THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 63/10

In the matter between:

SANDLUNDLU (PTY) LTD Appellant

and

SHEPSTONE AND WYLIE INC Respondent

Neutral citation: *Sandlundlu v Shepstone & Wylie* (63/10) [2010] ZASCA 173 (2 December 2010)

Coram: NUGENT, HEHER, SNYDERS JJA AND R PILLAY AND K PILLAY AJJA

Heard: **8 November 2010**

Delivered: **2 December 2010**

Summary: Damages for breach of contract – factual causation – general damages

ORDER

On appeal from the Kwa-Zulu Natal High Court (Durban) (Nicholson J sitting as court of first instance).

The appeal is dismissed with costs.
The cross appeal is dismissed with costs.

JUDGMENT

SNYDERS JA (Nugent, Heher JJA, R Pillay & K Pillay AJJA concurring)

[1] This is an appeal and a cross appeal from a decision of Nicholson J sitting as court of first instance in the Kwa-Zulu Natal High Court (Durban). The appellant successfully sued the respondent, its former attorney, for damages flowing from the respondent's conceded negligent failure to insert the orally agreed monthly rental in a written lease agreement signed by the parties thereto. The court below granted leave to appeal to this court to both parties.

[2] The appellant was the owner of prime real estate in Port Edward on which a hotel business, the Estuary Hotel, was conducted. The appellant's only shareholders, Mr and Mrs Reardon, wanted to develop a vacant part of the property adjacent to the hotel, but required funding to do so. At about the same time they happened to meet Dr Kotter (Kotter), an Austrian businessman and the majority shareholder in Biz Afrika 987 (Pty) Ltd (Biz Afrika). Kotter showed interest in the hotel business and the planned development and Mr Reardon (Reardon) saw an opportunity to acquire finance through Kotter's involvement. They started negotiating an involved series of transactions. At all material times an attorney, Mr Breytenbach (Breytenbach), from the respondent's firm acted for the appellant and attorney

Mr Michaelides (Michaelides) acted for Kotter and the companies that he controlled.

[3] Their negotiations envisaged, amongst other things, the sub-division of the appellant's land to accommodate the hotel business and the future development on separate pieces of land, a sale of the property on which the hotel was situated, a lease of the hotel business and the taking over of existing liability in respect of several mortgage bonds. The details of the negotiations are irrelevant. It is sufficient to state that, ultimately, as part of an elaborate scheme of transactions it was envisaged that Biz-Afrika would lease the hotel business from the appellant and that Slip Knot Investments 43 (Pty) Ltd (Slip Knot) would buy the sub-divided land on which the hotel business was being conducted.

[4] As a first step in the execution of the envisaged transactions the appellant leased to Biz-Afrika the Estuary Hotel. A lease was drafted by Michaelides. It was common cause that the oral agreement that preceded the written draft was for a monthly rental of R50 000 which was to escalate at a rate of 12 per cent per annum. In October 2000, when Breytenbach presented the draft lease prepared by Michaelides to Reardon for signature, the monthly rental was reflected as R4 500 with an escalation of 10 per cent per annum. Reardon noticed this mistake, pointed it out to Breytenbach, who urged Reardon to nonetheless sign the lease on the strength of an undertaking that he, Breytenbach, would in due course and before signature of the lease on behalf of Biz-Afrika, amend the amount to reflect the orally agreed rental. Reardon obliged, signed the lease and initialled next to the rental amount and escalation that Breytenbach had undertaken to amend.

[5] Biz-Afrika took possession of the hotel business during June 2000, prior to signature of the lease. At the end of November 2000 it paid an amount of R300 000 to the appellant. The appellant contended that the payment

constituted the orally agreed rental for the period June to November 2000.

[6] Breytenbach never amended the rental and escalation as per his instruction or his undertaking. On 18 October 2001 he forwarded the written lease, signed by Reardon, to Michaelides, for the latter's signature. This resulted in the written agreement of lease having been signed by both parties for a monthly rental of R4 500 with a 10 per cent per annum escalation and not for the orally agreed rental of R50 000 with a 12 per cent per annum escalation.

[7] No rental, not even R4 500 per month, was ever paid after November 2000. On 29 January 2002 the appellant and Slip Knot signed an agreement of sale in terms whereof the appellant sold the land on which the hotel business was situated to Slip Knot. This agreement was cancelled by the appellant during August 2002 as a result of Slip Knot's failure to cooperate in taking transfer of the property.

[8] Arbitration proceedings were launched by the appellant to effect a rectification of the lease agreement to reflect the rental orally agreed. Despite Biz-Afrika's opposition to the rectification sought it was granted on 4 February 2005. On 7 June 2005 the appellant cancelled the lease agreement due to Biz-Afrika's failure to pay rental. It then proceeded to seek Biz-Afrika's eviction by way of application proceedings, which was also opposed. After an unsuccessful attempt to appeal an eviction order granted during December 2005, the appellant successfully evicted Biz-Afrika during April 2006. On 9 May 2007 Biz-Afrika was liquidated. The appellant recovered no rental.

[9] The appellant relied on Breytenbach's failure to correct the rental amount in the lease agreement as a breach of his mandate for a damages claim. The breach of mandate was conceded in the following words in the respondent's

plea:

'The Defendant admits that Breytenbach:-

(a) failed to amend Clauses 4.1.1 and 4.1.2 so as to reflect a monthly rental of R50 000.00 and an escalation of 12% per annum on the rent payable;

(b) forwarded the agreement of lease, a copy of which is annexure "D1" hereto, to Michaelides, which agreement reflected an amount of R4 500.00 per month as rental for the first year with an escalation of 10% per annum as a rental payable;''

[10] The appellant alleged that its damages included:

(a) R6 159 267.74 representing the total of rental of R50 000 per month escalated at 12 per cent per annum over the period 1 December 2000 until April 2006 with interest at the rate of 15.5 per cent per annum accruing monthly as and when the monthly rental became due and payable;

(b) Legal fees, including attorney and client costs, for the arbitration proceedings in the amount of R450 000 together with interest on that amount at 15.5 per cent per annum from the date of service of summons until the date of final payment. During the course of the proceedings this issue was limited by agreement to the question whether the respondent was liable to pay the attorney and client costs or only party and party costs.

[11] The court below granted the appellant damages for the loss of rental income restricted to March 2002, the likely date upon which registration of transfer of the property in terms of the sale of January 2002 would have been effected. It awarded the appellant interest at 15.5 per cent per annum as damages calculated, not monthly, but from the date of service of summons. The court issued a declarator that the appellant was entitled to be paid its attorney and client costs in respect of the arbitration proceedings. The appellant was awarded its costs of suit.

[12] The appellant seeks to increase the damages awarded to include rental

for the full period until the eviction of Biz-Afrika in March 2006 and interest calculated from each month as the rental became due, owing and payable. The respondent's main contention in the cross appeal is that the factual cause of the loss was the dishonest conduct of Michaelides and not the negligence of Breytenbach. It seeks the replacement of the order of the court below with an order that the appellant's claim be dismissed with costs. Insofar as this court finds that Breytenbach's negligence was the sole cause of the loss suffered by the appellant and that the damages are recoverable in law, the respondent does not take issue with the award of damages made by the trial court and only seeks an amendment of the declarator by the court below to restrict the award in relation to the costs of the arbitration proceedings to party and party costs.

[13] A plaintiff who enforces a contractual claim arising from the breach of a contract needs to prove, on a balance of probability, that the breach was a cause of the loss.[1]

[14] In *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700F-G Corbett CJ explained the practical enquiry in the following terms:

'The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not so have ensued.'

1 The test for factual causation is the same in delictual and contractual cases, see *Vision Projects (Pty) Ltd v Cooper Conroy Bell & Richards Inc* 1998 (4) SA 1182 (SCA) at 1191I-J.

[15] Nugent JA in *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 25 pointed to the conceptual difficulties that arise when the enquiry is made:

'There are conceptual hurdles to be crossed when reasoning along those lines for, once the conduct that actually occurred is mentally eliminated and replaced by hypothetical conduct, questions will immediately arise as to the extent to which consequential events would have been influenced by the changed circumstances. Inherent in that form of reasoning is thus considerable scope for speculation which can only broaden as the distance between the [breach] and its alleged effect increases. No doubt a stage will be reached at which the distance between cause and effect is so great that the connection will become altogether too tenuous, but, in my view, that should not be permitted to be exaggerated unduly. A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.'

[16] During the hearing counsel for the respondent developed his argument on factual causation. He no longer relied only on Michaelides' dishonesty, but also that of Kotter and undisputed facts which he submitted indicated that the appellant would not have recovered any rental from Biz-Afrika. These facts are:

(a) Kotter, the mind behind Biz-Afrika, was dishonest. He paid no rental, not even the rental he contended was payable, from December 2000. Michaelides, on the instructions of Kotter resisted the rectification of the agreement whilst being fully aware that their basis for doing so was dishonest. On the same basis they resisted eviction, appealed the eviction order when it was ultimately granted and Michaelides surreptitiously tried to obtain an order suspending the order of eviction;

(b) The appellant has failed to recover any portion of the rental liability for the relevant period;

(c) Biz-Afrika was, from the inception of the lease, not conducting the hotel business efficiently or profitably and there probably would not have been

funds to meet any claim for arrear rental;

(d) Ultimately Biz-Afrika was hopelessly insolvent to the extent that no dividend resulted from its liquidation on 9 May 2007, illustrating that recovery of rental from it would not have been possible.

[17] On these facts counsel for the respondent asked this court to infer that the appellant probably would have been unable to recover any rental from Biz-Afrika irrespective of whether the agreement of lease contained the correct rental. He submitted that if Breytenbach had presented Michaelides and Kotter with an agreement that reflected the agreed rental of R50 000 they probably would not have signed that agreement. The respondent's contentions favour speculation that does not take account of other relevant facts and considerations.

[18] When Reardon was faced with the draft written lease agreement for the incorrect rental he telephoned Michaelides who then confirmed that the agreement should have reflected the rental as R50 000 per month. Despite this verbal concession, Biz-Afrika's opportunity to be dishonest was hugely increased, if not created, when it was asked to complete the signing of a lease for rental of R4 500 per month. One of the very reasons for instructing an attorney to see to the conclusion of a written agreement that reflects the true bargain between parties is to avoid dishonesty, be that of an attorney or his or her client. The appellant's position was hugely eroded in that it did not have a written agreement in support of its claim for arrear rental against a non-paying or dishonest lessee. It had to seek rectification of the written agreement before it could enforce its claim. Further transactions were envisaged which were Reardon's means to alleviate his financial burden and realise his future plans which he chose not to put at risk by pursuing the rectification straight away. During the early stages of the lease, as is evident from the payment of R300 000 to the appellant during November 2000, Biz-Afrika had access to money. That it was hopelessly insolvent five years later does not mean there were no resources available to cover a rental liability for at least some period

after November 2000.

[19] Considering all the facts, it is probable that if Breytenbach had not failed to execute his mandate there would not have been the opportunity for Biz-Afrika to rely on the written lease agreement in support of its dishonest contention, there would have been no need to pursue a rectification of the agreement before it could have been enforced and the appellant would probably have taken steps to enforce payment of the significant monthly rental at a much earlier stage. If it did it is probable that it would have made some recovery. The facts singled out by the respondent do not show that there are no such probabilities. Consequently it is probable that Breytenbach's failure did cause loss to the appellant.

[20] This conclusion does not entitle the appellant to all the damages it suffered. The general rule in relation to contractual damages is that the appellant is entitled to be put in the position it would have been in if the respondent executed its mandate properly. The general rule suggests that some line needs to be drawn to ensure that the respondent should not be caused undue hardship. The line is drawn with regard to broad principles of causation and remoteness. In *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 687 C-F the rationale for the rule in regard to an award of damages for breach of contract was eloquently stated as follows:

'The fundamental rule in regard to the award of damages for breach of contract is that the sufferer should be placed in the position he would have occupied had the contract been properly performed, so far as this can be done by the payment of money and without undue hardship to the defaulting party . . . . To ensure that undue hardship is not imposed on the defaulting party the sufferer is obliged to take reasonable steps to mitigate his loss or damage. . . . and, in addition, the defaulting party's liability is limited in terms of broad principles of causation and remoteness, to (a) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a

probable result of the breach, and (b) those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach. . . .'

[21] The actual test to be applied was stated as follows in *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 581G-I:
'That approach, postulating as it does not a likelihood (at the upper end of the scale) of the harm complained of occurring but (at the lower end) a realistic possibility thereof, appears to me to be sensible and sound. Parties cannot contemplate what they cannot foresee. In the end it will usually turn on the degree of foreseeability of the kind of harm incurred . . . . What matters to the law is, of course, not infinite but reasonable foreseeability. Leaving aside a typical situation (such as, for instance, a circumstance which was foreseeable by only one of the parties or only at the time of breach and not *also* at the time of contract), what is required to be reasonably foreseeable is not that the type of event or circumstance causing the loss will in all probability occur but minimally that its occurrence is not improbable and would tend to follow upon the breach as a matter of course.'

[22] The appellant's claim is for damages that flowed naturally and generally from the breach, the so-called (a)-leg of *Holmdene*. The appellant seeks to increase the damages in respect of lost rental over a longer period than was awarded by the trial court, to include the full period until Biz-Afrika was ultimately evicted. The respondent's principal attack was not that the appellant did not suffer damages, only that its negligence was not the cause of any damages suffered. In the event of failure on that point it confined its cross appeal to the scale of costs to be awarded in relation to the arbitration proceedings. It is therefore only necessary to consider whether the trial court should have awarded damages for loss of rental beyond March 2002.

[23] At the time of the conclusion of the sale in January 2002 it was evident that the relationship between Reardon and Kotter, and therefore the

companies they controlled, was soured, cash flow was problematic for all the parties and the contemplated future transactions were at risk. It is improbable that in those circumstances the appellant would have been successful in recovering rental of R50 000 per month until 2006. The evidence does not establish as a probability that damages were sustained after the period fixed by the trial court.

[24] Insofar as the attorney and client costs of the arbitration proceedings to effect a rectification are concerned, the test to be applied, as set out above, leads to the conclusion that those costs were within the contemplation of the parties as a reasonably foreseeable result of including the wrong rental in a written lease agreement. On behalf of the respondent it was submitted that attorney and client costs are not 'incurred necessarily and are therefore not recoverable as damages'. The submission is inappropriate for two reasons. First, it does not apply the correct test for the assessment of damages set out above. Second, the authorities on which it is based deal with a very different scenario of a party seeking costs as damages in subsequent proceedings when those costs were not awarded in initial proceedings between the same parties.[2] The respondent has not explained why party and party costs would have been in the contemplation of the parties at the time and not attorney and client costs.

[25] Insofar as the interest on the monthly rental is concerned, the trial judge correctly dealt with the matter and there is no need to repeat the findings. The essence of it is that the payment of interest on arrear rental was not part of the lease agreement and there was no proof that a demand was ever made that could have activated the payment of mora interest. The court below accepted the date of service of summons as the date of demand and allowed interest, as damages, from that date.

---

2 *So*me of the authorities relied upon are *Union Discount Co Ltd v Zoller* [2002] 1 All ER 693 (CA) and *Rothschild v Van Wyk* 1916 TPD 270.

[26] The appeal is dismissed with costs.

The cross appeal is dismissed with costs.

APPEARANCES:

For appellant: J G Wasserman SC (with him C L H Harms)

Instructed by De Villiers, Evans and Petit, Durban,
Matsepes Inc., Bloemfontein.

For respondent: P J Olsen SC (with him G R Thatcher)

Instructed by Deneys Reitz Attorneys, Durban,
Webbers, Bloemfontein.