with the Applicant as of the end of June

2010. He further relies on a document, Annexure “K”, which he states that it is a proposal for the renewal of the lease, which he relies on as a part and parcel of the oral agreement negotiations. The Applicant disputes the existence of the oral agreement and submits that Annexure “K” is fabricated and was not issued by the Applicant

APPLICATION OF THE LAW:-

[9] One has to bear in mind that it must be determined who are the contracting parties to the contract; if there was an offer and acceptance; where and when was the contract made and if consensus was reached. **Van der Heever JA in Estate Breef V Peri-Urban Areas Health Board**¹ had this to say:

“Consensus is normally evidenced by offer and acceptance. But a contract may be concluded without offer and acceptance other than pure fictions imported into the transaction for doctrinal reasons. Nor does every accepted offer constitute a contract.”

[10] It is therefore important to establish from the evidence before this Court as to whether there was an offer and acceptance, which leads to the ascertainment of when and where was the agreement made.

¹ 1955 (3) SA 523 (A) 532 E

[11] To determine if there was a valid and enforceable agreement it must be established if the parties were *ad idem*. To establish if this has occurred one must look at the external factors to the agreement. A subjective test is therefore applied. The Court must also consider the offer and acceptance, as not every offer and acceptance constitutes a contract; the time and place thereof; determine if the parties herein had the intention to enter into a contract (*animus contrahendi*), look at the nature of the offer, the relationship between the parties and the surrounding circumstances at the time of making the offer. These must all be examined to determine if the oral agreement was entered into at all.

It must also be borne in mind that there are circumstances where there is an intention to enter into a contract but the contract is void and unenforceable.

[12] The evidence of Mr Adrian Raw and Ms Kemraj dispute the existence of the oral agreement. It is submitted that the Applicant with the tenancy of over 400 would not have entered into an oral agreement spanning over a period of five (5) years. This is confirmed by the evidence before Court, which is not in dispute that even the first lease agreement that the Respondent entered into with the Applicant was in writing. This is the Applicant's policy with all its tenants. This is a more probable version than the one advanced by Mr Merchant, who represents the Respondent.

[13] There is evidence before this Court that the tenancy of the Respondent was terminated sometime in 2008. However, at the instance of the Applicant it retained the use of the premises on a month to month basis. The Court accepts that it is unlikely that such a tenancy would have been renewed with the tenant who has defaulted in the payment of rent to such an extent that the first agreement was terminated and a Court order of ejectment was obtained. The only reasonable measure for the Applicant, to have resorted to, if indeed it renewed the lease with the Respondent, would have been more of a cautionary nature, by having the lease agreement reduced in writing and with stringent terms for the payment of its rental. The initial lease agreement state that the contract could only be varied in writing. If the Applicant caters for variation of the terms of its agreements in writing it is more probable that any renewal or new lease agreement would be in writing.

[14] Kemraj gave a reasonable explanation why the Respondent was kept in the premises, being that there were ongoing negotiations with potential clients and that they did not want to have the building refurbished during the world cup to accommodate a new client as this would have a negative impact on the entire business centre.

[15] The Respondent's submission is that the Respondent knew nothing about the ejectment order obtained against it in 2008, which occurred as a result of

insufficient payment of rental by the Respondent. I find that the Respondent has a duty to perform in terms of the contract, in this case whether he had a debit order or stop order he should have made certain that he keeps to the terms of the contract. He could not have been in arrears if he was diligent and properly looked after his interests. He could also not have accepted the termination thereof in writing.

[16] The Respondent's case is that during or on or about the beginning of March 2010, Kemraj a duly authorised agent for the Applicant entered into an oral agreement with Mr Merchant, the representative of the Respondent, the salient terms thereof being *inter alia*; that there would be an increase in the rental amount; that the lease agreement was for a five (5) year period; and that the other terms would remain the same as in the initial agreement entered into in 2005. It was further submitted that the reducing of the oral agreement into writing would just be a mere formality.

[17] It is further submitted that Kemraj gave Merchant a document, which is referred to as Annexure "K", a proposal, which formed part of the oral agreement. Annexure "K" was an offer to the Applicant to enter into a written lease agreement on the 27th August 2010, which Merchant submits he signed at Kemraj's behest on the 24 May 2010. It is further submitted that the Respondent has complied with the terms of the oral agreement with regard to

the payment of rent. The strange aspect about Annexure “K” is that Merchant does not disclose its existence at the crucial stage when he asserts that he has entered into an oral agreement with the Applicant. This Court accepts that if he was in possession of such document which he believed to be valid, signed by an authorised representative of the Applicant, he would have disclosed it as early as possible. He claims to have acted at the instructions of Kemraj not to disclose it and was to use it as a trump card at a later stage. This notion is rejected by the Court as no reasonable person would not disclose such an important document at the expense of being ejected from the premises.

[18] There is no evidence before this Court that the occupancy of the premises by the Respondent was by virtue of an oral agreement or a re-instatement of the old lease agreement. I am saying so because the existence of the oral agreement and in particular where it was concluded is not certain from the evidence before this Court. The place where it was concluded is not certain, Merchant says it was at Kemraj’s office and his main witness Raza says it was concluded at the Respondent’s shop and where both Raza and Merchant were present. It is important in law to know where and when was the offer made to determine its existence.

[19] According to Merchant’s evidence the rental in terms of the oral agreement was to be about R200 to R250. An offer must be unequivocal and

unambiguous. One cannot therefore say that the parties were *ad idem*. Such a contract is void for vagueness, signifying that the parties were not *ad idem*. This put paid to any inference that this contract was discussed at all.

[20] The acceptance should have been clear, unequivocal and unambiguous. Can one really say that the evidence of Merchant in that he was assured by the “flippant don’t worry assurance” which he claimed he received from Kemraj from time to time were an acceptance of the offer. The Court rejects this assertion by Mr Merchant. Furthermore, the Applicant would not have accepted a proposal with indeterminable terms of payment of its rent at all and more so with a defaulting tenant.

[21] We must consider if the communication of an offer in terms of Exhibit “K” was a valid offer and if it indicates *animus contrahendi* on the part of the Applicant. At the receipt of Annexure “K” the offeree ought to have known that there was no intention to contract on the part to the Applicant. Lack of *animus contrahendi* can be ascertained from the nature of the agreement and from the surrounding circumstances. A similar position emanated in **Bosman v Prokureursorde Van Transvaal**², where an articulated clerk entered into a contract of articles with an attorney who already had the prescribed number of articulated clerks prescribed by the regulatory body. The Court held in that case

² 1984 (2) SA633 (T)

that there had been no intention that he should serve with the attorney as an articulated clerk; therefore, his articles were invalid. There is nothing that indicates in that document that the Applicant had the intention to enter into a contract with the Respondent.

[22] An offer made by way of an incomplete and vague proposal as to the pertinent issues of the contract cannot be valid in law. An offer accompanied by a proposal which has irrelevant terms on it, not applicable to the offeree is not a valid offer. In this case the signature of the signatory thereto is disputed; it is not even signed by the person who is alleged to have entered into a contract with Mr Merchant. It was Kemraj's evidence that she does not deal with proposals at all.

[23] The document Annexure "K" is said to have been delivered by Kemraj to Merchant for consideration and signing. It is submitted that it was collected by Kemraj from Ms Ramiah in the absence of Merchant who was abroad. At the same time Merchant has advanced other versions regarding the collection of this document. Merchant had stated that he signed Annexure "K" in May 2010, he forgot to give it to Nisha and Nisha had to remind him to look for it.

[24] This document is disputed by the Applicant's witnesses. Its authenticity is disputed. Kemraj's name is wrongly spelt. The Applicant's version is that

there was a new format of proposals in place. It could not have gone out without their knowledge; Ms Kemraj is not the authorised signatory; Ms Poswa's signature had been forged and she had no authority to sign on behalf of Kemraj. More so, Ms Kemraj's evidence is very relevant here in that once the document is handed over to Poswa, she has got nothing to do with it, therefore there was no need for the *per procuracionem* signature on her behalf.

[25] I accept the evidence of Kemraj that she would not have given Merchant a proposal which is meant for new tenants for the purpose of reducing the oral agreement in writing. The proposal that Merchant has deals with issues applicable to first time occupiers of the premises. Merchant could not explain why the document had such terms and why it was not in line with his version.

[26] The Court accepts that this document could not have come from Kemraj. Merchant's evidence is that Kemraj was an authorised signatory. He was given a document by a person in authority, but fails to disclose his trump card, even at the most opportune time, when that it would save him. I accept that the evidence of Ms Melville, that this document could not have been issued by the Applicant. Merchant was requested by the attorneys of the Applicant to furnish the terms of the agreement as early as the 2nd of September 2010, but failed to do so. He threatened to bring an urgent application to Court to force the Applicant to record the contract but failed to do so. Strangely enough even the

document that he relies on Annexure “K” states that *“you will be required to sign the landlord’s standard lease (a draft of which is attached hereto)”*. There is no mention in his evidence of what happened to the supposedly draft attached to the proposal.

[27] As part of the surrounding circumstances that I have looked at, I accept that this kind of contract could only have been entered, varied or renewed in writing. It is therefore unlikely that the Applicant, that manages such a huge business complex, would have made an exception of the Respondent. More so, according to Lee-Anne Melville, who is in charge of the renewal process, she was not given a mandate to renew this contract.

[28] I have extensively been addressed on the month to month basis contract which kept the Respondent on the premises. It was said that the Applicant has a way of stringing along clients. That is not an issue that was referred to oral evidence to prove the month to month tenancy of the Respondent after his ejectment on the premises. Further, that part of the month to month tenancy falls outside the ambit of the oral agreement which has been referred to Court for oral evidence and determination. The Respondent accepted in writing that he would vacate the premises after the Applicant obtained an ejectment order against him. This clears all the grey areas in the subsequent month to month tenancy by the Respondent.

[29] A number of issues were raised by Merchant regarding Kemraj. His alleged receipt of an email from Kemraj's husband. Irrespective of how he alleges that he received the document, he has failed to prove that the parties entered into a valid contract. The evidence given by the Applicants' witnesses was credible unlike the evidence of Messrs Merchant and Raza which was riddled with contradictions and improbabilities.

[30] The Applicant prayed for an order of ejectment within 24 hours of the granting of this order. In the light of the nature of the business that the Respondent conducts, the Court has considered if it is possible to do this within 24 hours. The Respondent has been involved in this protracted litigation and ought also to have made contingency plans should it not be successful. I therefore find that a reasonable period for the Respondent to vacate the premises would be a period of five (5) days upon the granting of this order. The calculation of the five (5) days period to include the weekends and holidays.

[31] The Applicant has prayed for an order of costs on an attorney and client scale. There have been delays occasioned by the Respondent, however, at each and every stage thereof, the Respondent was ordered to pay wasted costs. The Court is not inclined to make an order for punitive costs as it has not been fully persuaded to grant such an order.

CONCLUSION

[30] I therefore make the following order:

- (a) That the Respondent and all persons holding through the Respondent, are hereby ordered forthwith to vacate the premises at Shop G10, Gateway Theatre of Shopping, 1 Palm Boulevard, Umhlanga Ridge, Newtown Centre, Umhlanga, KwaZulu-Natal, within a period of five (5) days from the date of the granting of this order.
- (b) That in the event that the Respondent or any person or persons through the Respondent fail to vacate the premises within five (5) days of this order.
- (c) The Respondent is ordered to pay costs including costs of two (2) Counsel, where necessary and cost occasioned by the adjournment.

MBATHA J

Date of hearing:

Date of Judgement: 14 December 2012

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