CCT/122/2013

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

In the matter between

SURTIES INVESTMENT (PTY) LTD	**PLAINTIFF**
AND	
THE MINISTRY OF HEALTH	**1ST DEFENDENT**
THE MINISTRY OF LOCAL GOVERNMENT	**2ND DEFENDENT**
THE ATTORNEY GENERAL	**3RD DEFENDANT**

JUDGMENT

Coram : L.A. Molete J
Date of hearing : 5th June 2017
Date of Judgment : 28th September, 2017

SUMMARY

Claim for damages – Liability for incurred expenses – Proof of damages on a balance of probabilities – Onus of proof on Plaintiff – Defendants evidence of rebuttal insufficient – Plaintiff entitled to damages that have been proved.

ANNOTATIONS

CITED CASES

Ocean Accident and Guarantee Corporation ltd Vs KUCIT 1963(4) SA P147
Kotze V. Johnson 1928 AD at p.319
Miller V. Minister of Pensions 1947(2) A.E.R at P. 474
R v Sithole 1959 (1) PH H82(N)
Tritman v Edwick 1957(1) S.A. 443
Margaret Khaphiwiyo Vs Mapitso Khojane (C of A) CIV/APN/22/1995

STATUTES

[1] Plaintiffs claim against defendant was instituted on the **24th of May 2013** before this Court. It is a suit in which the Plaintiff was claiming against the Defendant.

1. Payment of **M1,675,163.33** for expenses.
2. Payment of **M504,100,00** for loss of business.
3. Interest at the rate of 18.5% per annum.
4. Costs of suit and
5. Further on/or alternative relief.

[2] The aforementioned claim arises out of a sublease agreement which was entered into during the month of April 2009; between Plaintiff and First and Second Defendants, in terms of which the former sublet to the latter certain premises known as Yasmin flats situated on **Plot No 12284-0259**, old Europa, Maseru Urban Area.

The premises were sublet as accommodation for public officers mainly doctors employed by the Government of Lesotho. This was a total of 15 flats, sublet by Plaintiff to Defendant.

[3] The said agreement would subsist, for a period of 36 months commencing from the **1st day of May 2009** with an option to renew. In terms of the agreement the rental amount for the whole period was **M103,810.00** per month. Thus Plaintiff would be paid the sum of **M6,920.67** per month, per flat. The rent was payable monthly with an escalation of 10% per year.

[4] It was an agreed term that upon termination of the contract the Defendants would leave the premises together with furniture and fittings in a good condition, fair wear and tear and damage by storm, flood, tempest and fire being excepted.

[5] **Plaintiff's case**

Plaintiff alleges that on the 22nd June 2011; the 1st Defendant through its Deputy Principal Secretary terminated the sublease agreement on the ground that the tenants occupying the premises were moving away to another district. The said termination was confirmed through a letter of the **16th November 2011**.

[6] Following the letter of termination a joint inspection was held on 20th December 2011 on the premises; all the parties were duly represented. It was discovered that the premises were damaged by the former occupants.

[7] As a result of the damages discovered on the premises; repairs and renovation had to be effected in order to make the flats habitable and suitable for business. It is claimed by Plaintiff that the said repairs were to the tune of **M1,675,163.53** and Plaintiff holds the Defendants liable for those expenses. Further, that while effecting the repairs on the premises; they became uninhabitable and as such Plaintiff lost business as no one could occupy the flats in that state. For the loss of business a sum of **M504,000.00** was incurred. This was the amount, that Plaintiff would have received as rental for the four months that the repairs were being done and thus rendering the whole premises uninhabitable. Plaintiff holds the Defendants liable for the said amount as well.

[8] Despite demand, the Defendants refused, ignored and/or neglected to pay the damages as claimed and as such the Plaintiff seeks an order by the Court that the Defendants pay all the claimed damages and costs of suit.

[9] **<u>Defendant's case</u>**

The Defendant denies that there was any form of damage to the premises and especially that it was the tenants who damaged the rental property.

They further deny that there was any joint inspection made on the premises by them and the Plaintiff and they put the latter to the proof thereof.

In paragraph 5 it is pleaded there were never any major repairs effected on the premises and that such repairs would have been made as a result of fair wear and tear and not because there was any specific damage to the property.

Defendants further deny that the repairs to the premises were as a result of the alleged damage which rendered them uninhabitable.

[10] **Evidence**

The Plaintiff relies upon a tenancy agreement signed between it and Defendants and such has been duly tendered as part of Plaintiff's evidence and marked "Exhibit A".

There is also "Exhibit B" which comprises of items which are claimed by the Plaintiff to have been missing and/or damaged.

[11] Attached to the Principal Secretaries witness statement is a document termed "Report" which comprises of items which upon a collective inspection have been found to be either damaged or missing. The aforesaid report seems to have been compiled by the officers of Defendants.

This gives the Court the impression that indeed there were some items in Yasmin flats that either needed to be repaired or replaced, and that a joint inspection was indeed conducted.

[12] The Defendants although having filed numerous statements in support of their defence, on the hearing of the matter they failed to bring any witness to give oral evidence before the Court in support thereof.

Further, and as a result of such failure, although having made witness statements, the Defendants have not proven their defence or rebuttal as expected and required by law. They did not call any evidence at all in rebuttal.

Balance of probability is the standard of proof in civil cases demanding that if the case that is more probable than not it should succeed.

[13] The Defendants in their plea contend that if at all repairs were made it was not due to damages on the property but due to fair *wear* and *tear*. Further that if the Plaintiff decided to make repairs for four (4) months and they could not do business that was due to natural causes and was unavoidable.

[14] The above paragraph is an admission by the Defendants that yes indeed the repairs had to be effected and that in so doing they could have taken four months or less.

[15] The question to ask is has the Defendant proven on the balance of probabilities that indeed repairs were effected as a result of fair wear and tear and not damage. Has he done enough to convince the Court that his version more probable than that of Plaintiff.

The Defendants elected not be lead evidence in support of their defence of fair wear and tear. This means that the only version the Court has is that of Plaintiff who did lead evidence in proof of its claim.

[16] The onus was on the Defendant to show that the damage on the premises was due to fair wear and tear and not as claimed by the Plaintiff. This was the case in **(Ocean Accident and Guarantee Corporation ltd Vs KUCIT[1])** wherein **Cloete AJ** said that the onus of proof was on a respondent whose defence was that his illness/medical condition was a direct result of a motor vehicle collision caused by the Applicant to proof his case on a balance of probabilities. **(Kotze V. Johnson[2],)**.

The onus is a normal civil onus and requires proof on a balance of probabilities**. (Miller V. Minister of Pensions[3]).**

[17] By failing to lead evidence in rebuttal and to support their defence it meant that there could not be any cross –examination carried out on witnesses of the defendant. The duty to cross examine is of special importance because it is the primary method of examining and testing viva voce evidence. **Cross-examination in South African Law, Dr JP Pretorius, Butterworths 1997, Pg 148.**

It is therefore impossible for the Court to determine where the truth lies if there is no evidence and lack of cross-examination to verify **(R v Sithole[4]).**

Surely no legal man can suppose that judicial officers can tell whether a witness is or is not speaking the truth by mere divination **(pg 149 supra)**

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1 1963(4) SA P147
2 1928 AD at p.319
3 1947(2) A.E.R at P. 474
4 1959 (1) PH H82(N)

[18] It is the duty of the Court to make a decision when matter is before it; and it is therefore imperative for legal practitioners to fully assist the Court in that regard. Litigants must place the Court in a position to make a proper evaluation of the evidence **(Pg 149 supra).**

In general a witness will deliver his testimony from the witness box **(supra Pg 165).** In *casu* the latter was not done and this places the Court in an awkward position and thus hinders its ability to render justice. The Court was not put in a position to deliberate properly as to which version (of oral evidence) is more probable than the other.

[19] On the other hand Plaintiff has also not been able to prove the full extent of its damages; and more or less seems to have replaced and repaired every item that was subject of the sublease. The managing director of Plaintiff produced a list of items that required to be replaced, but did not however bring evidence to show quantities and the actual cost of repairs.

[20] There are many cases that are authority to the effect that a litigant who sues to recover loss sustained because of the wrongful act of another is entitled to the amount by which his patrimony has been diminished by such conduct[5] **(Tritman V Edwick)**.

[21] The case of **Margaret Rhaphiwiyo Vs Mapitso Khojane**[6] established the principle that to determine such diminution in value Plaintiff would be entitled to establish the difference between the value of the items before and after the

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[5] 1957(1) S.A. 443
[6] (C of A) CIV/APN/22/1995

alleged event in order to prove the specific loss or damages incurred. Plaintiff did not do this and the Manager merely presented a list of the missing and damaged items, which is not enough. Plaintiff is only entitled to the difference in the value of the items before and after the sublease agreement.

[22] In so far as the loss of business is concerned, it is a different story, because the flats were rented at a specific monthly amount which is ascertainable. The only question being whether or not it was reasonable for the Plaintiff to have kept all the flats out of business for four months while the renovations were being done.

[23] It was suggested that the renovation works could have been completed in two months, and furthermore that Plaintiff acted on the wrong basis that all the flats would have to be renovated first and sublet thereafter while an option would have been to renovate say half and reopen for business while the other half continues to be renovated. This would have reduced the losses incurred.

[24] I agree that it was not necessary to renovate all the 15 flats at the same time and lose rental on all of them. I accordingly am obliged to make a reasonable reduction on the amount claimed.

[25] I therefore grant Plaintiff judgment in respect of loss of business for three months only. In the result therefore;

(a) Judgment is granted to the Plaintiff for payment of the amount of **M311,430-00** in respect of damages for lost business.

(b) Plaintiff is also granted interest on the said amount at 7% per annum from the 31st December 2011 to date of Payment.

(c) Costs of the action are awarded to the Plaintiff.

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L.A. MOLETE

JUDGE

For Plaintiff : Mr S.P. Shale

For Defendants : Mr M. Sekati