

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 16454/2015

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

Date: _____

WHG VAN DER LINDE

In the matter between:

ANDRE BEYERS

APPLICANT

And

ETIENNE CHAPELLE
KARIN LEFEVRE CHAPELLE
THE CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT

Judgment

Van der Linde, J:

[1] This is an application by a homeowner for the eviction of his two tenants on the basis that their lease has expired. They resist their eviction on the basis that they

extended their lease for 18 months in terms of a contractual right to do so. The right concerned avails only if at the time it is exercised the tenants were not in breach of the lease.¹

[2] At the relevant moment, 9 December 2014, they owed the applicant R86 635.27² in rental and utilities that was overdue, and were thus in breach,³ were it not for the following. They say that they paid those arrears by set-off, and whether their contention was sound was the central issue in the application.

[3] As it happened the parties settled the merits of the application shortly before it was argued. The terms of the settlement included that the tenants will vacate the house by 30 September 2016. They were not able to settle the question of costs, and argued it for determination by this court. The parties helpfully prepared draft orders catering for the range of eventualities that a costs order may entail, and this court is to select the appropriate one, depending on the conclusion to which it comes on costs.

[4] The principles that apply to the determination of costs when parties have settled a matter, include that a decision on costs is a decision on the merits.⁴ That derives from the concept that a person who has had to engage professional legal assistance is entitled to be reimbursed, if engaging the legal process was justifiable in the circumstances. Conversely, if resisting the engagement of the legal process against one was justifiable, then the defendant too is entitled to be reimbursed.

¹ Clause 6.2.2.

² Page 34.

³ Clause 8.2.

⁴ These principles are collected in LAWSA, 2nd ed, vol 3 Part 2, paragraph 297, and particularly the cases collected at footnote 7.

[5] That comes down to the unavailability of having to engage with the merits of the case so as to decide the question of costs, with this proviso. Costs should not be incurred just to decide costs, and so the matter should be disposed of in a relatively brief fashion.⁵

[6] Returning then to the merits:⁶ payment is a matter in respect of which the onus rests on the debtor. Here, the tenants say that the applicant owed them R73 463.15⁷ in contractual damages and that this amount has extinguished the overdue debt, together with an amount of R13 000 also owed to them by the applicant, this time in respect of electricity. Since this contractual damages claim is the largest of the two, I start with it. The claim arises in this way.

[7] The applicant is contractually “... responsible for the maintenance of and for all repairs ... becoming necessary from time to time ...” to the exterior of the house, including its systems.⁸ One such system is the plumbing and water piping that leads water from the municipal supply to the house. Back in July 2012 the tenants experienced a sharp increase in their water billing.⁹ They complained with the

⁵ An added reason why this should be so, is derived from the principle that courts are reticent to allow appeals on costs only. Indeed, under s.17(1)(b) of the Superior Courts Act 10 of 2013, leave to appeal may not be granted if the issue falls under s.16(2)(a) of that Act. And the latter section provides: “(2) (a) (i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.” This implies that when all issues are settled between the parties, except costs, the court of appeal will have no power to hear the appeal, save for the “exceptional circumstances” under s.16(2)(a)(b); compare *Legal Aid South Africa v Magidiwana and Others*, 2015 (2) SA 568 (SCA).

⁶ It is unnecessary to consider the applicant’s submission that the respondents have in effect conceded the eviction relief claimed. The tenants’ response, that they will vacate when the extended lease, on their version, expires, seems a complete answer.

⁷ Page 79, annexure C to the answering affidavit.

⁸ Clause 15.3.

⁹ Answering affidavit, page 55, paragraph 14.2, and the annexures there referred to.

applicant (through his agent) about it, saying that there must be an error in the billing.¹⁰

[8] These complaints went on for some time until the tenants employed a professional to check whether there was a leak somewhere. A leak was promptly detected and repaired, and the problem solved.¹¹ The tenants say that the applicant is liable to them for the amounts that they had paid for the unnecessary consumption of water caused by the leak. They estimate that their normal consumption over this period would have been about a third of what it actually was, and their arithmetic therefor translates into the amount claimed and consequently set off against the debt.¹²

[9] Two issues were raised by the applicant in response to this contention. The first is that there was no lawful claim against the applicant for the amount, and the second is that in any event, even if there were a claim, the amount is not liquidated and so not capable of being set off.

[10] Concerning the first, the applicant's proposition is that contractual "*responsibility*" for keeping the water pipes in good order and repair does not imply breach of that obligation until the tenants will have identified and will have demanded repair of the leak and the applicant will have refused to do so. Since the tenants and not the applicant occupy the house, it was up to them to have identified the problem, and to have conveyed it to the applicant. When indeed this was done, the problem was sorted. But, according to the applicant, he is not liable for the costs incurred in the lead-up to that moment.

¹⁰ Ibid, and paragraph 14.3.

¹¹ Ibid.

¹² Ibid, and paragraph 14.4.

[11] The tenants' response to this proposition is that their complaint is that the applicant did nothing in response to their repeated complaints about the large water bills. They say that he should at least have done something to get going and to investigate what the cause was of the problem.

[12] This is the kernel of the dispute. Was it up to the applicant to have done so, or was it up to the tenants to have done so? In my view it was up to the tenants to have done so, for the following reasons.

[13] The word "*responsible*" has a wide range of meanings.¹³ It could conceivably mean – in a wide sense - that the applicant needs to have in place a schedule of repair and replacement whether or not problems arise; or it could mean – in a narrow sense - that the applicant need only respond as and when problems arise. Whether it bears the wide or the narrow meaning depends, in my view, on the context.

[14] Take the painting of the house, as an example. The applicant would have to paint the exterior of the house, from time to time, and need not be reminded of it by the tenants. This is because it would be obvious to any reasonable person driving past that a coat of paint was needed.

[15] But take the water leak. The reasonable driver-by would not know that there was a water leak requiring repair. And before a water leak is actually established, one will not know whether there is a leak, for which the applicant is contractually "*responsible*." It may, after all, have been a billing error; and there is no contractual provision that renders the applicant "*responsible*" for billing errors. To the contrary, under clause 15.4.2 the applicant is probably not contractually liable for billing errors.

¹³ Compare Webster's Unabridged Dictionary, 2nd ed, Random House, sv "*responsible*."

[16] Where does that leave one? The tenants live on the site. They know their water consumption. They know whether there would have been some conduct on their part that might have been beyond the usual. As it happened, it was they that actually incentivized the detection of the problem by employing a professionally leak detector. Although their argument was that the applicant should have done this earlier, they are not able to explain why, in the event, they themselves did not do it earlier.

[17] This impels one to the conclusion that in the context of clause 15.3 and clause 15.4 the obligation was on the tenants to have identified the problem as being one for which the applicant was *“responsible”*. It follows then that the applicant’s contractual obligation is not to guarantee that there will not be a water leak; that is impossible to perform. His obligation is to fix, or pay to fix, a water leak if one should occur, as did here. From this it follows that he is not in default until he is placed in default, meaning until he is told about the leak, and asked to fix it.

[18] On the facts of this case the applicant was therefore not in breach of his obligation, and the tenants have no claim against the applicant for payment of what the tenants assert are damages suffered by them.

[19] This conclusion makes it unnecessary to consider whether the damages claim was liquidated, but since it was argued, I express my view in that regard. The manner of assessment is simple, as the tenants argued, that is true. But so is the assessment of damages for pain and suffering as a result of a femur fractured in a motor vehicle crash. Yet that does not make it liquidated. The plaintiff is still required to tell a court that s/he has suffered pain.

[20] In this case, the tenants were still required to come to court to explain that their consumption remained, largely, within their usual pattern. Their evidence was still liable to be tested. It follows that I would have concluded, had it been necessary, that for this reason set-off did not occur.

[21] It is also unnecessary, in view of my conclusion, to examine the dispute concerning the electricity billing. It is also undesirable that I should do so, since another appropriate forum may be called upon to do so.

[22] The applicant was accordingly entitled to have engaged the system to secure the eviction of the tenants, and is entitled to his costs. The scale of costs was an issue, the tenants arguing that the Magistrates' Court, or the Regional Court, had jurisdiction to have heard the matter.

[23] Assuming that the tenants are right, the fact remains that the parties expressly agreed in their written lease¹⁴ that they could approach either the Magistrates' Court or the High Court, if they had to involve the system. The applicant chose the latter, and was thus entitled to have done so.

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

The draft order annexed, initialed, dated and marked "X" is made an order of court.

WHG van der Linde
Judge, High Court

For the applicant: Adv. A Bester
Instructed by:
Marto Lafitte & Ass
11 Smith Street
Bedford View

¹⁴ Clause 33.

011- 6166420
Ref: Mr J Pereira/LB332R

For the respondent: Adv. AJ Venter
Instructed by:
D & K Attorneys
218 Barkston Drive
Blairgowrie
Randburg
011 – 7894598
Ref: J Van Eeden/JVE13541

Date argued: 15 June 2016
Date of judgement: 17 June 2016