

SOUTH AFRICA / JUDGMENT

Zitonix (Pty) Limited v K201250042 (South Africa) (Pty) Limited (290/2017) [2018] ZASCA 63 (21 May 2018) [2018] ZASCA 63

COURT

Supreme Court of Appeal

BEFORE

Lewis, Swain, Davis, Mothle, Rogers

CASE / FILE NUMBER

290/2017

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 290/2017

In the matter between:

ZITONIX (PTY) LIMITED APPELLANT

and

K201250042 (SOUTH AFRICA) (PTY) LIMITED

RESPONDENT

Neutral citation: Zitonix v K201250042 (290/2017)

[2018] ZASCA 63 (21 May 2018)

Coram:

Lewis and Swain JJA and Davis, Mothle and Rogers AJJA

Heard:

10 May 2018

Delivered: 21 May 2018

Summary: Where a claim for the cancellation of lease agreements, and the eviction of the tenants, is based only on the terms of the agreements, and not on the title of the lessor, the court of the tenants' domicile, and of the place where the contracts were concluded, has concurrent jurisdiction with that of the forum rei sitae. Ignorance of a term of the leases entitling the lessor to cancel in the event of a surety's sequestration not a justus error on the

facts.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Holderness AJ sitting as court of first instance):

The appeal is dismissed with costs including those of two counsel, save that para 3 of the order of the Western Cape Division of the High Court is set aside.

Lewis JA (Swain JA and Davis, Mothle and Rogers AJJA concurring)

- [1] This is an appeal against a judgment handed down by Holderness AJ in the Western Cape Division of the High Court of South Africa, in an application seeking the confirmation of the cancellation of five leases, and the eviction of the tenants from the premises hired by them. She made the orders sought in the application, and authorized the Deputy Sheriff of the High Court to eject the tenants in the event of their failure to vacate the premises.
 - [2] The defences to the applications were dealt with comprehensively by the court a quo and were all rejected. I do not propose to deal with them all, in view of the fullness of the judgment of the court a quo, which cannot be faulted in any respect, and because in any event only two were pursued with any vigour on appeal.
 - [3] The appellant is a company, Zitonix (Pty) Ltd (Zitonix), which had traded in fashion, with several different South African brands, in shopping centres throughout the country. By the time the application to the court a quo was heard, Zitonix had shops in only one shopping centre, the Gateway Theatre of Shopping (the centre) in Umhlanga, KwaZulu Natal. The controlling mind of the tenant companies is Mr Marcel Joubert. The applications for confirmation of cancellation of the leases and eviction were in respect of these shops, and were brought by the manager of that centre, Old Mutual Property Management Services (Pty) Ltd, acting on behalf of the owner of the centre, K2012150042 (South Africa) Pty Ltd, the respondent. I shall refer to the respondent as the lessor.
 - [4] It should be noted that Zitonix is part of the Platinum Group (Pty) Ltd, which owned the brands. Joubert was the sole director of the Platinum Group, and of Zitonix, until his final sequestration in
2016. The Platinum Group has its registered office in Hout Bay, Cape Town, and that is Joubert's residential address as well. The address in Hout Bay is also the chosen domicilium citandi et executandi of the tenants of the shops in the centre.

- [5] Joubert had concluded leases in respect of the shops in the centre in Cape Town in February 2016. The shops had leases in the premises before then, and in order to persuade the lessor to enter into new leases, Joubert had paid what he called a 'premium' to the lessor: in fact, the amount paid was arrear rental in respect of the shops. And the lessor agreed to backdate the leases to August
2015. Joubert signed as surety in respect of the five leases.
- [6] Zitonix fell into arrears shortly after February 2016, and the lessor cancelled the leases. The disputes between the parties were resolved, however, and the leases 'reinstated' on the same terms. Zitonix again defaulted, and the lessor gave the tenants the opportunity to remedy their breaches in terms of clause 16.1(a) of each of the leases. That did not really assist the lessor because by August 2016 four of the lessees were again in default.
- [7] The lessor sent letters of cancellation of the leases in respect of those four leases on 25 August 2016, and then further letters of cancellation in respect of all five leases on 31 August 2016. A new breach was relied on in the five letters cancelling the leases – the final sequestration of Joubert as surety. A final order of sequestration of Joubert was issued on 22 August 2016, which, under clause 16.1(e) of the leases, amounted to a breach warranting cancellation. Clause 16 dealt with breach generally. Clause 16.1 read 'should the tenant' commit any one of a number of breaches the lessor would be entitled to cancel. Subclause (e) read 'should any surety of the Tenant be sequestrated or placed in liquidation', the lessor had the right immediately to cancel the lease and resume possession of the premises.
- [8] As I have said, Zitonix raised numerous defences to the application for cancellation and eviction brought by the lessor. These were (a) that the Western Cape Division did not have jurisdiction to entertain the application since the property – the centre – is in KwaZulu-Natal which is the *forum rei sitae*;
- (b) the deponent to the founding affidavit did not have authority to depose to it; (c) the letters of cancellation were deficient in that they did not disclose in detail what was due in arrear rental and other charges; (d) Joubert had been ignorant of the provisions of clause 16(1)(e) as a result of *iustus error* and his sequestration could not therefore ground cancellation; and
- (e) that the lessor was engaged in anticompetitive behaviour, an issue that had to be referred to the Competition Tribunal in terms of s 65 of the Competition Act 89 of 1998.
- [9] Holderness AJ found that each of these defences was lacking in merit and rejected them. On appeal, Zitonix persists only with the arguments on lack of jurisdiction, and Joubert's ignorance of the suretyship provision in the leases. I shall accordingly deal only with these two issues, and then only briefly, as Zitonix virtually conceded that the conclusions of the court *a quo* were correct.

Jurisdiction

[10] The basis for the argument that the Western Cape Division did not have jurisdiction is that the application for eviction was one in rem and thus only the forum rei sitae had jurisdiction. It was put to counsel for Zitonix that the application for confirmation of the cancellations was based on the

contracts of lease – a contractual claim and not one in rem – and that the application for eviction was equally based not on possession or title, but was entirely contractually founded – in personam. The lessor did not at any stage of the proceedings allege that it had title – ownership. The application was not a rei vindicatio. The lessor was not exercising a possessory remedy either. As the domicile and residence of Zitonix were in Hout Bay, Cape Town, the court a quo had concurrent jurisdiction with the KwaZulu-Natal Division. As Holderness AJ said, if the leases were validly

cancelled, no issue of title arose.

[11] Counsel for Zitonix conceded, as he had to do, that if the action was not in rem, then the jurisdiction argument had to fail. I shall accordingly not traverse the authorities that deal with the jurisdiction of a court that is not the forum rei sitae. The court a quo did not err in this regard. It considered, correctly, that s 42(1) and (2) of the Superior Courts Act 10 of 2013, which deal with the execution of process throughout the country, permits the Sheriff of the KwaZulu-Natal Division to execute in that Division if the tenants failed to vacate the premises. To the extent that the court a quo made an order that the Sheriff or Deputy Sheriff of the Western Cape Division be authorized to execute in the event of the tenants not vacating, that part of the order must be set aside. The Western Cape Division does not have the authority to make any order against the officers of the court in KwaZulu-Natal. If the tenants fail to vacate the premises, the lessor will, by virtue of s 42, be entitled to obtain a writ of ejectment from the Registrar of the KwaZulu-Natal Division of the High Court for execution by the Sheriff or Deputy Sheriff of that court. No special order to that effect is needed.

The effect of the surety's sequestration

[12] Zitonix alleged that Joubert had signed the leases oblivious to the consequences of his sequestration. He did not know that if he were sequestered, the lessor would be entitled to cancel the leases in terms of clause 16.1(e) of the leases. He had thus erred and his error was iustus because at the time of signing, the lessor, through its legal representative, knew that he was on the brink of sequestration, yet

allowed him to enter into long term leases despite its right to cancel in the event of his sequestration.

[13] The evidence adduced by the lessor showed, however, that it was not aware of the possibility of final sequestration at the time of signing the leases. Moreover, Joubert, an experienced businessman, who had entered into many similar leases beforehand, containing similar clauses, was represented in negotiations by his attorney. He had signed some 25 leases with

this same clause with the lessor itself. There is no reason to believe that Joubert was misled in this regard. And equally there is no reason to accept the argument that clause 16.1(e) was ‘tucked away’ in the lease agreement. It appeared in the body of each lease under the heading ‘breach’. This defence must also be rejected.

[14] Holderness AJ dealt comprehensively with the other defences, including the argument that the lessor’s conduct was anti-competitive and should be referred to the Competition Tribunal. She declined to do that. Zitonix did not persist with the arguments regarding the other defences raised in the court a quo at the hearing of the appeal.

[15] Accordingly, the appeal is dismissed with costs including those of two counsel, save that para 3 of the order of the Western Cape Division of the High Court is set aside.

C H Lewis

Judge of Appeal

APPEARANCES

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