THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 223/2018

In the matter between:

JALITE (PROPRIETARY) LIMITED **APPELLANT**

and

SHANGHAI FURNITURE IMPORT & EXPORT CC **RESPONDENT**

Neutral citation: *Jalite (Pty) Ltd v Shanghai Furniture Import & Export* (223/2018) [2019] ZASCA 39 (29 March 2019)

Coram: Leach, Zondi and Mocumie JJA and Mokgohloa and Matojane AJJA

Heard: 1 March 2019

Delivered: 29 March 2019

Summary: Appeal - interference with trial court's factual findings not justified – lease agreement – alleged material misrepresentation not established – lessee not entitled to cancel the lease.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Rabkin-Naicker J, with Malindi AJ concurring sitting as court of appeal):

1 The appeal succeeds with costs.

2 The order of the High Court is set aside and is substituted by the following:

'The appeal is dismissed with costs.'

JUDGMENT

Zondi JA (Leach and Mocumie JJA and Mokgohloa and Matojane AJJA concurring)

[1] The appellant, Jalite (Pty) Ltd (plaintiff) sued the respondent, Shanghai Furniture Import & Export CC (defendant) in the regional court, Germiston (trial court) for payment of various amounts arising from the breach of a written lease of business premises situated at Diagonal Street, Eastleigh, Edenvale. The plaintiff sought payment of the sum of R180 993.61 for arrear rental; damages in the sum of R90 000 for an estate agent's commission and R159 600 for loss of rental. In terms of a written offer to rent accepted by the plaintiff, which constituted the lease , the defendant was obliged to sign a written agreement with the plaintiff and pay all amounts to the plaintiff on due date. The defendant failed to comply with its obligations.

[2] The defendant in its plea admitted its failure to comply with the terms of the lease. But it sought to justify its conduct by contending that it was induced to enter into the agreement by the plaintiff's material misrepresentation. The defendant alleged that during negotiations before the conclusion of the agreement, the plaintiff represented that the premises to be let were approximately 2000 square metres in size. This, the

defendant alleged, turned out to be false, because when it measured the premises it discovered that there was a difference of approximately 25 per cent between the size of the premises as represented by the plaintiff and the actual size of the premises. The defendant contended that the term regarding the size of the premises constituted a material term of the agreement, and that it would not have contracted with the plaintiff on the terms that it did, or at all, had it been aware that the size of the premises was smaller than it was represented.

[3] These allegations formed the basis of the defendant's counterclaim for payment of damages in the amount of R190 824.85 which the defendant alleged it had suffered as a direct result of what it claimed to be the plaintiff's fraudulent representation. Basically, the defendant's counterclaim was for the refund of rental deposit in the sum of R136 824.85, and payment of R54 000 for unjust enrichment resulting from the improvement the defendant effected to the leased premises before it took beneficial occupation of the premises. Needless to say these allegations on which the defendant's counterclaim is founded, were vehemently denied by the plaintiff.

[4] The trial court rejected the defendant's defence, dismissed its counterclaim and found for the plaintiff. The defendant appealed to the Gauteng Local Division of the High Court (per Rabkin-Naicker J and Malindi AJ) (the High Court). The Full Bench of that Division upheld the appeal and awarded damages to the defendant as claimed in its counterclaim. The appeal, with special leave of this court, is against the judgment and order of the High Court.

[5] The anterior questions are, whether the size of the premises was a material term of the agreement and whether the price of the rental payable under the agreement was to be determined on the basis of the square meterage of the premises. If the answer to these questions is in the affirmative, then the next question is whether the plaintiff misrepresented the size of the premises and whether such misrepresentation induced the agreement. An affirmative answer to all of these questions will be dispositive of the appeal.

[6] The basic facts are largely common cause. During October 2012, Mr Chris Price, the managing director and a sole shareholder of the plaintiff, was looking for a

tenant to rent the business premises concerned comprising two warehouses[1] and two back yards. At the time, these premises were each leased to two different tenants which, according to Price, was not an ideal situation from the administration point of view. To that end, Price contacted Ms Stephanie Bernstein, an estate agent and gave her a mandate to rent the premises. Bernstein accepted the mandate. She later invoiced Price for the commission in the sum of R90 000 plus VAT. In a letter of instruction addressed to Bernstein on 29 October 2012, Price made it clear to her that he wanted R35 000 per month for each warehouse and R10 000 per month for each back yard. In other words, Price wanted R90 000 for the premises as a whole. According to Bernstein, Price stated that the premises were approximately 2000 square metres in extent.

[7] In due course Bernstein introduced Mr Abbi Feng and Mr Simon Shi of the defendant to Price at the premises. They were looking for business premises on behalf of the defendant. According to the defendant's representatives, the defendant's existing lease in terms of which it was renting a space of 1600 square metres for R120 000 per month, which had become too expensive for the defendant, was due to expire in about April 2013. Bernstein showed them the plaintiff's premises in about October 2012 and after viewing the premises on about six occasions, Feng and Shi expressed interest in the premises. Feng and Shi were, however, not prepared to pay R90 000 per month for the premises. They successfully negotiated a reduction of the monthly rental to R70 000 plus VAT. Feng and Shi did not measure the size of the premises, because at that stage the plaintiff's previous tenants were still in occupation.

[8] Having reached agreement with Feng and Shi on the rental to be paid, Bernstein filled out a standard printed form to which she attached a document written in manuscript containing certain conditions. The document reads:

'I/We Shanghai Furniture Import & Export registered no 2006/03115/23 herein represented by Mr Hai Shi ID 6706115837

Hereby offer to rent Mr Chris Price of Jalite's Diagonal Street two back units plus yard measuring *approximately* 2000 sqm plus yard for a period of 3 years at a rental of R70 000 per month plus VAT commencing 1 Feb 2013 (date), for the purpose of conducting therein the business of [*] Warehousing of furniture & related products.

[1] In the record the two warehouses are sometimes referred to as the two factory units.

Should this offer be accepted we agree to enter into an agreement of lease with the lessor.

Once accepted this offer becomes binding on the parties. . .” (emphasis added)

The document then recorded the following special conditions in manuscript:

‘This offer is subject to the following:
The tenant shall be entitled to a month of free occupation at commencement for fitting & lessor may work alongside.
The lessor shall replace the window areas with IBR sheeting at lessors cost.
-Premises to be clean & tidy & plumbing & electrical to be in working condition.
-The lessee shall have a right to use or install an entrance gate along the driveway which expense shall be agreed between the parties, if necessary lessee shall contribute hereto.
-The deposit to be one month’s rental.
-The annual escalation is to be 8%
Note:
The tenant hereby confirms that Shanghai Furniture Import and Export has annual turnover &/or assets in excess of R2 million.
Whilst the commencement date has been written as 1 February 2013, it is agreeable to the tenant if commencement is no later than 1 April 2013, provided this date has been set in advance.’

[9] Price signed the agreement on behalf of the plaintiff and Shi on behalf of the defendant. This constituted the lease upon which the plaintiff relied. Pursuant to the agreement the defendant paid to the plaintiff an amount of R136 827.85 for deposit and rental. The defendant could not take occupation of the premises on the date envisaged in the agreement partly because of the plaintiff’s delay in getting the premises ready for occupation. Additionally, the defendant had to first install burglar bars to the premises before it could move in its goods. The burglar bars installation costs in the sum of R54 000 form the basis of the defendant’s claim for unjust enrichment. Having regard to these delays, the trial court correctly found that the lease commenced on 1 April 2013 and that until then the defendant enjoyed free use of the premises.

[10] It is common cause that the defendant thereafter refused to occupy the leased premises and to pay all amounts due to the plaintiff. As I have alluded to in para 2 above, the defendant justified its conduct mainly on the basis of the contention that it cancelled the agreement due to the plaintiff's alleged misrepresentation of the size of the premises. The plaintiff was only able to find a replacement tenant during August 2013 and lost rental during the period that the premises remained unoccupied.

[11] The dispute therefore is whether the size of the premises was a material term of the agreement and whether the plaintiff misrepresented the size of the premises with an intention to induce the defendant to enter into the agreement. The related question is whether the defendant was entitled to cancel the agreement. This is so, because to justify the rescission of a contract a misrepresentation must be material or in respect of a material fact.[2]

[12] The defendant's version is that it was a specific term of the lease that the size of the premises to be let was approximately 2000 square metres excluding the back yard. According to Shi the figure of 2000 square metres quoted by the plaintiff was the size of the two factory units excluding the yard, which the defendant contended, was of no use to it as it could not be utilised for storage purposes. Based on this understanding, Shi then offered to pay R65 000, which he considered reasonable as it translated to R32,50 per square metre of the usable leased space. When Shi thereafter arranged for the premises to be measured he discovered that the premises in extent were smaller than what had been represented to him. He immediately confronted Price about the discrepancy. Shi's version is that Price agreed to reduce the rental to compensate the defendant for the shortfall. Shi offered to pay R65 000 for the two warehouses. Price accepted his offer and undertook to have a new lease agreement drawn which would reflect the correct size of the premises and the rental amount of R65 000. According to Shi, Price failed to honour his undertaking. The new agreement Price presented to him for signature still reflected the original rental amount of R70 000

[2] Cf *Woodstock, Claremont, Mowbray and Rondebosch Councils v Smith & another* (1909) 26 SC 681 at 701.

and the size of the premises as ‘plus minus’ 1700 square metres for the two units and a yard of plus minus 1000 square metres. To make matters worse, Shi contended, the lessor on the lease agreement was Thundersley Holdings (Pty) Ltd, not Jalite (Pty) Ltd.

[13] The plaintiff’s version through Price who testified for it, and which was corroborated by Bernstein, is that during negotiations and prior to the conclusion of the agreement it did not commit itself to the exact size of the premises. Price testified that all that he said was the premises were *approximately* 2000 square metres in extent and that the price of rental he quoted was for the entire leased premises. He denied that he fraudulently or negligently represented the size of the premises to induce the conclusion of the agreement. Price further denied that he agreed to reduce the rental to R65 000 per month at the meeting he held with Shi, Feng and Bernstein on 27 May 2013 in which Feng complained about the size of the premises. Price’s version is that at the meeting he explained to Shi that the quoted figure was an estimate of what he believed to have been the size of the premises and he then undertook that he would have a new agreement drawn to reflect the correct size of the two factory units, which according to his own measurement was 1700 square metres.

[14] On the issue whether the amount of rental payable was determined on the basis of a square meterage of the size of the premises, the trial court accepted the plaintiff’s version and rejected that of the defendant. In accepting the plaintiff’s version the trial court reasoned that if the size of the premises and the rental pricing method contended for by the defendant had been material terms, they would in all probability have been included in the agreement and the fact that they were not included, the trial court reasoned, rendered the defendant’s version less probable. According to the trial court the size of the premises could not have been material considering the fact that the defendant’s reason to move into the plaintiff’s premises was to secure cheaper premises.

[15] As regards the question whether Price misrepresented the size of the premises, the trial court held that he did not do so, because in its view, it was probable that Price did know the exact size of the premises having regard to the fact that he did not calculate the rental on the basis of a square meterage. For that reason, the trial court held that Price’s representation of the size of the premises was not fraudulent.

[16] The trial court accordingly concluded that the defendant was not entitled to cancel the agreement and that its purported cancellation constituted a repudiation of the agreement. This conclusion was based on the defendant's evidence that the decision to relocate from the previous premises was motivated by a desire to secure cheaper premises. The trial court held that the defendant was liable for arrear rental, damages in respect of the estate agent's commission and damages for loss of rental for one and half months' period. It dismissed the defendant's counterclaim.

[17] On appeal the High Court, with reference to the cases of *R v Dhlumayo* 1948 (2) SA 677 (A) at 705-706 and *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC) para 45, correctly reminded itself that since it was sitting as a court of appeal it was enjoined to caution itself against overturning the factual findings of the trial court unless it was convinced that they are clearly wrong. The High Court, however, found that in the present case there was a basis for it to interfere with the trial court's factual findings.

[18] It held that the trial court had misdirected itself in its treatment of Bernstein's evidence relating to the materiality of Price's statement that the premises to be let were approximately 2000 square metres in extent. The High Court in para 14 of its judgment expressed itself as follows:

'In this case, the Learned Magistrate simply ignored the evidence by Bernstein as to how she came to the conclusion that the rental for the premises was reasonable, and how the rental industry computes the quantum of rental. The Learned Magistrate's notion that such a calculation could not be made when the floor area was described as "approximately" 2000 square meters, was contradicted by evidence from both sides of the dispute. Her finding that the inclusion of the approximate size of the premises in the offer to rent agreement was not an indication that the rental was determined by the square meterage amounted to a material misdirection.'

[19] The High Court held that the trial court should have found that the size of the premises was a material term of the agreement. This conclusion was based on Feng's evidence, which the High Court accepted, that when Bernstein showed him premises of 1000 and 1500 square metres in extent he rejected them stating that they were too

small and not suitable for the defendant's expansion plans. The High Court found it 'probable that the defendant would not have contracted for premises significantly less than 2000 square metres at the agreed price if it had not been represented that they were 2000 square metres' and that the defendant's conduct after discovering what the true size of the premises was, was consistent with that finding.

[20] According to the High Court the trial court should have found that, on the probabilities, Price misrepresented the size of the premises based on the fact that, first, when Shi confronted him about the discrepancy between the represented size and the actual size of the premises he erased a recordal on a Grinaker plan that the premises were 1500 square metres in extent; secondly, his defence that he did not rent out his premises on a square metre basis did not bear scrutiny and finally, that he was not prepared to reduce rental even after discovering that the size of the premises was 1700 square metres. In the result the High Court set aside the trial court's judgment and entered the judgment for the defendant in terms of the relief sought by the defendant in its counterclaim.

[21] The present appeal is directed against these findings of the High Court and its conclusion that the trial court materially misdirected itself 'by finding that the inclusion of the approximate size of the premises in the offer to rent agreement was not an indication that the rental was determined by the square meterage'. Counsel for the plaintiff submitted that the High Court misconstrued the context in which Bernstein gave the evidence in question. He argued that Bernstein's evidence was in response to the question whether the rental charged was reasonable.

[22] I agree with the plaintiff's counsel's contention. The trial court correctly analysed Bernstein's evidence. Bernstein's evidence was that the rental was not determined on the basis of the square meterage and, according to her, the fact that the approximate size of the premises found its way into the agreement did not indicate that the size of the premises was a material term of the agreement without which the price of rental could not be determined. It is therefore not correct to interpret Bernstein's evidence as providing support for the contention that a square meterage was used to calculate the price of rental.

[23] Counsel for the defendant supported the findings of the High Court. He submitted that the plaintiff was or must have been aware that the size of the premises and the rental amount constituted material terms of the agreement. As a factual basis for this contention he relied on the evidence of Feng, who testified that when he met with Bernstein, he informed her that he was looking for a warehouse of 2000 square metres in size; that the defendant was currently renting a 1600 square metres warehouse for which it was paying R120 000 per month and that Feng already had rejected two separate warehouses to which he was taken by Bernstein for viewing, one in Meadowdale, measuring about 1000 square metres in extent and the other in Jet Park measuring about 1500 square metre in size on the ground that they were small.

[24] As regards misrepresentation it was argued on behalf of the defendant that Price knew that the size of his premises was smaller than 2000 square metres. Because Price, so the argument went, intended to induce the agreement, he intentionally misrepresented the size of the premises to the defendant's representatives. This contention was founded on the evidence of Shi who testified that after he discovered that the size of the premises was smaller than that what was represented to him, he immediately confronted Price about the discrepancy. According to Shi when he informed Price that the size of the premises was 1500 square metres, Price pulled out a copy of a floor plan of the premises on which a size of 1500 square metres was recorded and he erased by tipex the recordal on it, before giving it to Shi.

[25] I disagree with the defendant's contentions. Commercial leases, such as the present one, use various rental pricing methods to determine rental amount payable. It is for the parties to choose a rental pricing method that is best suited to their commercial needs. The parties may agree to set the price of rental per square meterage of the leased space in which event the size of the premises becomes a material term of the agreement since the amount of rent will be fixed with reference to the square meterage of the premises. In those circumstances if the lessor were to misrepresent the size of the leased space with an intention to induce the lessee to conclude the agreement, the latter would be quite entitled, upon discovery of the true

facts, to rescind the agreement and claim damages on the ground of misrepresentation.[3]

[26] In *Christie's Law of Contract in South Africa* at 315 in dealing with the general effect of misrepresentation on a contract, the authors say:

'A party who has been induced to enter into a contract by the other party's misrepresentation of an existing fact is entitled to rescind the contract provided the misrepresentation was material, was intended to induce the person to whom it was made to enter into the contract and did so induce that person to conclude the contract. If the misrepresentation was fraudulent or negligent, the innocent party may also be entitled to delictual damages.' [footnote omitted]

[27] The probabilities are that the size of the premises was not a material term of the agreement and neither was there any agreement to set rent on the basis of the square meterage of the leased space. At one of the viewing meetings, Shi and Feng enquired from Bernstein about the size of the premises. Bernstein said it was approximately 2000 square metres. Price, who was also present at the meeting, added by pointing out that he had not measured the premises for many years. He told Shi and Feng that they were welcome to measure the premises, though 'the rent will not change'. If in the minds of the defendant's representatives the size of the premises was a deal breaker, one would expect it to have featured more prominently in their negotiations with the plaintiff's representatives.

[28] It seems from the evidence that the whole idea of pricing rent per square metre came up with Shi. Bernstein's evidence is that after informing Shi that Price wanted R70 000 per month for the two factory units and R10 000 per month for each back yard Shi offered to pay R65 000 for both factory units and R5 000 for the yards. According to Shi, he made this offer after doing his own calculations of the amount he would be paying per square metre. Shi estimated the price to have been R32.50 per square metre which he considered to be a 'good price' and was acceptable to him.

[29] Feng's version that the size of the premises was a material term of the agreement appears to be mistaken and must be rejected. First, there is no reference

[3] G B Bradfield *Christie*'s *Law of Contract in South Africa* 7 ed (2016) at 317.

in the agreement to the stipulation that the price of rental was to be calculated with reference to the square meterage of the premises. Secondly, when Shi negotiated the reduction of rental prior to the conclusion of the agreement, he did so without any regard to the size of the premises. The conduct of the defendant's representatives after becoming aware of the correct state of affairs, is inconsistent with an agreement reached on a rental determined by the precise square meterage of the property. Moreover, Shi did not seek to resile from the agreement. On the contrary, Shi's conduct indicated that he wanted to affirm the agreement, albeit on the terms that were more favourable to him. This goes to show that the alleged misrepresentation did not induce the agreement.

[30] The trial court's finding that the defendant had failed to prove that it was entitled to cancel the agreement, was correct. The defendant's conduct amounted to unlawful repudiation which the plaintiff accepted. In the circumstances the High Court erred in overturning the trial court's factual findings. The order made by the trial court was a correct one and should have been confirmed by the High Court.

[31] In the result I make the following order:

1 The appeal succeeds with costs.

2 The order of the High Court is set aside and is substituted by the following:

'The appeal is dismissed with costs.'

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D H Zondi
Judge of Appeal

APPEARANCES

For the Appellant:	D L Williams
Instructed by:	Wright Rose-Innes Inc, Bedfordview
	Rossouw Attorneys, Bloemfontein
For the Respondent:	N Alli
Instructed by:	Gascoigne Randon & Associates, Edenvale
	Honey Attorneys Inc, Bloemfontein