IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) 38/2016**

In the matter between

FARAH INVESTMENTS (PTY) LTD **APPELLANT**

AND

TOTAL LESOTHO (PTY) LTD **RESPONDENT**

CORAM: **LOUW, AJA**
DR. MUSONDA, AJA
MAKARA, JA

HEARD: **4 MAY 2017**
DELIVERED: **12 MAY 2017**

SUMMARY

Law of contract – Lessor is bound by a warranty against eviction which is implied by law – In terms of this implied term to a contract of lease, the lessor guarantees that the lessee will enjoy undisturbed use and enjoyment of the premises and that the

lessee will not lawfully be disturbed by a third party with a legitimate title to the use and enjoyment of the premises – unless the lessee was aware of the lessor's lack of title or the third person's legitimate title to lawfully use and enjoy the premises – The lessee is entitled to claim for damages suffered as a result of the eviction, including compensation for consequential loss – unexecuted addendum is ineffectual.

JUDGMENT

DR. MUSONDA AJA

[1] The dispute between the parties arose from a Sub-Lease Agreement. Total had a business relationship with Mara Holdings (Pty) Ltd, who were the owners of Crossroads Service Station situated at plot 13291-054, Upper Thamae, Maseru.

[2] Their business relationship dated from 1985. The parties concluded a Head Lease with the provision of a lease-back to Mara Holdings to conduct the service station business on the premises as Total's tenant.

[3] Mara Holdings (Pty) Ltd, ran into financial difficulties resulting in indebtedness to Total in the sum of M580,000. Total obtained a judgment against Mara Holdings and the Sureties, which remained unexecuted.

[4] In order to settle the indebtedness in January 2006 a Tripartite Agreement was concluded between Total, Mara Holdings and Thabang (Pty) Ltd, which provided for conclusions of a sub-lease of the premises and conditioned upon Thabang paying the sum of M580,000 which was Mara's indebtedness to Total under High Court Case No. CIV/T/7/03. Total was to furnish a formal Notice of withdrawal and abandonment of the Judgment to effectively absolve Mara from its indebtedness to Total.

[5] Total subsequently entered into another Tripartite Agreement with Farah Investments and Mara; though Mara was reluctant. By November 2007 Total had received the amount of M580,000 from Farah as provided in the 2007 MOU.

[6] Thabang and Mara alleging that the 2006 MOU remained valid and enforceable, sought an interdict from the High Court against Total and Farah to restrain Total and Farah from carrying out any further operations and affecting any further improvements at Crossroads Services Station under the 2007 MOU pending the finalization of the application.

[7] Thabang and Mara sought an order that Total be compelled to perform its obligations under the 2006 MOU entered into between Total, Mara and Thabang as Thabang, the first appellant had placed the sum of M580,000 in the trust account of its Attorney Legal Man Chambers Incorporated, in favour of Total. It was Thabang's assertion that while they had performed the side of the bargain, Total had not performed their side of the bargain.

[8] The High Court granted an interdict. The learned Judge held that (1) Total did not deliver the formal notice of withdrawal nor did the First Respondent abandon that Judgment against Mara Holdings, as they did not comply with **Rule 44(1) of the High Court Rules** couched in these terms."

> *"44 (i) Any party in whose favour any order or Judgment has been given may abandon such order or Judgment in whole or in part by delivering notice thereof to the Registrar and all parties affected by such Judgement";*

The learned Judge went on that:

> *"(ii) Neither did they rescind or abandon the Judgement against Mara Holdings;*
>
> *(iii) It did not file any formal notices or required, neither did it provide any proof to this court that it did*

> *so, but it tried to sideswipe this issue by saying they tendered performance. Can it be seriously argued with any degree of success that the First Respondent had interpreted the terms of and or conditions of clause 1.4 of the MOU Agreement correctly? I think not. What the First Respondent has done is to read an interpretation which is not in the MOU."*

[9] In the learned Judge's view damages could not adequately atone for the unlawful conduct of the First Respondent and she cited the case of **National Chemsearch SA (Pty) Ltd v Borrowman**[1]**,** as authority for that proposition. She granted the application as prayed in the notice of motion.

[10] Dissatisfied with the learned Judge's Judgement, the Respondents Total Lesotho (Pty) Ltd and Farah Investments (Pty) Ltd appealed to this court under case No. C of A (CIV) No. 35/2009.

[11] On appeal Total contended that it was entitled to payment in terms of clause 1.4 of the MOU, because it complied with its obligations as regards furnishing the required notice of withdrawal. The notice was not annexed to the opposing affidavit. The original notice was not said to have been lost and destroyed, even if it

[1] 1979(3) SA 1092 T 1123F

had been, no attempt was made to provide secondary evidence of its contents. There was no explanation offered why no copies existed.

[12] Total's allegation was dealt with in the replying affidavit (by Thabang's General Manager) by way of the statement that –

> *"My Attorneys dispute that this has happened and in this regard I wish to refer to Annexure T19, which is contrary to the allegations made by the 1st Respondent"*

The deponent then referred to the failure to annex the notice to the opposing papers and concluded with the assertion that no such notice ever existed. The annexure relied on was Mr. Khoboko's letter of 4th April, 2006 in answer to Total's cancellation letter. He merely said that Total had failed to perform in terms of the MOU and did not directly challenge the allegation that a notice of withdrawal had been tendered.

[13] However, this court need not go into the niceties of the earlier appeal as this is well documented in this court's Judgement save and except to allude to the holding.

[14] This court dismissed the appeal of Total and Farah, as Total had not executed its side of the bargain. The Court however refused to confirm the order of declaring the MOU between Total and Farah null and void.

[15] While Total and Farah had been co-litigants in previous proceedings based on the same facts as these proceedings, the affirmation of the interdict against Total and Farah by this court. This led Farah to commence fresh proceedings, which are subject of this appeal.

[16] Farah's claim is based on the breach by Total of its obligation to allow Farah the use and enjoyment of the premises. Farah claims damages in the amount of thirty two million four hundred and sixty two Maloti and twenty Lisente (M32,434,762-20) for the remaining seven and half years of the Agreement.

[17] The defence of Total, was basically that when they signed the second MOU all the parties accepted the risk involved and went ahead to sign, well aware that their agreement could be nullified, if Thabang's claim was upheld.

[18] Furthermore it was specifically pleaded that the plaintiff had violated the Sales Agreement by non-payment of an amount of M909,174-78 and such breach caused the cancellation of the Sales Agreement. It had a clause that in such event both the Sales Agreement and the Sub-lease Agreement would end and no consequential damages would be claimed.

[19] The learned Judge placed much reliance on Mr. Mahomed, the director of Farah Investments response in cross-examination mirrored in para 44 of the Judgement. Mr. Mahomed answered that Mr. Rasephei, the main shareholder of Mara Holdings was undecided and he was afraid he could evict them. He wanted protection in the addendum to the Agreement, because Mr. Rasephei was untrustworthy.

[20] Mr. Rasephei would shut Farah down and because of those concerns Total met and eased his concerns.

[21] Both Plaintiff and Defendant relied on advice from their Attorneys and Counsel who assured them that the Thabang application could never succeed.

[22] The learned Judge went on, to hold that:

> *"Mr. Mahomed, it is clear from the foregoing, appreciated not only that there was a risk involved he also acknowledged that the type of risk was to be shut down. He admitted that the parties, specifically Plaintiff wanted to be safeguarded and took all reasonable steps to ensure that the impact of the undesirable outcome would be limited. Nevertheless when it did occur, he turned around and sued his co-conspirator, who also took the risk."*

APPELLANT'S CASE

[23] It was argued by Mr. Suhr for the Appellant that, it is a fundamental term of the contract of letting and hiring known as lease that the lessee be given undisturbed use of the property let. Cooper says:

> *"A lessee's object in hiring being to acquire the right to use and enjoy property, a lessor is under a corresponding obligation to ensure that for the duration of the lease the lessee has the use and enjoyment of the property let to him to this end*[2]*.*

A lessee who is disturbed in his use and enjoyment by a third party with superior title has a claim for damages against the lessor unless he knew of the defect in the lessor's title, when the parties contracted. A lessee is entitled to compensation which will place him in the position he would have been in had the lease been

[2] W & Cooper SA Law of Landlord and Tenant 1973 at 107

performed. Thus he is entitled to recover loss of profits and legal costs incurred by him in eviction proceedings[3].

[24] The Appellant came to the scene after the Respondent had cancelled or purported to cancel the MOU of 2006 between Total, Mara and Thabang. The invalidity of the sub-lease between the Respondent and Thabang was the view held by Total's lawyer Mark Harcourt SC, Bedver Irving, Rahim Khan, Almero Meyer and Pitso Ntšene who acted for Farah. Mr. Meyer testified that he regarded Thabang's claim to the premises as being bogus.

[25] In **Frye's (Pty) Ltd v Ries[4],** it was held by the then South African Appellate Division, that knowledge required of the defect in the lessor's title was actual knowledge and that the fact that the defect in title was apparent from the title deeds registered in the Deeds office did not make the lessee possess deemed knowledge, but not actual knowledge.

[26] Hoexter JA said:

[3] Ibid, at 113
[4] (1957)3 SA 575 (A) 581-582

> *"In my opinion knowledge must be actual knowledge. By signing the contract the respondent undertook to give occupation of the leased premises and to give delivery of the property if the option was duly exercised by the appellant. The appellant was entitled to rely on that undertaking without taking any steps to find out whether the Respondent would or might be able to make good that undertaking. There is no duty on a prospective lessee to find out whether the prospective lessor will or will not be able to give occupation of the premises to be let."*

[27] In **Minister of Finance & Others v Ceone** it was held, in the context of prescription by Cameron and Brand JJA that:

(a) Knowledge is no confined to the mental state of awareness of facts that is produced by personally witnessing or participating in events, or by being the direct recipient of first-had evidence about them.

(b) It extends to a conviction or belief that is engendered by or inferred from attendant circumstances.

(c) On the other hand, mere suspicion not amounting to conviction or belief justifiably inferred from attendant circumstances does not amount to knowledge.

[28] In the circumstances it was argued it could not be said that Farah had actual knowledge, but at least a suspicion not amounting to conviction or belief.

[29] The sub-lease contained a no-variation clause couched in those terms:

> *"No term of this lease shall be suspended, modified, cancelled or otherwise varied save by means of a further written agreement signed by the lessor and the lessee."*

[30] It was argued that properly construed the addendum dealt with the consequences of a termination of the head lease between Mara and Total, something that did not happen and cannot be relied on by Total.

[31] In conclusion it was strenuously argued that the court below made a flawed finding of fact that the sub-lease contained a non-variation clause that required variation in writing and that the detailed documents were intended to provide a complete memorial of their legal relationship. The court erred in finding, apparently with reference to their addendum to the sub-lease, that the parties had, in effect, waived their rights against each other, when a proper construction of the addendum (if it was binding at all it was not shown to have been signed on behalf of the Respondent) show that it did not have effect.

[32] It was argued that the appellant was in breach of the Sales Agreement as a consequence of its admitted non-payment of an amount of M909,174.78 and that resulted in the cancellation of the Sales Agreement and consequently the sub-lease.

[33] In the event the addendum Agreement was applicable, the Respondent had tendered the payment of M261,009.00.

[34] The Respondent denied any wrongful or unlawful conduct, pleaded that the relationship between the parties was governed by four inter-dependant agreements which excluded warranties and guarantees, and compliance by the parties. The Respondent agreed to have assured the appellant that the cancellation of the agreement between itself and Thabang was lawful.

[35] It was argued that not every act by one party to a contract which causes loss to the other will give rise to an action on the contract. It was therefore necessary for the appellant to allege and prove a breach of the contract, committed by the Respondent.

[36] The Respondent was prevented to perform their side of the bargain by supervising impossibility under which could be included an act of state and in the present case the order and Judgement of the Court of Appeal. The Respondent is therefore discharged from liability.

[37] There was no wrongful conduct on the part of the Respondent which falls within the category of a breach of the agreement based upon conduct by the Respondent which was in any way, manner or form wrongful.

[38] The Appellant was not an innocent party that had no knowledge of all the surrounding facts and the circumstances regarding Thabang and future potential consequences when it concluded the 2008 Sub-Lease Agreement.

[39] The issued that arise in this appeal are:

1. Was there express exclusion of the implied term of the sub-leasing contract?

2. Did Farah had the required knowledge of the validity of the claim made by Thabang and the facts upon which Thabang based its claim?

3. What was the effect of the addendum which was unexecuted?

[40] The genesis to the parallel litigation and this litigation was the failure by Total to comply with **Rule 44(1) of the High Court Rules**, which prescribes how the Judgment is withdrawn and abandoned as correctly determined by the High Court in CIV/APN/114/2008.

[41] It therefore follows that when Total entered into a Sub-lease with Farah, the earlier Sub-lease had not been validly terminated. There was as a result a concurrence of leases.

[42] The Respondent (Total) had commercial superiority in that the bargaining power syndrome was in their favour. Their legal representatives with whom they assured Farah, that the Thabang claim was bogus held a professional duty towards Farah. Farah's reliance on their presentations was therefore reasonable.

[43] Farah, had executed their side of the bargain and therefore had done nothing to undermine the agreement. It is for that reason that the respondent valiantly litigated the protection of the Farah's rights under the Sub-lease.

In these proceedings it is common cause that Thabang's Sub-lease had not been validly terminated.

[44] The learned trial Judge made findings of fact perverse to the evidence on record. He characterised Mara Holding and Farah as co-conspirators basing such a finding on Mr. Mohammed director of Farah is distrust of Mr. Sy Rasephei the shareholder of Mara Holdings in cross-examination. The other aspect was that he faulted Farah, because Mr. Mohammed said, "in any business there is a risk to mean Farah was desirous to enter into a Sub-lease notwithstanding the encumbrance. I think that was quoted out of context. What he meant was that any business whether running a Filling Station or not is risky. The mistrust of Mr. Sy Rasephei had no bearing on the Sub-lease, Mara Holdings was not privy to it, it was between Total and Farah.

[45] The lessor is bound by a warranty against eviction which is implied by law. In terms of this implied term to a contract of lease, the lessor guarantees that the lessee will enjoy undisturbed use and enjoyment of the premises and that lessee will not lawfully be disturbed by a third party with a legitimate title to the use and enjoyment to the premises.

[46] The warranty against eviction binds the lessor to compensate the lessee who is:

(i) evicted from the whole or part of the premises;

(ii) by a third person with a better title

Unless the lessee was aware of the Lessor's lack of title, or relevant in this case, of the third person's legitimate title to lawfully use and enjoy the premises. The lessee's claim is for damages suffered as a result of the eviction, including compensation for consequential loss.

[47] In this case Total raises the following defences:

1. The implied term against the eviction is not part of the contract because it is excluded by the express terms of the contract between Total and Farah. There is no merit in this contention. The implied term is not expressly excluded, nor is it in conflict with the terms of the lease between Total and Farah.

[48] The addendum to the contract excludes the implied term. There is no merit to this defence, for three reasons:

1. The lease contains a no variation clause requiring any amendment, such as the addendum, to be in writing and to be signed by the parties. While Farah signed the addendum, there is no acceptable evidence that it was signed by Total. The document itself was not produced by Total under whose control it was nor is there any direct evidence that it was signed on behalf of Total. The contention that it would in the ordinary cause have been signed on behalf of Total, is mere speculation in the circumstances of this case, where the person who would have been able to testify in this regard was not called by Total. The fact that he had left Total's employment does not mean that he could not be called to testify.

2. Even if it was signed, the terms of the addendum does not exonerate Total. Claus 1 deal with the case where the head lease between Mara and Total is terminated, clause 2 deals with a breach by Farah, clause 3 deals with the termination of the lease between Mara and Total after 5 years.

3. Farah was aware of the Thabang's claim, but nevertheless concluded the contract and thereby accepted that Thabang may turn up with a legitimate claim in the use and enjoyment of the premises. In my view this defence cannot, on the facts of this case, succeed.

[49] The knowledge required, must be actual knowledge, not only of the claim made by Thabang and the facts upon which Thabang bases its claim, but also know of the validity of such claims.

[50] In this regard, Farah was assured by the legal representatives employed by Total to oppose Thabang's claim, that the claim was not legitimate and would not succeed. In addition, Mr. Meyer Total's in-house lawyer who was directly involved in the dispute considered Thabang's claim to be a "bogus claim."

[51] In the circumstances although Mr. Mohammed on behalf of Farah was worried about the risk, especially that Farah might obtain an (ex parte) interim interdict against Farah, it could not be said that Thabang's claim was convincing enough to stop a reasonable prospective lessee from concluding the lease. Ultimately Thabang's claim turned on the question whether what Total's own attorney had done in purporting to cancel Thabang's claim to the premises under the 2006 MOU, amounted to compliance with clause 1.4 of the 2006 MOU and whether there was compliance with **Section 44 of the High Court Act.** This involved a technical legal argument in regard to the outcome of which Mr. Mohammed's mind was set at rest. His concerns regarding the risks "were solved by Total" according to his testimony.

[52] In the result, the knowledge that Farah had, was not enough. The facts that Farah knew of did not result in a belief or conviction, that Thabang had a claim which could result in Farah being lawfully evicted from its use and enjoyment of the premises.

[53] If follows that Farah is entitled to a declaration that Total is liable to Farah for such damages as it is able to prove to have suffered as a result of Total's breach of the sub-lease concluded by the parties on 2nd May 2008.

[54] The following order is made:

1. The appeal succeeds with costs

2. The order of the court a quo is set aside and the following order is made in respect of case CIV/T/230.2011.

    (1) The matter is remitted to the High Court for assessment of damages both actual and consequential.

    (2) The appellant is entitled to costs at attorney client scale in this court and the court a quo.

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DR. MUSONDA
ACTING JUSTICE OF APPEAL

I agree

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W. J. LOUW
ACTING JUSTICE OF APPEAL

I agree

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E. F. M. MAKARA
JUSTICE OF APPEAL

For the Appellant: **R. A. Suhr**

For the Respondent: **H. Louw**