

In the matter between:

VALLEY MOTEL (SWD) (PTY) LTD

and

NATIONAL TEXTILE CORP (SWD) LTD

CORAM

F. X. ROONEY

FOR PLAINTIFF  
FOR DEFENDANT

MR DUNSEITH  
MR FRIEDLANDER

JUDGMENT

7/6/89

Rooney, J.

In a summons issued in May 1986 the plaintiff claimed payment of E2,929.50 in respect of hotel services rendered by the plaintiff to the defendant in February 1986. In the declaration it was alleged that the parties entered into a verbal agreement in terms of which the plaintiff agreed to accommodate certain guests for a fixed period at the cost of E5,859.50 payable as to one half in advance by way of deposit and the balance on arrival of the guests at the plaintiff's hotel. The pleading went on to allege that notwithstanding the arrival of the guests the defendant failed and refused to pay the amount then due.

The defendant admitted the agreement and that three (3) persons stayed at the hotel, one of them between the 5th and 22nd February and two between the 11th and 22 February. The defendant admitted that it became liable to the plaintiff for the payment of E1,291.50 in respect of accommodation actually provided for the guests. The defendant denied liability for any excess on the grounds that the plaintiff evicted the three (3) guests on the 22 February. There was an alternative plea which related to the standard of service at the plaintiff's hotel which was not seriously pursued at the trial and may be disregarded. The defendant counter-claimed for a refund of E1,638.00 but this was abandoned at the hearing.

On the 15th December, 1986 the plaintiff filed an amended declaration with the leave of this Court. In this the plaintiff alleged that, having failed to pay the sum of E2,929.50 upon due date the defendant "repudiated the agreement between the parties which repudiation the plaintiff accepted".

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It claimed damages in the sum of E2,929.50.

In an amended plea the defendant denied having repudiated the . agreement and further denied that the plaintiff accepted such repudiat ion. The defendant also denied that the plaintiff suffered damages in the sum claimed or at all. Particulars given by the plaintiff claimed that the defendant repudiated the agreement by refusing to comply with its terms regarding payment and accepted the repudiation by requesting the guests to leave the hotel.

The only evidence led at the trial was that of Miss Velosa who was the Manageress of the plaintiff's

hotel at the material time. She stands uncontradicted. She made an agreement with a Mr Parrot of the defendant company in January 1986. This provided for the accommodation of three (3) persons, one for six weeks from the 4th February and two for 11 weeks from 11th February. The total cost of the accommodation amounted to E5.859 plus tax at 5%. E2.292.50 was paid immediately and Mr Parrot undertook to pay the balance on the arrival of the guests.

Miss Velosa prepared an invoice (exhibit "A") which recorded these terms and she added the words "No cancellation: No Refund" Mr Parrot brought the first guest to the hotel on the 5th February and he indicated he would pay the balance when he brought the remaining guests on the 11th February. After those persons arrived, the money was not paid. Miss Velosa telephoned Mr Parrot who promised to call and bring a cheque. When he did not come, Miss Velosa saw Mr Parrot at his office where he told her that he would cancel the accommodation. He gave no reasons. When she referred him to Exhibit "A" he said it did not matter. She told him she would tell Mr Diamond, a director of the plaintiff, of his attitude which she duly did. On the 21st February the guests were refused further accommodation at the hotel. Mr Diamond wrote a letter (exhibit "B") on the 23rd February in which he set out his case. He complained that the defendant had not honoured the contract. He concluded - "We hereby request payment of the account overdue in the sum of E2,929-50, to reach us on or before Wednesday 5 p.m., when your men can return to the accommodation you have contracted for

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In a reply dated 3rd March 1986 (exhibit C) the defendant complained about the standard of service and cleanliness of the plaintiff's establishment. The letter went on to say - "that you have aggravated the situation by summarily evicting our specialists only augments our extreme dissatisfaction, and we therefore demand the return of all unexpended monies....."

Nothing turns on the plaintiff's reply (exhibit D) dated 7th March, 1986

In cross examination Miss Velosa revealed that, even after the eviction of the guests, their rooms were held ready for their re-occupation for the whole of the period of the contract. They were not re-let to other persons. She agreed that the rooms could have been re-let if they had not been so reserved.

In *White and Carter Ltd v McGregor*, 1961 3 All E.R. 1178 Lord Reid referring to the law of both Scotland and England said at 1181

"If a party to a contract repudiates it in the sense of making it clear to the other party that he refuses or will refuse to carry out his part of the contract, the other party, the innocent party has an option. He may accept the repudiation and sue for damages for breach of contract whether or not the time for performance has come; or he may if he chooses disregard or refuse to accept it and then the contract remains in full effect."

The South African Law is similar (see *Jaffer v Falaante* 1959 (4) S.A. and *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) S.A. 462). The general rule is stated in *Myres v Abrahamson* 1952 (3) SLAL 121 by Van Winsen J. at 123 thus -

Where one party to a contract had unjustifiably repudiated it the injured party has as a general rule, the right to elect to accept the repudiation - and so by consent to put an end to the contract and sue for damages, or he is entitled to ignore the repudiation and hold the other party to the contract and claim specific performance."

By not making payment on the due date and by announcing the intention to cancel the contract, Mr Parrot on behalf of the defendant committed a clear breach of contract. By evicting the guests from the hotel the plaintiff evinced the intention of accepting the repudiation and ending

the contract. In his letter of the 23 February Mr Diamond offered a compromise, if payment was effected the accommodation would be returned. That offer was not accepted. The plaintiff has pleaded its acceptance of the defendant's repudiation. The plaintiff retained the right to sue for damages. The retention of the rooms beyond the date of the cancellation of the contract served no purpose

The plaintiff is entitled to recover damages if it can prove that it sustained loss arising out of the wrongful repudiation of the contract by the defendant. Mr Flynn submitted that the loss equalled the money not paid by the defendant. Mr Friedlander submitted that the plaintiff has not proved any loss, and has been in receipt of more than enough to pay for the accommodation actually provided.

The plaintiff let rooms to the defendant. The defendant undertook not to cancel the contract but, in effect, did so . The Plaintiff accepted the cancellation and recovered possession of the rooms. It became entitled to let the rooms to other people, but, chose not to do so. To award the plaintiff what it now claims would confer upon it the full benefit of the contract which neither party has performed. An aggrieved party is not entitled to be put in a better position that he would have been in had the contract been performed. (Kerr: Principles of Law of Contract 2nd edition, 365)

The party claiming on a breach of contract must show that he has actually suffered damage. What damage or loss was incurred by the plaintiff? It received E2,929-50 and, the rooms were occupied for a total of 42 days by the people booked in by the defendant. That amounted to a daily rate of E69-75 including tax. The plaintiff having evicted the guests, did not attempt to mitigate any resulting loss by finding other guests.

I accept the submission of Mr Friedlander that no damages have been proved and the defendant is entitled to be absolved. The plaintiff must pay costs of this action.

F. X. ROONEY

JUDGE