



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

2024-05-13

DATE

Case Number: 2023-038064

In the matter between:

THE WARE JAKOB GROUP (PTY) LTD

t/a SOWAAR BAR

Plaintiff/Respondent

and

PACIFIC PARAMOUNT PROPERTIES (PTY) LTD

Defendant/Excipient

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 13 May 2024.

JUDGMENT

POTTERILL J**Background**

[1] The plaintiff issued a summons against the defendant seeking relief flowing from a written retail lease agreement. The particulars of claim “pleads that on a proper interpretation of the proposal, read with the lease agreement, both the plaintiff and defendant agreed that live events would be provided for and held at the legal premises, to be named “the Sowaar Bar”.¹ In return, and to prevent excessive noise nuisance resulting from the live events, the plaintiff undertook to soundproof the leased premises in accordance with the proposal.²

[2] It is further pleaded that the defendant deliberately and wilfully failed to disclose that the leased premises was zoned special, thus with a limited approved use, despite the defendant knowing that the premises would be used partially as a place of amusement, including live events as set out in the proposal. This representation was material and was made with the intention of inducing the plaintiff to enter the written lease of agreement. Had the plaintiff been aware of the zoning prior to the conclusion of the lease it would not have concluded the lease.

[3] The plaintiff further pleaded that almost a year later, on 17 August 2022, the defendant directed a letter of demand to the plaintiff alleging it had reached breaking point on noise disturbances and the bathroom in the centre. Another letter of demand followed requesting further soundproofing and a noise curtain to be installed. Both letters make no mention about a town planning scheme infringement. For the first time on 30 January 2023 did the defendant, in an email, set out that hosting of live events constituted an illegality in that it infringed upon the City of Tshwane Town Planning Scheme.

¹ Par 9 of Particulars of Claim

² Par 10 of Particulars of Claim

[4] The particulars of claim set out that another letter of demand dated 22 February 2023 demanded that the plaintiff within 7 days comply with the zoning within a period of 7 days.

[5] The plaintiff sought specific performance in seeking the defendant's assistance in rezoning the property. The defendant refused.

[6] The plaintiff then disputes the plaintiff's right to cancel the contract as it purportedly did on 29 March 2023 and claims specific performance in applying for rezoning of the property so that it be used for its envisaged purpose to conduct live events.

[7] The plaintiff requests the court to grant an order as follows:

- "1. A declaratory order that the lease agreement, concluded between the plaintiff and the defendant, remains extant and has not been cancelled.
2. That the defendant be ordered to allow the plaintiff to apply for the rezoning and/or an amended land use of the leased premises to make provision therefore that the leased premises be used as a place of amusement, as envisaged in the Tshwane Town Planning Scheme: and
 - 2.1 that the defendant be directed to sign all powers of attorney and consents that may be required for that purpose; and
 - 2.2 should the defendant fail to sign such consents and powers of attorney on demand within a period of 7 days from such demand, that the sheriff of this court be authorised to sign the required approvals and powers of attorney in the stead and place of the defendant.
3. That the plaintiff's claim for damages be postponed for determination at a time when the quantum thereof can be properly ascertained.

4. That the plaintiff be granted a reduction in rent of 50% of the agreed upon rent until such time as the leased premises is rezoned to include a place of amusement retrospectively, calculated from 1 February 2023, until the date of the leased premises being rezoned to allow for the live events.
5. Costs of suit on an attorney and client scale.
6. Further and/or alternative relief."

[8] The defendant filed an exception to the particulars of claim in that the particulars of claim does not disclose a cause of action. In a nutshell the excipient, to whom I shall refer as the defendant, raised three grounds of objections:

- 8.1 The plaintiff's claim for a 50% reduction of the rental amount is incompetent and does not disclose a cause of action.
- 8.2 The plaintiff's claim for the defendant to apply for rezoning is in contravention of the special conditions wherein it is recorded that the landlord does not warrant that the premises are zoned for the use of the premises by the tenant. In terms of clause 9 of the agreement the plaintiff was only entitled to use the leased premises as stipulated, the plaintiff did not warrant that the premises is suitable or fit for the purpose it was let for, and the plaintiff can withhold consent within its sole and absolute discretion.
- 8.3 The damages the plaintiff seeks to recover is not competent in law and directly contrary to the provisions in the written lease agreement.

[9] The plaintiff opposes the exception to the particulars of claim and seeks that it be dismissed. For ease of reference I refer to the parties as in the summons

First ground of exception

Defendant's argument

[10] The plaintiff pleaded in paragraphs 22-40 of the particulars of claim that the defendant repudiated the agreement, the plaintiff did not accept same and elected specific performance which was conveyed to the defendant. The lease agreement must thus stand as concluded, yet the plaintiff seeks a 50% reduction of the agreed rental until such time as the leased premises is rezoned to include a place of amusement. Having elected to keep the agreement in place the plaintiff is bound to all the terms and conditions of the agreement and cannot when it elected specific performance at the same time seek a variation of the terms and conditions of that agreement. In effect the plaintiff seeks a new agreement for the parties.

[11] The plaintiff made an election; i.e. to claim specific performance. When an election was made then a right inconsistent with it is waived. When the plaintiff pleaded for specific performance it could not seek a 50% reduction of the agreed rent.

Plaintiff's argument on the first ground

[12] It was argued that there was a material misrepresentation and the plaintiff would never have entered into the lease agreement had it been made aware of the zoning of the property. The plaintiff had incurred massive expenses, including soundproofing and has established a reputable brand business and cannot elect to "rescind" the lease agreement. This is the reason it seeks a 50% reduction in rent.

Decision on ground 1 of the exception

[13] The principles pertaining to an exception are trite; an excipient has the duty to persuade the court that upon every interpretation which the particulars of claim could reasonably bear, no cause of action was disclosed. An exception should be dealt with not over-technically, but sensible. However, it has also been found that an exception is a valuable tool to obtain a speedy and economical decision on questions of law which are apparent on the face of the pleadings and to weed out cases without legal merit.

[14] In argument on behalf of the plaintiff much was made of the fact when evidence was led a cause of action could be disclosed. No amount of factual evidence on the first ground of exception could disclose a cause of action for the simple reason that the cause of action as pleaded is in law fundamentally flawed. A party wishing to claim specific performance of a contract must allege and prove the terms of the contract and compliance with any antecedent or reciprocal obligations. Seeking to not comply with the terms of the agreement, i.e. not paying the rental amount as set out in the contract contradicts the requirements of specific performance and is bad in law. Once a party with one or more remedy at its disposal elected to pursue a specific remedy, all other remedies have been waived which is inconsistent thereto.³

Second ground of exception

Argument on behalf of the defendant

[15] The plaintiff seeks the court to order the defendant to apply for rezoning with ancillary relief. This claim is based on an alleged fraudulent misrepresentation at the time of the conclusion of the agreement. But, that could not sustain a claim, its rezoning is on the basis that the defendant is unreasonably withholding consent from the plaintiff.

[16] The plaintiff relies on a written proposal and special conditions to sustain its cause of action that the defendant is unreasonably withholding its consent. In the written proposal is sets out that the plaintiff intended to operate a restaurant and bar however in the proposal does not set that out that live entertainment will be hosted at the premises and the special conditions record that "the landlord does not warrant that the premises are zoned for the use of the premises by the tenant."

³ *Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A) at 627B

[17] The agreement only provides for a restaurant and bar. Clause 9.1 of the lease agreement further provides that the premises may only be used as stipulated in the schedule. In terms of clause 9.3 the defendant pertinently did not warrant that the leased premises is suitable or fit for the purpose for which it had been let. Clause 43 of the lease agreement recorded that “all verbal or written warranties and representations, whether express or implied, made by or on behalf of the landlord have been accurately recorded in this agreement ...” Clause 40 of the agreement contains the “Shifren-clause.”⁴

[18] In terms of clause 9 of the agreement the defendant has the right to withhold consent within its sole and absolute discretion. The defendant is not unreasonably withholding its consent as it set out that the taxes and levies would increase drastically.

[19] The reliance by the plaintiff on a general remark of a minority judgment in *South African National Parks v MTO Forestry (Pty) Ltd and Another* [2018] ZASCA 59 is not support for its argument that the defendant is unreasonably withholding its consent.

[20] The reliance on *Airport Inn and Suites (Pty) Ltd v Strydom* [2021] JOL 50312 (GJ) is not on point at all and no reliance can be placed thereon.

Argument on behalf of the plaintiff

[21] The plaintiff's argument is that in terms of the written proposal the respondent intended to operate a restaurant and bar and host live entertainment at the leased premises. When it was revealed that the property was not zoned as a place of amusement the respondent has attempted to comply and repeatedly attempted to obtain the consent of the defendant to change the zoning of the property in order to host live entertainment.

⁴ *SA Sentrale Ko-op Graanmaatskappy Beperk v Shifren* 1964 (4) SA 760 (A)

[22] The defendant is unreasonably withholding its consent to assist the plaintiff to rezone. The *South African National Parks* matter found that landlord's consent may not be unreasonably withheld. Although clause 9.1 of the lease agreement permits the defendant to withhold its consent "in its sole and absolute discretion", the withholding of such consent cannot be unreasonable.

[23] Reliance on the *Airport Inn* matter is from a finding that the reasons advanced by the lessor for refusal should be the reasons advanced by the lessor at the time of the refusal. The reasons submitted by the defendant is not proven and not legitimate.

Decision on ground 2 of the exception

[24] Upon a reading of the particulars of claim the plaintiff is as a result of the repudiation of the agreement by the defendant seeking specific performance "in the sense that it required the defendant to provide it with the necessary assistance, consents, and powers of attorney to be able to the CTMM for a rezoning of the leased premises."

[25] The consent required by the defendant does not flow from the misrepresentation, it can only flow from the terms of the contract. The claim is thus bad in law. To claim specific performance of the contract, the plaintiff must allege that the non-performance of the plaintiff is in terms of the contract. No a single clause in the contract provides that the defendant must give consent. The contract provides that the defendant is entitled to withhold consent within the sole and absolute discretion of the defendant. The plaintiff cannot claim specific performance of the contract, where the contract does not provide for such specific performance.

[26] The persistence by counsel for the plaintiff to rely on a single sentence of a minority judgment is disconcerting as it is not a *dictum* of the court. Secondly, the

sentence only sets out the general proposition that lease agreements often contain a clause that the landlord's consent may not be unreasonably withheld. This contract has no such provision. The plaintiff cannot seek specific performance of such a clause that is not in the contract.

[27] If the reasonableness of the withholding of consent is to be pleaded, it must be found on another cause of action, but not on specific performance. No cause of action is thus disclosed.

Ground 3 of the exception

Defendant's argument

[28] This ground of exception relates to the damages claimed as a result of the fraudulent misrepresentations. The defendant argues that the zoning of the property cannot constitute misrepresentation because the town planning scheme is public document, has the force of law and binds all land owners, occupiers and all organs of state. The plaintiff cannot plead ignorance of the law pertaining to the zoning.

[29] The plaintiff failed to plead the facts that place a duty on the defendant to disclose and the facts that the breach of this duty had the intention to deceive the plaintiff.

[30] In terms of clause 43 the parties recorded that any all verbal or written warranties or representations made by the defendant have been accordingly recorded in the agreement. The plaintiff furthermore recorded that it has not entered into the lease agreement by virtue of any warranty or representation made to him by the defendant not contained in the written lease agreement. The trite Shifren principle; the insertion of a non-variation clause voluntarily by parties is a protection mechanism from disputes that may arise from uncertainty created by oral agreement.

Argument on behalf of the plaintiff

[31] It was submitted that all the necessary facts were pleaded. The defendant made a representation that the lease agreement read with the proposal included to host live entertainment. The representation was material and factually induced the contract.

[32] It was in the plaintiff's exclusive knowledge and it had a duty to communicate this knowledge.

Decision on ground 3 of the exception

[33] Where reliance is placed on a fraudulent non-disclosure, facts giving rise to the duty to disclose must be set out. Facts must also be set out to show that the duty to disclose was deliberately breached in order to deceive.⁵ This has not been done. In the heads of argument of the plaintiff for the first time it is raised that the duty flows from the fact that the plaintiff had exclusive knowledge. This is not pleaded. It is not pleaded that the omission to disclose the zoning was deliberately breached with the intention to deceive. It is nowhere pleaded that the defendant did so to ensure the contract is concluded.

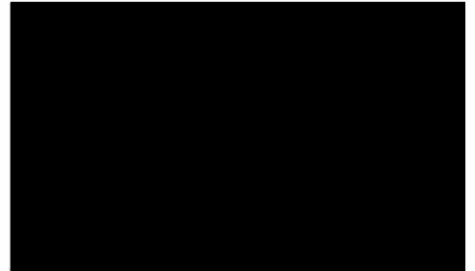
[34] Much reliance was placed on the proposal. Counsel for the plaintiff could not show the court where in the proposal it was set out that live music would be part and parcel of this lease agreement. On the facts pleaded together with the proposal no cause of action for damages based on fraudulent misrepresentation has been set out.

I accordingly make the following order:

[35] (1) The exception is upheld with costs on scale C.

⁵ *Ozinsky NO v Lloyd and Others* 1995 (2) SA 915 (A)

- (2) The particulars of claim are set aside.
- (3) The plaintiff is granted leave to file an amendment of the particulars of claim, if it so desires, within 15 court days of this order.



JUDGE OF THE HIGH COURT

CASE NO: 2023-038064

HEARD ON: 8 May 2024

FOR THE PLAINTIFF/RESPONDENT: ADV. S. VAN DER WALT

INSTRUCTED BY: Jacques Classen inc.

FOR THE DEFENDANT/EXCIPIENT: ADV. M.C. ERASMUS SC

INSTRUCTED BY: Mark Efstratiou Inc.

DATE OF JUDGMENT: 13 May 2024