IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED
2/10/2014
DATE SIGNATURE

3/10/2014

Case No: **A943/2013**

In the matter between:

LITTLE RIVER TRADING 95 (PTY) Ltd — Appellant (Defendant *a quo*)

And

GERRIT CORNELIUS BEZUIDENHOUT — Respondent (Plaintiff *a quo*)

JUDGMENT

STRAUSS AJ:

[1] The respondent claimed payment for damages in the amount of R134 770,00, in the Magistrate Court, Pretoria, based on breach of a lease agreement, the appellant also counter claimed for outstanding rental due to the cancelation of the lease agreement. The Court *a quo* gave judgment in favour of the respondent, dismissed the counterclaim of the appellant, and the appellant now appeals against the judgment by the Regional Magistrate Louw given on 10 June 2013.

THE PLEADINGS:

[2] The respondent's claim is based on a written lease agreement entered into between the parties on 31 May 2011. A copy of the aforesaid written lease agreement was annexed to the Particulars of Claim, as annexure 'A".

[3] It should be pointed out, at this stage, that the appellant, during the course of the trial, denied that a further annexure annexed to such lease agreement formed part of the initial agreement between the parties. This further annexure was a plan setting out demarcated plots, on the land and both counsel incorrectly referred to this plan as Annexure "A' throughout the appeal. The appellant however still persisted with its contention that the plan, was not a term implying that a singular access road would be given to the area and that the

respondent contracted on the basis that singular access would be provided.

THE COMMON CAUSE FACTS

[4] It is common cause that the respondent took occupation of the leased premises on 1 September 2011; he paid a deposit of R28 000,00 being one month's rental and also paid rental for the month of September 2011, and vacated the premises at the end of September 2011.

[5] The respondent's claim is based on breach of contract; in the alternative misrepresentation, that relates to the implied term of the agreement in that a representation was made that singular access would be given to the leased premises. The respondent's claim for damages is for improvements to the leased premises effected by him prior to occupation of the premises. The respondent set out the specific amounts for such improvements, which amounts were paid to third party contractors.

[6] Both the appellants and the respondent amended the quantum of their claims. The respondent amended his claim; which became R134 770, 00, by subtracting an amount of R41 600, 00, from the amount claimed, due to the fact that he removed the shadow netting on the premises after cancellation of the contract. The appellant also amended its counterclaim which became

R188 000.00, after subtracting the value of the shadow netting from its claim, therefore only claiming for outstanding months' rental at R15 000,00 per month, due in terms of the lease agreement.

[7] It was common cause that the pedestrian accesses were already opened by other lessees situated in Zambezi street in September 2011 when the respondent occupied the premises, two months after the contract was concluded. The additional vehicle access gate was opened only during the middle of September 2011 when the respondent was already trading from the premises.

[8] In regard to the improvements it was common cause between the parties that every lessee, indeed, had to effect certain improvements on the property in order to run a business from the property, which was an undeveloped open piece of land. Thus the lessees occupying the premises had to erect a structure from which to trade, connect their own electricity and also erect palisades around their specific stands, and could also erect shading on the stand. The appellant was not obliged to make any improvements to the property.

EVIDENCE

[9] The respondent and Mr. Cilliers testified in the respondent's case. The respondent testified that he had met Mr. Odendaal the only

director of the appellant on the property during April or May 2011, on which occasion the map was shown to him. He testified that representations were made regarding a singular access to the premises, which caused him to choose stands 19 and 20 on the map, as he could not choose stands 7 to 13 which had already been allocated to other lessees at the time he signed the lease agreement.

[10] I pause to mention that the stands chosen by the Respondent, 19 and 20 on the map, are situated directly in front of the access road from the eastern direction. The map showed a circular route through all the stands on the map. The respondent testified that he chose these stands, as according to him, they would provide him with the best exposure to traffic entering the premises.

[11] He testified that certain improvements were made to the leased premises and that certain directions were given by the appellant regarding the aesthetics of such improvements. He testified on more than one occasion that had he known of the additional accesses to the premises, being the pedestrian accesses, he would have chosen other stands.

[12] The respondent testified that a second gate was opened by the appellant during September 2011, and denied that he ever agreed

to this gate being opened, and the opening of the gate, according to him, was a material breach of the agreement. The appellant, on the contrary, testified that it was at the insistence of the respondent that the second gate was opened in order to allow "more feet", so to say, on the property.

[13] The respondent said that he cancelled the agreement orally and also sent an e-mail to the appellant to this effect, which was also included in the documents before the Court *a quo*. In the e-mail the respondent mentioned that they (him and the appellant) needed to come to an agreement and have a discussion in regard to the improvements and payment for these improvements that he had made.

[14] What is further of importance is that the respondent conceded that if the contract had reached its fulfilment and he stayed on the property and moved out thereafter, he would have attempted to sell the improvements that he had erected to the next lessee taking over the premises. Based on this concession, the respondent at least foresaw that any improvements he would make on the property would be for his own pocket and he would not be able to claim this back from the appellant, <u>had the contract run its course without a breach.</u> (my emphasis)

[15] All the improvements the respondent had effected on the property, having regards to the amendment, amounted to R134.770.00.

[16] To prove his claim for the improvements he had effected, he produced at trial receipts evidencing payments he made for the actual improvements effected on the property. The reasonableness of the amounts and not the reasonableness of the improvements were in dispute.

[17] Mr. Cilliers, the second witness called on behalf of the respondent, testified that certain improvements had to be made to the premises to enable him to do business. He indicated that he occupied stands 19 and 20 after such stands were vacated by the respondent. He only paid rent in respect of stand 22 and concluded no lease agreement in respect of stands 19 and 20.

[18] Mr. Cilliers, while occupying stands 19 and 20, paid R15 000,00 per month as rental for these stands. No other lessee could occupy these stands occupied by Mr. Cilliers, which were previously occupied by the respondent. The appellant therefore received a rental income for stands 19 and 20. Mr. Cilliers also testified that there was no obligation in terms of the lease agreement to make any improvements to the property, but that such improvements were necessary to conduct business.

[19] He also confirmed that he understood that if he vacated the stands, he had to leave the improvements on the property, but he could enter into an agreement with the next lessee in order for the lessee to reimburse him for the improvements he would have effected, on the property.

[20] The appellant testified that he had no obligation to make any improvements to the leased premises in terms of the agreement, and he disputed that the purpose of the map was to identify the access route. He testified that the map was only to identify the leased premises and the stands. He further testified that the agreement made no provision for improvements that should be made to the leased premises by each party, and as such he had no obligation to erect the palisade fencing surrounding the premises. He did so to secure the premises and for the safety of the lessees.

[21] He contended that he did not give written permission for the effecting of the improvements as per the contract, but agreed that he had allowed it, and set certain standards to all the lessees who would make the necessary improvements, adding that the lessees knew that if they had effected such improvements, it would be for their own account. The only requirement was that the improvements on the stands should conform to all the other

improvements already made by the other lessees.

[22] He denied representing to the respondent that a singular access road would be provided to the premises and testified that the respondent chose stands 19 and 20 because they were the best compared to other stands available. All the stands adjacent to Zambesi Drive were at that stage already reserved and deposits paid. He did, however, concede that the respondent could have chosen the stands because the road depicted on the map led to stands 19 and 20, and that this could have influenced the respondent to choose these stands.

[23] He stated that he had drafted the map himself and showed it to prospective lessees to indicate the stands on the property. The access route on the map was also depicted by him, but the premises, at that stage, had not been fenced with a palisade that he had later erected.

[24] In cross examination he conceded that he foresaw that he would open up another access route when the lease agreement was signed. The road would lead to the kiosk. In the beginning of September, when the respondent occupied the stands, this access gate was locked and he only opened it during September 2011.

[25] The pedestrian accesses were opened up by the lessees situated in Zambezi street, to whom he had given permission to open. When asked by the respondent to close these gates, he refused, giving the reason that he had already given permission to the other lessees to open these gates. He denied that he was ever inclined to reimburse the respondent for the improvements, stating that the reimbursement had to be agreed to, and sorted out between the lessees, at such time a lessee vacated the stand, and another lessee took over.

[26] Mr. Naude who also testified on behalf of the appellant confirmed that all the improvements made at the premises were effected by the lessees making use of their own contractors, on the understanding that it would be for their own account. Lessees vacating the property, would have to enter into an agreement with any new lessees in order to get some of their money back for the improvements made. He said he was also never under the impression that he could take the improvements with him, when he vacated the premises.

[27] He testified that he was still conducting business from the premises, and that the access to the premises, either by road or pedestrian gates, did not influence his business due to the fact that pedestrians coming onto the premises, had regard to all the cars on the premises, and not only to cars in one specific stand. He also

advertised.

THE AGREEMENT

[28] The leased premises, in the lease agreement, is defined as demarcated stands19 and 20 at R26 "Wolmaranspoort" and that the premises were leased "voetstoots".

[29] The agreement neither refers to any access to the premises, nor to any written permission that must be obtained from the lessor, in order to erect shading or palisades. The only term in the lease agreement that refers to written permission is the written permission in regard to the wooden structure that had to be erected and for which a plan had to be produced.

[30] Considering the evidence, in its entirety, it is clear that none of the lessees ever provided a plan for the erection of the wooden hut, but it was ostensibly done with the permission, although not written, of the appellant.

ISSUES ON APPEAL

[31] The following questions need to be answered:

(a) Whether it was an implied term of the agreement that singular access to the property would be provided by the appellant and if such a representation was ever made by Mr Odendaal on behalf

of the appellant. If such a term is to be implied, whether there was breach of such a material term that went to the root of the contract when the appellant, in fact, opened up or allowed the pedestrian access as well as the introduction of the second vehicle access to the property.

(b) The second question is, whether if the representation was made, such representation was intended, and if so whether such representation induced the respondent to enter into the agreement.

[32] Should it be found that the term was indeed implied, and that a material breach thereof was committed, and that the respondent had acted thereon to his prejudice, the court has to enquire whether the respondent has, as a result thereof, suffered damages.

[33] The nature of damages for breach of contract was stated by Innes J in ***Victoria Falls and Transvaal Power Co Ltd v. Consolidated Langlaagte Mines Ltd,*** *1915 AD 1 22* as follows:

"The agreement was not one for the sale of goods or of a commodity procurable elsewhere. So that we must apply the general principles which govern the investigation of that most difficult question of fact- the assessment of compensation for breach of contract. The sufferer by such a breach should be placed in the position he would have occupied had the contact been performed, so far as that can be done

by the payment of money and without undue hardship to the defaulting party."

In ***Mainline Carriers Ltd v. Jaad Investments CC*** *1998(2) SA 468 (C) at 475 [18] –[21]* The court per Farlam J discussed the interest that is to be protected by remedies by breach in discussing the article of Fuller and Perdue:

"Many forms of reliance falling short of these which benefit the other party may be recoverable on a claim for reliance loss, and in spite of the difficulty of distinguishing between restitution and reliance in borderline cases, the two concepts remain distinct. The phrase restitutionary damages has indeed been used in south Africa to cover both concepts in order to emphasise the destination between them and damages for loss of expectations. But this usage is confusing, leading to the imposition of condition e.g. as to the restoration of benefits received by the plaintiff, on a claim for reliance loss, which are only appropriate where restitution is claimed. Here it is only necessary to stress the general point that protection of the reliance and restitution interest is not regarded as adequate. A contracting party cannot limit his liability by simply restoring what he has received or by compensating the other party for his reliance loss. He is in principal bound to perform or to compensate the other party for loss of his bargain. The plaintiff in a contractual action may have the option of formulating his claim onone or the other bases, but the defendant has no corresponding option."

And at 484 [57] "It follows from an acceptance of the correctness of this analysis that there is room in our law for the protection by contractual damages of a plaintiffs reliance(or negative) interest in the event of breach subject to Fuller and Perdue's 'very simple formula that recovery of the reliance interest is limited by the expectation interest."*

[34] Different dicta in other cases were mentioned wherein some instances a party may elect to claim reliance damages. One of these instances is referred to in the case of ***Tweedie v Park Travel Agency (Pty) Ltd t/a Park Tours*** *1998(4) SA 802 (W).* Where the issue related to: *The cost of a tour and expenses incurred which were rendered useless by the Defendant's failure to supply test match tickets which were the object of the tour.*

Both counsel in this matter referred us to this case, albeit for different reasons.

[35] In another matter referred to: ***The Masters v. Thain t/a Inhaca Safaris*** *2000(1) SA 467,* an amount was claimed by the appellant from the respondent for a ten day holiday package. It was argued by the appellant's counsel that the first crucial distinguishable factor between the aforesaid case law and the facts *in casu* was that the said amount referred to herein was paid to the respondent, and not to third parties as it was the case *in casu.*

[36] In the ***Master***'s case supra, Horwitz AJ then continued and stated at 473 "*in the instant case, however, the Plaintiff's claim was for an amount of money that he had paid to the Defendant herself. The claim was not for a loss suffered in consequence of his having paid money to a third party. That distinguishing feature I have apprehended lies at the heart of the difference between negative and positive interesse. Where an injured party to the contract cancels that contract by reason of a breach by the opposite party (the guilty party) his claim that that guilty party should repay or deliver to the injured party the latter's presentation under the contract does not as a rule fall within the purview of claims for payment of negative interesse.*"..... *Such claims would usually be cast in the mould of the distinct remedy referred to by Botha JA and Nienaber J. It is fallacious to argue, merely because the injured party is claiming back and amount form the defendant, which would have the effect of putting the injured party back in the position that he would have been had the parties not concluded the contract, that therefore the claim is one for payment of the injured parties negative interesse. Nevertheless , even if the plaintiff's claim fits the mould of a claim for negative interesse, so that by awarding the plaintiff the amount of his claim he reverts to the position he would have been had he not entered into the contract with the defendant, that is purely coincidental.*

At 475 "The practical effect of this is to restore the plaintiff to the position in which he would have been, had he not contracted with the

defendant. For this reason, the claim might appear to be one for compensation in respect of the plaintiff's negative interesse. Whether it can juristically be categorised as such a claim does not detract from the fact that it can also be categorised as the other types of claim. If the plaintiff's claim fits a legally cognisable one, it matters not that by some coincidence it also fits one that the law does not recognise."

[37] In the present case, it is argued by the appellant, that the respondent paid the amounts to third parties, that is contractors, and improved the land and did not pay the appellant, and further that even if the term regarding singular access was incorporated as part of the agreement, and that such a term was breached by the appellant, the respondent can only be put in the position he would have been in if the appellant performed in terms of the agreement.

[38] If that is the case, it is argued, the respondent would not have been entitled to recover from the appellant the costs incurred relating to the improvement of the premises. At best, it is argued, the respondent would have had an enrichment claim for improving the property against the owner of the property and not the appellant.

[39] On the facts of this matter it is so that the respondent paid the amounts to contractors, however, by doing so, he enabled the

appellant to, in future, lease out the premises to prospective lessees with the improvements already effected by the respondent.

[40] It is clear that because of the improvements, the appellant, in future will be able to charge more money as rental to any prospective lessee. The appellant, therefore, will no doubt benefit from the improvements.

[41] The appellant had a lease agreement with the Department of Public Works, in terms of which the whole piece of land was leased from the Department. The difference between the amount of lease he paid to the Department of Public Works and the amounts paid to him by all the lessees would be for his pocket alone, and therefore any improvements made on the property would be to the benefit of the appellant, and not to the benefit of the actual landowner.

[42] The respondent's claim, throughout, has been that there was a breach of a material term of the lease agreement, and based on that, the respondent cancelled the lease agreement, and claimed damages arising from such breach representing the value of the improvements made by him on the property.

[43] The respondent reiterated in its address to the court a quo that its claim was not based on an enrichment or a type of *condictio* claim, but on damages.

[44] The Court *a quo* in its judgment found that the respondent had proven that there was a material misrepresentation in that the appellant had indicated to the respondent that there would be a singular access to the property and that if the respondent had been aware of the additional gates, he would not have entered into this specific contract.

[45] The Court *a quo* further found that the statement by the appellant was made deliberately and seriously and it was due to this, that same was an implied term of the contract. The Court *a quo* further found that misrepresentation was established by the respondent, who had thereby been influenced to conclude the contract with the appellant.

[46] The Court *a quo* further found that the respondent had proven on a balance of probabilities, at the very least, negligent misrepresentation by the appellant, on a material aspect of the contract and that the respondent, therefore, had the right to cancel the contract. The court *a quo*, in my view, correctly dismissed the appellant's counterclaim.

[47] As to damages the Court *a quo* found that the respondent could either claim his actual damages, or could be placed in the position that he would have been in, if the misrepresentation had not been made.

[48] In the ***Tweedie*** case referred to the following is stated at 808:

"There is authority for allowing the recovery of expenses incurred by an aggrieved party and which became useless by reason of the other party's breach of the contract in connection with which they were incurred. The justification for the awards in the cases to which I had referred and for the appellant's claim in the present matter for reimbursement of expenses they incurred is simply that where a party has claimed restitution (in the non - technical sense) by reason of the other party's breach, he must obviously be entitled in addition to claim expenditure reasonably incurred in reliance on the other party's expected performance and which has been wasted – subject to the provision that the economic consequences of the contract which he did enter into, must be taken into account.".

[49] The Court *a quo* found that the respondent had proved his actual damages by proving his actual expenses that he incurred in order to put himself in a position to comply with the purpose of the contract. Regarding damages in delict the Court referred to the case of ***Joel v. Bramwell Jones & Others***, *2001 All SA Law Reports, p. 162* where the following was stated" .

"The element of damages or loss is fundamental to the Aqaulian action and the right of action is incomplete until damages is caused to the plaintiff by reason of the defendant's wrongful conduct. ***Evens v. Shield*** *1980(2) SA 814 SA (A) at 838 H to 830 C. "This applies no*

less to claims arising from pure economical loss than it does from claims arising from bodily injury or damage to property. Whether a plaintiff has suffered damage or not is a fact which like any other element of his cause of action and subject to what is set out below, must be established on a balance of probabilities. Once the damage or loss is established, a Court will do its best to quantify that loss even if it involves a degree of guesswork."

[50] The respondent's claim in the alternative, is set out in paragraph 9 of the particulars of claim, which I will not repeat herein. Essentially the respondent alleged that the appellant had made an intentional alternatively negligent misrepresentation when he stated that there would only be one access road to the property and that there would be no other roads or entrances leading to the property. The respondent further alleged that the appellant, when making these representations, knew they were false and knew that the respondent would act thereon and enter into the contract and that the misrepresentations induced him to enter into the contract. The respondent as a result therefore entered into the contract and effected the necessary improvements, in the amount as mentioned.

[51] Having regard to the case law referred to above, it therefore stands to reason that if this Court finds that the Court *a quo* correctly found that misrepresentation was made by the appellant, and that it induced the

contract between the parties, the respondent should be placed in the position he was, before he entered into the contract, and should therefore be able to claim his actual damages suffered, being the improvements on the property.

[52] I find that on the evidence presented, the trial court, having the advantage of observing the witnesses and their demeanour correctly found that the respondent was a truthful, honest and credible witness, and that the appellant was not.

[53] The respondent's version that he never requested the appellant to open up the other vehicle access is supported by the evidence of the appellant who confirmed that the respondent was unhappy about the pedestrian access gates, and requested him to close them. The testimony on behalf of the appellant that the respondent requested another access gate to be opened leading away from his stands towards the kiosk was in total contradiction to the respondent's previous request that the pedestrian gates be closed. The appellant's version in this regard thus seems contrived, and I find, that the respondents continued disapproval towards other access gates being opened, supports his version.

[54] On the evidence, I find that the respondent, when entering into the contract in May 2011, was induced and as a result chose stands 19

and 20. Evidence and the plan, persuade me to conclude that a normal person, seeing the plan which showed a singular access route leading directly to stands 19 and 20, with no other stands available adjacent to Zambezi road from which access to the premises could be given, would have had reason to accept that this would give them the best exposure to the public and sales.

[55] The respondent, acting on this misrepresentation, went ahead and effected all the improvements he was obliged to do for the effective conduct of his business on the premises.

[56] In September, when the respondent started trading from the premises, the pedestrian accesses were present, he was unhappy with the state of affairs but decided to stay on the property, at the time there was still only one access road leading to his property.

[57] The straw that broke the camel's back, seems to me to be the fact that the appellant opened up another road leading traffic away from the respondent's stands. Very shortly thereafter, and as a result, the respondent vacated the premises and attempted to remove the improvements. This, in my view, points to the subjective mind of the respondent at the time thinking that due to the fact that the contract had not run its course, and that there was misrepresentation, he could take the improvements made by him.

[58] The respondent's email to the appellant dealing with payment of the value of the improvements effected by him, confirmed his view that the improvements made were his own property.

[59] Whether other lessees sold vehicles or not on the stands smaller or similar to the respondent's, is irrelevant. That does not assist this court in determining whether, in fact, the respondent was induced into entering into the contract or not. The respondent did not advertise that he was selling vehicles as he reasonably believed that the singular access road would lead prospective buyers directly to his premises. This we know did not happen as he only sold one vehicle in the month he was on the premises.

[60] The trial court was correct in finding that the misrepresentation by the appellant induced the contract, There can be no other reasonable conclusion in light of the fact that the respondent, at great costs, effected the improvements and only traded for one month before cancelling the contract. His actions point to the conclusion that he was not willing to continue with a contract that was concluded as a result of misrepresentation of material facts.

[61] In finding in favour of the respondent on misrepresentation it is trite law that he has to be placed in the position he was in before entering into the contract.

[62] The respondent proved the costs of the improvements by proving the actual amounts paid to contractors for such improvements. The evidence further supported the fact that the expenses incurred by him were reasonable and in certain instances lower than the expenses of contractors suggested by the appellant. I find, therefore, that the attack directed at the reasonableness of the actual amounts paid, is without merit.

[63] The parties contemplated the expenses that would be incurred and the appellant knew that the respondent would incur these expenses if he wanted to trade from the premises. It was, in the circumstances, incumbent on the appellant to advise the respondent on all the access routes which would be given to the premises prior to the conclusion of the agreement. In that event, the respondent, would probably not have entered into the contract.

[64] There was no need for any expert evidence to prove the specific amounts paid by the respondent to the contractors as he was the best witness regarding the issue of the actual expenses he incurred. Thus he successfully proved, by showing and demonstrating the actual payment that he made. The appeal, in my view, therefore should fail.

I thus make the following order:

The appeal is dismissed with costs.

S STRAUSS

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

M W MSIMEKI

JUDGE OF THE HIGH COURT

Heard on:	**29 May 2014**
For the Applicant:	**Adv.:**
Instructed by:	**VAN DER HOFF INGELYF**
For the Respondents:	**Adv.:**
Instructed by:	**PIETER W DE WET PROKUREURS**
Date of Judgment:	**3/10/2014**