IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: ~~YES~~ / NO.	
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.	
(3) REVISED.	
28/07/2016	
DATE	SIGNATURE

CASE NO: A647/2015

DATE: 28/7/2016

IN THE MATTER BETWEEN:

BEAUX LANE (S.A.) PROPERTIES LIMITED

APPELLANT
(Plaintiff in the Court *a quo*)

AND

THE MINISTER OF PUBLIC WORKS N.O.

FIRST RESPONDENT
(First defendant in the Court *a quo*)

THE EXECUTIVE AUTHORITY OF THE DEPARTMENT OF PUBLIC WORKS

SECOND RESPONDENT
(Second defendant in the Court *a quo*)

JUDGMENT

KOLLAPEN J:

1. This appeal comes before this Court following the dismissal of an action for damages instituted by the appellant against the respondent in the Court *a quo*. Leave to appeal was sought and granted by the trial Court in respect of the order as well as paragraphs 17 and 18 of the judgment of the Court *a quo*.

2. Paragraph 17 and 18 of the judgment of the Court *a quo* read as follows:

> *17. This situation clearly concerns the causal link between the damages claimed and the breach. It therefore also begs the question how it can be said, in the circumstances of the case, that the selling of the property at a so called "reduced" price could have been reasonable foreseeable as a realistic possibility.*
>
> *18. Accordingly it has to be found that there is no fact before this Court substantiating a causal link between the breach of the agreement and the damages claimed.*

The issues before the Court a quo and the issues on appeal

3. By way of background the matter served before the Court a quo in terms of a stated case in terms of Rules 33(1) and (2) and the following facts are relevant for the purposes of this appeal:

    i. During 2000, the Department of Public Works ('the Department') entered into a written lease agreement with a company known as Leopont 163 Properties (Pty) Ltd ("Leopont") for the period 1 September 2000 to 31 August 2010. During 2007, Leopont sold the property to the plaintiff and in doing so, ceded, assigned and transferred Leopont's rights and obligations in terms of the lease

agreement to the plaintiff. Clause 23 of the lease agreement expressly contemplated such a sale of the property.

ii. Subsequent to the sale of the property to the plaintiff, the plaintiff and the Department extended the period of the lease until 30 April 2011.

iii. The material terms of the lease agreement were that:

a. The Department would use the property only for the purposes of "official residence";

b. Upon termination of the lease agreement the Department would immediately vacate the property and restore free and undisturbed possession of the property to the plaintiff.

iv. The property was leased by the Department of Public Works to provide residence to officers of the Department of Correctional Services ('the DOC'), which officers occupied the property from the commencement of the lease agreement in accordance with the terms and conditions that were applicable to their employment with the DOC.

v. During November 2009, the DOC gave the officers notice to vacate the property on or before 31 August 2010, pursuant to a decision taken by the DOC that the lease agreement would not be renewed. Despite such notice and by 20 January 2011, approximately 70 families of the relevant officers had not yet vacated the property.

vi. On March 2011, the plaintiff gave the Department one month's written notice of termination of the lease agreement with effect from 30 April 2011, and simultaneously informed the Department that it had sold the property and that in the event that the Department failed to provide vacant possession of the property by 30 April 2011, the plaintiff would suffer damages.

vii. On 24 January 2011, the property was sold by the plaintiff to Midnight Storm pursuant to a written agreement of sale concluded on 24 January 2011 in terms of which:

a. The purchase price for the property was the amount of 40 million Rand;

b. Vacant occupation and possession of the property would be given to Midnight Storm on 11 April 2011 and should the plaintiff fail to give vacant occupation to Midnight Storm on that date, Midnight Storm would have the right to cancel the sale agreement;

viii. Pursuant to a first addendum to the agreement of sale concluded on 3 March 2011, in terms of which vacant occupation of the property would be given to Midnight Storm on 11 May 2011 and should the plaintiff fail to give vacant occupation to Midnight Storm on that date, Midnight Storm would have the right to cancel the sale agreement;

ix. Pursuant to a second addendum to the agreement of sale concluded on 12 May 2011, in terms of which vacant occupation of the property would be given to Midnight Storm on 1 June 2011 and should the plaintiff fail to give vacant occupation to Midnight Storm on that date, Midnight Storm would have the right to cancel the sale agreement.

x. On 24 May 2011, the plaintiff was granted an order evicting the Department and the officers of the DOC from the property, with effect from 1 June 2011 ("the eviction order").

xi. On 28 June 2011, 54 officers of the DOC who had remained in possession and occupation of the property from at least August 2010 to July 2011, successfully procured the reconsideration and setting aside of the eviction order, on the grounds *inter alia* that they were involved in an unresolved labour dispute with the DOC and also that their occupation of the property after the termination of the lease agreement rendered them 'unlawful occupiers of the property' as contemplated by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('the PIE Act'), the procedure specified in the PIE Act not having been followed at the time the eviction order was granted.

xii. On 26 July 2011, the plaintiff and Midnight Storm concluded a third addendum to the agreement of sale in terms of which:

a. Midnight Storm would take occupation and possession of the property whilst the Department remained in occupation of the property;

b. In return for Midnight Storm taking occupation and possession of the property whilst still occupied by the Department, the purchase price for the property would be reduced to an amount of 32,5 million Rand.

xiii. When the third addendum to the agreement of sale was signed on 26 July 2011, at least 54 units on the property remained occupied by officers of the DOC.

xiv. Subsequent to the conclusion of the agreement of sale and the three addendums, Midnight Storm paid the amount of 32,5 million Rand to the plaintiff and the property was transferred into the name of Midnight Storm.

4. In dismissing the appellants claim, the Court a quo however was satisfied and concluded that the nature of the damages sought were general damages and not special damages as the respondent sought to contend. In addition the court *a quo* concluded that the respondent, by failing to restore vacant possession of the property to the appellant, committed a breach of the lease agreement.

5. The Court *a quo* however in dismissing the claim concluded that it could not be said that the selling of the property at a reduced price could have been reasonably foreseeable as a realistic possibility within the contemplation of the parties. Having made such a finding the Court then went on to find that there was no causal link between the breach of the agreement and the damages claimed.

6. That is the crisp issue that this appeal relates to, namely whether the damages suffered by the appellant, constituting a reduction in the sale price of the property, were damages that were reasonably foreseeable as a realistic possibility.

7. This question of legal causation has been the subject of numerous judgments of our Courts and a particular approach has crystallised over time.

The Supreme Court of Appeal in ***THOROUGHBRED BREEDERS' ASSOCIATION v PRICE WATERHOUSE*** **2001 (4) SA 551 (SCA)**, dealt with the issue of foreseeability within the context of general damages as follows:

> '*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 (compare McElroy Milne v Commercial Electronics Ltd [1993] 1 NZLR 39 (CA) at 43-5). 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.*'

9. In ***TRANSNET LTD T/A NATIONAL PORTS AUTHORITY v OWNER OF MV SNOW CRYSTAL*** **2008 (4) SA 111 (SCA)**, the Supreme Court of Appeal said the following in the context of whether damages flow naturally and generally from the breach:

> '*To sum up therefore, to answer the question whether damages flow naturally and generally from the breach one must inquire whether, having regard to the subject matter and terms of the contract, the harm that was suffered can be said to have been reasonably foreseeable as a realistic possibility.*'

10. In ***SANDLUNDLU (PTY) LTD v SHEPSTONE AND WYLIE INCORPORATED*** **[2011] (3) All SA 183 (SCA)**, SNYDERS JA stated that 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 a loss. The learned Judge furthermore stated that:

> *'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'.*
>
> *Nugent JA in Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) at paragraph 25 pointed to the conceptual difficulties that arise when the enquiry is made:*
>
> > *'There are conceptual hurdles to be crossed when reasoning along these 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.'

11. Thus even though it is settled law that the measure of damages claimable pursuant to holding over is the market rental value of the property, an aggrieved party however is entitled to claim other damages provided that they are foreseeable and not too remote. (See ***HYPROP INVESTMENTS LTD AND ANOTHER v NCS CARRIERS AND FORWARDING CC AND ANOTHER* 2013 (4) SA 607 (GSJ)**).

12. In arguing that the damages were not too remote but in fact reasonably foreseeable as a realistic possibility, the appellant contends that the lease agreement did in fact contemplate a sale which is what happened when Leopont sold the property to the plaintiff in 2007. In addition it argues that the parties must have contemplated the realistic possibility that the sale of the property, which was occupied without there being a lease agreement in place, will result in a seller achieving a lower price than it would have achieved had it been in a position to sell the property with vacant possession. On this basis it contends that the harm (a lower purchase price) would have been reasonably foreseeable as a realistic possibility.

13. The court *a quo* in dealing with this submission took the view that after the termination of the agreement in December 2010, both parties would have become aware of the uncompromising attitude of the occupiers and that the problem of their continued occupation would only be resolved in terms of legal steps that would be required. It concluded that there was no indication or even a suggestion that this situation was reasonably foreseeable by either of the parties at the time the agreement was concluded.

14. In my view a useful starting point would be the position adopted in ***HYPROP*** that the measure of damages claimable for holding over is the market value of the premises but that other damages may well be claimed provided they are foreseeable and not too remote.

15. Having regard to the legal principles set out above, can it be said that the damages that the appellant suffered were of the type or event that would follow a breach as a matter of course?

16. The appellant's stance is that it must merely prove the extent of its damages and not that it was foreseeable as the law presumes such foreseeability. I understand this argument to be premised on the assertion that the damages flowed naturally and generally from the breach of the lease agreement. However it cannot simply be assumed that the damages flowed naturally and generally from the breach. While it may well be so that but for the breach the damages would not have resulted, that cannot be the end of the matter as it only satisfies the requirements of factual causation. The requirements of legal causation are what I understood the court *a quo* found was lacking.

17. Ordinarily, holding over would deprive the owner of property of the market value of rental that would be obtained for the property. Such deprivation would clearly ground

an action for damages. On the other hand the contemplated sale of a property under such circumstances may stand on a different footing. When one has regard to the Lease Agreement then the sale contemplated therein was one that would occur during the currency of the lease. That sale in fact took place during 2007. The second sale which is the subject of this action occurred In January 2011 after the written lease had terminated and took place while the property was the subject of a monthly lease and the addendum to that sale reflecting a lower purchase price, occurred in July 2011.

18. While a breach and holding over could have consequences, to suggest however that it could result in a sale at a reduced or lower price, may well extend beyond the scope of what is reasonably foreseeable as a realistic possibility. In ***THOROUGBRED BREEDERS' ASSOCIATION*** (*supra*) the Court observed that one cannot contemplate what one cannot foresee and that very often the question is the degree of foreseeability. In my view the damages resulting in a lower purchase price for the property certainly would fall outside what the parties would have reasonably foreseen as a realistic possibility and fall within that category of instances where the distance between cause and effect simply becomes too tenuous as was described by NUGENT JA in ***VAN DUIVENBODEN*** (supra).

19. In this regard the consequence of a breach accompanied by holding over could well be a factor in the efforts to alienate the property but on the facts in the stated case it hardly appears that a reduction in the purchase price is what was foreseen as a realistic possibility. In this regard even though a sale with the promise of vacant possession by the 11th of April 2011 was concluded on the 24th of January 2011, the plaintiff continued to lease the property to the Defendant on a monthly basis until at least the end of April 2011. In addition when the agreement was amended on the 12th of May 2011 to provide for occupation on the 1st of June 2011, it would have been

known to the parties to the sale agreement that there were unlawful occupants on the property. Despite this there appears to have been no reason to adjust the purchase price at that stage. Even though it is arguable that the continued occupation of the property would impact on the plaintiff's ability to give vacant possession what at best would have been foreseeable as a reasonable possibility was a delay in doing so. Such a delay would be occasioned by the steps necessary in law to secure vacant possession. Such a delay could well have been contemplated as being reasonably foreseeable as a realistic possibility. I would not however accept the proposition that a breach caused by holding over would give rise to the reasonable foreseeability that a sale already concluded would then have to proceed at a reduced price.

20. In this regard a contract of sale is a voluntary act between parties whom the law recognises as operating on an equal footing. To suggest that the parties would have contemplated a sale at a reduced price simply on account of a breach resulting in holding over is a suggestion that seeks to stretch and extend the concept of reasonable apprehension to unacceptably wide parameters inconsistent with the *dicta* of our Courts.

21. In this regard it is trite that a legal framework exists that provides appropriate remedies to secure vacant possession as against unlawful occupiers and that ordinarily speaking an owner or person in charge would be able to utilise such remedies. Under such circumstances a breach in the form of holding over may well give rise to a reasonable foreseeability of some delay in securing vacant possession but in my view this would hardly extend as far as a reasonable foreseeability that such a sale would have to proceed on different terms and conditions in relation to the purchase consideration.

22. In the context of the facts in the stated case the following would be of relevance:

a) The property was leased for the purposes of providing official residence to officers of the Department of Correctional Services;

b) Upon expiry of the written lease in December 2010, there were still members of the DCS in occupation notwithstanding a request by the DCS as far back as November 2009 that they vacate the property;

c) The sale of the property on 24 January 2011 for 40 million Rand was effected after the expiration of the lease and at the time, vacant possession was undertaken to be given by 11 April 2011;

d) It follows that it must have been within the contemplation of the plaintiff at the time that it would be able to secure vacant possession by 11 April 2011;

e) Despite an order for eviction being obtained by the appellant on the 24th of May 2011, the occupiers were able to successfully challenge the eviction on the basis that the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 were not complied with.

f) Clause 23 of the Lease Agreement upon which the appellant relies in support of its stance that a sale of the property was one of the options the lease contemplated, refers to a sale that occurs during the currency of the lease and not a post-lease sale, which is what occurred here. The property was sold after the termination of the written lease. Thus a reference to the sale of the property in Clause 23 of the Lease does not to the extent that the appellant suggests, bolster the argument that a sale without vacant possession would fetch a lower price and this was a realistic possibility.

21. It could in my view hardly have been reasonably foreseeable that even in the event of a breach and an unlawful holding over, the eviction process would take as long as it did or be delayed and/or reversed for the reasons given and that a sale of the property at a reduced price was reasonably foreseeable as a realistic possibility and that it would follow from the breach as a matter of course.

22. While the law does not require the event or occurrence to be reasonably foreseeable as a certainty, at the same time it does not suffice if it is only reasonably foreseeable as a mere possibility. What is required is for that possibility to be realistic which CORBETT JA (as he then was) in ***HOLMDENE BRICKWORKS (PTY) LTD v ROBERTS CONSTRUCTION CO. LTD*** **1977 (3) SA 670 (A)** at 687 referred to as 'a probable result of the breach '

23. In *Christie's Law of Contract of South Africa 6th Edition* at page 575 the authors offer the comment that the phrase 'a probable result of the breach' should not be taken as requiring a strong probability but something more like a realistic possibility. They however do not represent separate or different approaches. What is probable and what is realistically possible is in essence what is likely to flow naturally and generally from the breach of contract.

24. In the context of the facts in the stated case it does constitute stretching the idea of what is natural and general to contend that a likely result of the breach (as in a realistic possibility) was that post the lease agreement, a sale of the property would be concluded and that as a result of the holding over, the appellant would be forced to sell at a reduced price.

25. For these reasons I am unable to conclude that the prospect of the plaintiff having to sell the property for a reduced price was reasonably foreseeable as a realistic possibility or that it could be said that such an outcome flowed as a matter of course from the breach. In my view such an occurrence was not only improbable but would certainly not follow from the breach as a matter of course.

26. What may well have been reasonably foreseeable as a realistic possibility in the face of a contemplated sale was that the sale would be delayed, that proceedings for eviction would be initiated and finalised, after which the sale would be proceeded

with. Under such circumstances damages for holding over would be payable on the basis of the market rental and the sale would proceed at the price originally agreed upon.

27. In the circumstances the conclusion reached by the court *a quo* is not assailable and it must follow that the appeal must fail.

ORDER

21. I make the following order:

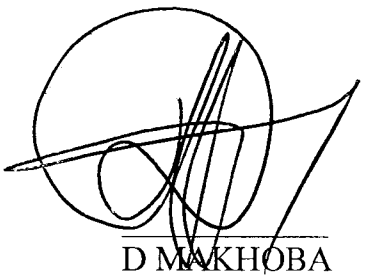
    1. The appeal is dismissed with costs including the costs of senior counsel which costs are to include the costs of the application for leave to appeal.

N KOLLAPEN
JUDGE OF THE HIGH COURT

I AGREE,

R G TOLMAY
JUDGE OF THE HIGH COURT

I AGREE,



D MAKHOBA
ACTING JUDGE OF THE HIGH COURT

IT IS SO ORDERED.

A647/2015

HEARD ON: 08 JUNE 2016
FOR THE APPELLANT: ADV. A J EYLES SC
INSTRUCTED BY: BOWMAN GILFILLAN INC (ref.:F Bhayat/6103935)
FOR THE FIRST & SECOND RESPONDENTS: ADV. J A MOTEPE SC
INSTRUCTED BY: THE STATE ATTORNEY (ref.: D P Burger/2339/13/Z3/nk)