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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

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

[Signature]
16/02/2018

CASE NO:22240/2013

16/2/18

In the matter between:

BERRYDUST 52 (PTY) LTD

PLAINTIFF

and

THE MINISTER OF PUBLIC WORKS

DEFENDANT

JUDGMENT

THOBANE AJ,

Introduction

[1] The plaintiff, a company with limited liability, duly registered and incorporated in terms of the company laws of the Republic of South Africa, instituted an action against the defendant, a Government Minister responsible for the Department of Public Works in his representative capacity, for damages in respect of unpaid rent as well as compensation for repairs to the plaintiff's building.

[2] This matter, which is defended, proceeds only in respect of merits thereof, owing to a separation of issues in accordance with the provisions of Rule 33(4) of the Uniform Rules of Court.

Plaintiff's pleaded case

[3] In the particulars of claim the plaintiff makes the following case;

3.1. On 5 February 2009 the plaintiff and the defendant entered into a written agreement of lease of premises situated 31 Gallagher Avenue, Midrand;

3.2. The lease commenced on 1 March 2009 and was to terminate on 28 February 2011, at a monthly rental of R103 879-60 escalating at a rate of 10% per annum for the duration of the lease;

3.3. On 1 March 2009 the defendant took occupation of the premises.

3.4. On or about the second week of May 2011, while the defendant was in occupation of the premises, or while the lease subsisted, extensive damages were caused thereto, seemingly due to vandalism;

3.5. On 10 June 2011 the plaintiff and defendant entered into a written addendum in terms of which the termination of the lease was extended to 31 August 2011;

3.6. All the terms of the lease agreement entered into on 5 February 2009 were, in terms of the addendum, to be effective until the extended date of termination. In essence, the lease agreement was extended;

3.7. On 28 November 2011, the plaintiff's legal representatives wrote a letter of demand to the defendant, the thrust of which was to;

3.7.1. Confirm that the defendant had undertaken to carry out repairs on the property so as to hand it back in the condition it was prior the lease or at the commencement thereof;

3.7.2. Seek details concerning the date of commencement of the repairs as well as the date of hand over;

3.7.3. State that its own Quantity Surveyor would be utilized and that the agreed Bill of Quantities would not be deviated from;

3.7.4. Insist that rental was to be paid during the period of repairs up until the premises are handed back to the plaintiff;

3.7.5. That outstanding payments were to be made,

3.7.6. To caution that in the event repairs were not completed on time, annual escalation would have to be made effective.

3.8. That on 18 December 2012 the defendant returned possession of the property to the plaintiff;

3.9. That the defendant only paid rental until end of February 2012 and was therefore in arrears with rental from 1 March to 18 December 2012;

3.10. That the defendant was therefore indebted to the plaintiff in the sum of R1.4 million.

Defendant's plea

[4] In its plea, the defendant;

4.1. Admitted that the lease agreement was concluded between the parties and acknowledged its terms;

4.2. Denied that they remained in occupation of the premises until 18 December 2012.

4.3. Pleaded that they remained in occupation until August 2011 but that payment of rent continued until the return of the premises;

4.4. The property was returned in March 2012 but that the plaintiff refused to take occupation;

4.5. The damage to the building, the demand for the repairs as well as the undertaking to effect the repairs were admitted;

4.6. It was purely out of courtesy, it is pleaded, that the repairs were effected in that there was no obligation to effect them. This is so because in terms of the lease agreement the plaintiff was supposed to obtain insurance cover for damages to the premises owing to vandalism.

Common cause issues

[5] The following facts are common cause;

5.1. That the parties concluded an agreement of lease on 5 February 2009;

5.2. That the lease was for a period of two years commencing on 1 March 2009 and terminating on 28 February 2011;

5.3. That on 10 June 2011 the parties concluded a further agreement, an addendum, extending the date of termination to 31 August 2011;

5.4. That the premises were vandalized;

5.5. That the plaintiff demanded repairs to the building and that the defendant agreed to effect the repairs and return the building to the condition it was prior the vandalism, fair wear and tear being excepted;

5.6. That the defendant undertook to pay rental while the repairs were being effected;

Issue for determination

[6] The court is firstly called upon to determine when exactly was the property handed back by the defendant to the plaintiff. This will assist in the determination of rent payable. Secondly, whether at the time when the building was handed over, was there compliance with an undertaking made by the defendant to repair the damages which resulted from vandalism.

Plaintiff's evidence

[7] Michael Fraser Vermaak, a director of the plaintiff, testified that prior to the lease agreement entered into between the plaintiff and the defendant, the premises that were leased by the defendant were in a good condition with functional electricity, water, alarms, electrical fence, PABX networks and had

an electricity generator. The offices were modern in furnishings, complete with a canteen and they had a somewhat open plan appearance to them. In May of 2011 he received a call from a neighbor to their building who stated that vandalism was taking place on their building and that he had reported it to the Defendant as well as to the SAPS. A joint site inspection was conducted and it was discovered that there had been extensive vandalism resulting in the removal of air conditioners, theft of DB boxes, damages to the ceiling and to bathrooms, the ripping of cables, damages to doors and the alarm system and theft of intra-red eye gadgets. He prepared an email to the defendant detailing the damage.

[8] Around July 2011, after the vandalism had take place, the addendum was signed and he personally did so. Beginning of August of 2011 he received a letter to the effect that the lease would not be renewed beyond August 2011. He responded by writing a letter details all the outstanding issues. A spreadsheet was prepared with details of repairs the defendant had to effect as well as the costing.

[9] Despite directing correspondence at the defendant, he did not have the courtesy of a reply. He tried to engage services of an estate agent with the view to possibly marketing the property, however, he was advised that in its then state, the property would chase away prospective clients instead of

inviting or interesting them. In the mean time rent was being received from the defendant until the end of February 2012.

[10] The plaintiff prepared its own quotation and in the process discovered that the defendant had not effected all the previously identified repairs. At some point he was asked to remove a crane that was positioned on the premises. E-mails were being exchanged between the parties and he was generating monthly invoices to the defendant. Eventually the building or the premises were handed over or returned to the plaintiff on 18 December 2012.

[11] The claim is in respect of rental for the period 01 March 2012 to 18 December 2012 as well as a balance for the incomplete repair work as at the time of return of the premises.

Defendant's evidence

[12] Tubatse Peter Moloi testified that he is an admitted attorney with a B. Proc and an LLB degree. At the time of the lease agreement he was a Deputy Director Leasing, within the defendant and was personally involved in the conclusion of the agreements. At the onset he readily conceded that the defendant made an undertaking to, while repairing the damage to the premises, pay rental to the plaintiff. The undertaking that the defendant made, namely, to pay rental while awaiting repairs to the premises, was made out of

goodwill, and further that there was never an agreement to extend the lease. The settlements that were made were meant to simply lay the matter to rest.

[13] He stated that the defendant tried a few times to hand back the premises to the plaintiff but the plaintiff would not accept them. There were other attempts to hand over the premises to the plaintiff however they did not result in any positive result. One of the obstacles related to the crane which needed to be moved and repositioned. Further, the defendant had posted security guards, in circumstances where there was no obligation on the part of the defendant, to guard the building so as to avoid damages thereto. He asserted that there was an offer to hand over the building but that such an offer was refused by the plaintiff.

[14] During cross examination he was asked about the effect of exchanged emails and discussions contained therein concerning outstanding repairs as well as whether these had any binding effect on the parties. One such email with a list of outstanding repairs was sent on 14 May 2012.

[15] Beyond the date stated above, the parties continued to communicate with the view to handing over the premises to the plaintiff. The defendant could not recall whether after the above date certain matters remained outstanding beyond. What is not disputed however is that the defendant still

had its security personnel on the premises and most importantly there was no finality to the list of outstanding repairs.

[16] The security personnel that remained on the premises beyond the date of the lease as well as the rental that was paid beyond the date of lease was purely *ex gratia* and was aimed at guarding the building against further vandalism. Not guarding the building beyond March 2012 would not have necessarily amounted to wasteful expenditure, in the defendant's view.

Legal principles

[17] Parties to an agreement have reciprocal obligations. In ***R H Christie & GB Bradfield Christie's The Law of Contract in South Africa 6 ed (2011)*** at 437, the authors state the following:

'In BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 1 SA 391 (A) the Appellate Division reviewed in some detail the history and scope of what have come to be known as the principle of reciprocity and the exceptio non adimpleti contractus. The principle of reciprocity recognises the fact that in many contracts the common intention of the parties, expressed or unexpressed, is that there should be an exchange of performances, and the exceptio gives effect to the recognition of this fact by serving

as a defence for the defendant who is sued on the contract by a plaintiff who has not yet performed or tendered to perform.'

[18] There is an obligation on a lessee to restore the leased premises to the lessor in a good condition, or at least in substantially the same condition as they were in at the time he took occupation thereof, fair wear and tear excepted. See ***Bartman v Leonard and Others* 1952 (2) SA 582 (C)** at 596G; ***Phil Morkel Ltd v Lawson & Kirk (Pty) Ltd* 1955 (3) SA 249 (C)**; ***Sandown Park v Hunter Your Wine & Spirit Merchant* 1985 (1) SA 248 (W)**.

[19] In ***Sapro v Schlinkman* 1948(2) SA 637 (A)** the Supreme Court of Appeal, in the context of a breach that resulted in cancellation of a lease, found that in such circumstances, a plaintiff, notwithstanding his breach, was entitled to sue for rent due during the full period in which the Defendants had enjoyed undisturbed occupation of the leased premises. The court briefly discussed "*holding over*".

"To sum up: the authorities all show that the date that matters in regard to the termination of the lessee's liability to pay rent in terms of the lease is not the date of the breach, or the date on which the lessee purported to cancel the lease, but the date on which he actually quitted the premises."

[20] The full bench in **Nedcor Bank Ltd v Withinshaw Properties (Pty) Ltd** 2002(6) SA 236 (C) at 253B, held as follows: -

*“Once a party to the lease agreement has, however, elected to cancel it, or the parties have mutually agreed to terminate it, the rights and obligations relating to the payment of rent must be regarded as having likewise terminated. Should the lessee then fail to restore the leased premises to the lessor, he would be liable to him in damages. It may well be appropriate, I respectfully suggest, for the Supreme Court of Appeal to reconsider the ratio underlying the **Sapro** judgment, should the opportunity arise.”* (Emphasis added).

Application of law to the facts

[21] It is common cause that the initial lease the parties concluded was meant to commence on 1 March 2009 and terminate on 28 February 2011. It is further common cause that by way of an addendum, it was extended to 31 August 2011. The building was vandalized while in the hands of the defendant. The vandalism by all accounts and if the invoices and the testimony of Mr Vermaak is anything to go by, was quite extensive. The damage to the building is common cause as well as the fact that the defendant attempted to restore the property to the condition it was in before the vandalism. The defendant chooses to explain the attempts to repair and

also pleaded, that the repairs were done “out of courtesy”, “*ex gratia*” or “out of goodwill”.

[22] It is clear from the common cause facts that the defendant remained in occupation of the premises beyond the extended date of termination being 31 August 2011. During that time, the defendant continued paying rent while some of the repairs were being attended to. The letter from the plaintiff's legal representative, annexure “X3”, dated 28 November 2011, in part was confirmation of the defendant's decision communicated in a letter dated 22 November 2011, to carry out the repairs on the building and to later hand it back in a condition that it was prior the damage. The defendant may view the repairs as having been carried out “out of goodwill”. That contention is however not legally sustainable in light of the fact that there was in any event an obligation on the defendant to hand over the premises “*in a good condition, or at least in substantially the same condition as they were in at the time he took occupation thereof, fair wear and tear excepted*”.

[23] On the defendant's evidence there were in total three attempts to hand over the premises to the plaintiff, all of which did not materialize. Two of those attempts were in February 2012. On 29 March 2012 there was a site meeting. I pause to indicate that the date of the meeting is the date the defendant argues the plaintiff refused to take back the premises. When Mr Moloi testified, he stated that on that day the building was offered to the plaintiff

who refused to take it back. On his version, more items were pointed at as not having been repaired including the issue of the crane which remained unresolved. Beyond 29 March 2012, according to the defendant, security personnel were kept on the premises for purposes of guarding against further vandalism.

[24] The defendant sticks to the version that there was an attempt to hand the building over to the plaintiff on 29 March 2012 but the plaintiff refused that offer. On the same breath however the defendant admits that there were repairs outstanding beyond 29 March 2012. Earlier, on 9 December 2011, the defendant had stated in a letter that;

24.1. The premises would be handed back in the same condition they were prior the vandalism;

24.2. The tenancy will continue until the building is handed back.

[25] The defendant it seems, seeks to minimize the importance of the letter. It came through during argument that the defendant was of the view that the letter amounted to a mere undertaking and did not amount to a contract. As authority for his proposition counsel for the defendant relied on *Siyepu and Others v Premier of the Eastern Cape (203/2000) [2011] ZAECHC 8; 2013 (2) SA 425 (ECB)*. In the judgment Alkema J discusses briefly the difference between a “gentlemen’s agreement” and an enforceable

contractual obligation. In **Sipeyu** (*supra*), the court was called upon to determine if a clause in a written agreement was legally enforceable. The dispute was summarized thus;

“[4] In summary, clause 3 records Government’s “commitment” to job creation (generally) in the transport industry for the 1644 workers, and in particular, to “...assist former TRTC employees to secure employment in a new transport arrangement.” The clause specifically records that “...government will put in place mechanisms to address transport needs in the Province and thereby creating employment opportunities.”

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[5] The gravamen of the dispute is whether clause 3 is legally enforceable. There is a further dispute between the parties relating to the question whether or not Government, as a matter of fact, complied with its obligations under clause 3.”

[26] Alkema J discusses whether or not what was contained in clause 3 of the agreement was legally enforceable, the concept of a gentlemen’s agreement as well as the question whether undertakings in a written agreement constitute enforceable undertakings. The issues the court was confronted with are clearly distinguishable from the facts of this case. It is therefore, in

my view, no authority for the proposition that what was contained in the letter of 9 December 2011 in which the defendant “assured” the plaintiff that the building will be handed back in good condition and also “agreed” that tenancy will continue until the such time that the building is handed back has no legal effect. Even if I am wrong and the facts of this case are applied to the three requirements that counsel for the defendant in argument asked that they be applied, namely, commercial sense, efficacy and the nature of the undertaking, it is my view that the “undertaking” meets all the requirements for various reasons. For a start, the undertaking would be founded on a sound legal principle that there is an obligation on a lessee to hand back the property in a good condition. It is therefore clear that even commercially speaking it is not anomalous to keep the defendant to the undertaking. Secondly, the damages that were caused to the building were extensive, therefore there is no other manner of applying fairness and doing what is just other than through the undertaking. The undertaking, if it is that, is restorative in nature. In **Sipeyu** the court was prepared to accept that the undertaking made was binding. The court said the following at paragraph 38 ;

“I am therefore prepared to accept, in favour of the plaintiffs, that the content of the clauses manifest an intention on the part of Government to be bound by its written commitments and obligations.”

[27] The posture by the defendant that the building was handed back is not supported by objective evidence. The plaintiff is not under obligation to accept the building in circumstances where it had been seriously vandalized. I accept that the plaintiff could have opted to accept the building not completely repaired as was the case at the aborted handover of the 29 March 2012 and to thereafter record all the outstanding repairs. At that stage however the defendant had not only acknowledged the damages on the building but had also shouldered the responsibility for the repairs. In addition, the defendant, despite the attempt to distance himself from the letter of 9 December 2011, had readily accepted to pay monthly rental for the period of the repair work and the continuation of the tenancy during that time.

[28] What is more telling however is that on the version of the defendant, on the date of the handover a list of more outstanding work was prepared. It is my view that in light of the outstanding work at the time, the plaintiff can not be faulted for not having accepted the building back. On 14 May 2012 an email with a list of outstanding work was sent to the defendant. In cross examination Mr Moloi conceded that if he was of the view that the outstanding work referred to in the annexure to the aforesaid letter had been completed he would have written back and indicated that much. In any event the letter was never responded to by the defendant. It is a significant concession because it puts paid to the contention that at the time the building was not taken back by the plaintiff all the outstanding work had been completed.

When the plaintiff needed to go back to the building to effect some repairs permission was sought from the defendant. This additionally shows that the defendant was in firm possession of the premises.

[29] On 29 October 2012 there was yet another letter written by the defendant in which reference was made to outstanding repairs. Mr Moloi conceded that at the time the letter was written there were still outstanding repairs as they were still sourcing funds. This additional concession is another indication that the building was not repaired even in October 2012.

Conclusion

[30] I am persuaded that the premises were not on 29 March 2012, in a state they were when the lease was entered into fair wear and tear excepted. I find that the plaintiff was under no obligation to take possession thereof. I am further of the view that beyond that date the premises remained partially in a state of disrepair as shown in the letter of October 2012. I find that the premises were only handed back on 18 December 2012 and even then certain repairs were still outstanding. For the period 1 March 2012 to 18 December 2012, the defendant is liable for rent. Lastly I find that when the premises were handed back there were still outstanding repairs.

Order

[31] I therefore make the following order,

1. The defendant is held liable for rent for the period 1 March 2012 to 18 December 2012;
2. The defendant is held liable for the repairs of items outstanding on the day of the hand over, 18 December 2012, agreed or proven;
3. The defendant is directed to pay the plaintiff's party and party costs for the determination of liability.



SA THOBANE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA