

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 25902/2021

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

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SIGNATURE

...08/11/2024.....
DATE

In the matter between:

RELTA 25 (PTY) LTD

PLAINTIFF

(Registration No: 2014/182908/07)

and

DALINJABO TECHNICAL SERVICES CC

DEFENDANT

(Registration No: 2009/093873/23)

JUDGMENT

Manoim J

- [1] This case involves a claim and counter claim. Both claims arise from a lease of business premises in Boksburg in Ekurhuleni that the plaintiff leased to the defendant.
- [2] The plaintiff is a property owning company. It alleges that the defendant, a transport logistics company, owes it R885 088,46. This amount is made up of arrear rentals and utility costs. A second claim is for damages. The plaintiff alleges that the defendant left the premises in a state of disrepair on its departure and that it cost it R 315 813 to restore the premises.
- [3] The defendant disputed the amount owing in respect of the first claim, or Claim A, as it was described in the pleadings. However, during the course of the hearing, the parties settled claim A. I gave order in respect of that claim on 6 November 2024.
- [4] The matter then proceeded only in respect of the plaintiff's claim B, the claim for damages and the defendant's two counter claims. The plaintiff's damages claim is made up of an amount the plaintiff said it paid to a third party contractor to repair the premises after the defendant had departed, in either late April or early May 2021.
- [5] The defendant denies liability in respect of the damages. In turn it has counterclaimed for repayment of its deposit of R 50 000 ("defendant's claim A") and for improvement to the premises it says it effected, which amounted to R 583 462.00 ("defendant's claim B"). I will now consider each of the respective claims.

Plaintiff's claim B

- [6] The lease agreement was from 1 September 2017 to 30 September 2020. However, the defendant remained on the premises until 30 April 2021. There is no dispute over this as the lease provided for a month to month lease on the same terms once the original lease period had expired.
- [7] The plaintiff alleges that when the defendant vacated the premises it had left them in a state of disrepair. In its pleadings it alleges that in terms of clause 10(iii) of the lease, or any extension of it, the “... *Lessee shall make good and repair, at his own expense all damages and breakages to same and shall be responsible for all replacements to the Lessor's premises.*”
- [8] The clause goes on to state that if the lessee does not do so within 21 days of being notified, the lessor is entitled to carry out the repairs and recover the costs from the lessee. There is a proviso to this that this comes about only after the lessee has been given an opportunity to remedy the damages and has not done so within a reasonable time.
- [9] The plaintiff's pleaded case is that the defendant failed to reinstate the premises to the condition that they were in when it took occupation, fair wear and tear excepted. The plaintiff enclosed a quotation for the repairs with its particulars of claim. The total cost amounted to R 315 813 (inclusive of VAT). The plaintiff alleged that despite demand the defendant had refused to make payment.

- [10] There is no evidence that the plaintiff followed the procedure required in clause 10(iii). There is no evidence that it gave the defendant the 21 days' notice nor that it gave it the opportunity to remedy the damages before undertaking them itself.
- [11] However, none of these procedural points have been taken by the defendant. In its plea the defendant pleaded a bare denial. This, as the plaintiff argued, amounts to non-compliance with Uniform Rule 22 which states that a defendant must clearly and concisely state the material facts on which it relies. The defendant did not do so. This is not a mere technical quibble. The plaintiff would thus not know if the defendant was denying that any damage had been caused, or if it had, it was fair wear and tear, or if the proper process had not been followed, or if the quantum was unreasonable.
- [12] When the plaintiff led its evidence, it did so without the benefit of knowing the basis for the denial. It led the evidence of one of its directors Mr Naidu, who went through a series of photographs showing the state of the premises on the date of departure. These showed the buildings in a state of disrepair; walls had partitions hammered into them, toilets were broken, and in one place a cistern was missing; ceilings had been removed and electric wiring hung loose.
- [13] Naidu was led through a number of these photographs, and he was not challenged on his description of what they depicted. The plaintiff then led the contractor who had made the repairs. His evidence again was on the state of the premises which he saw after the defendant had already departed, what repairs had been done and their cost. In cross examination he was not

challenged about either the extent of the repairs or their cost. The only suggestion was that he was not in a position to comment on their state when the lease commenced. He testified he was not. He had only viewed them after the premises had been vacated.

[14] The significance of this cross examination only became apparent when the defendant presented its case. Its only witness was Mr Bhengu, a director the defendant. Bhengu did not dispute the fact that the premises were in a state of disrepair, as evidenced by the photographs. The most he did was to assert that some abandoned refuse shown on one photograph, was not left by the defendant. However, the plaintiff has not claimed for the removal of this refuse. But what Bhengu testified was that the premises were in a state of disrepair on the date they occupied. He testified that he had got a low rental from the plaintiff precisely because the premises which had been vacated by a previous owner were in such a woeful state when occupation commenced. Rather what had happened is that the defendant had made its own improvements to the premises which form part of its claim.

[15] The plaintiff objected to the leading of this evidence on the basis that it had not been pleaded. I allowed it in provisionally.

[16] In final argument counsel for the plaintiff argued that this evidence could not be relied on for two reasons. It was never pleaded, and the version was never put to Naidu when he testified.

[17] Counsel for the defendant conceded that the plea was a bare denial but sought to take refuge in what was pleaded in the counter claim. The plaintiff he argued,

would have known from the counter claim that the claim the defendant was making for its improvements meant that the defendant's version that the premises were defective from the date of occupation was pleaded. He cited some authority for this proposition. But those cases deal with the rationale for hearing a counter-claim at the same time as the main claim.¹ They do not deal with the issue he had argued – that a counter-claim can be used to bolster a deficient plea in the main claim.

[18] Moreover, even if such a generous reading could be given to the counterclaim, its claim for improvements are different from the ones' the plaintiff seeks compensation for. To put it bluntly the plaintiff's claim B and the defendants counter claim B do not relate to the same alleged expenses.

[19] After hearing final argument, I have decided that this evidence is not admissible. First this version, as I have noted, was never pleaded. If it had the plaintiff would have been put in a position to lead evidence on the state of the premises when the defendant commenced occupation. Secondly the version that the defendant now sought to rely on was never put to the Naidu in cross examination. As was held in SARFU:

“If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness is testimony is accepted as correct.”²

¹ One of the cases cited was *Standard bank of SA Ltd v SA Fire Equipment (Pty) Ltd* 1984 (4) SA 693 (C) at 699C.

² *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) Paragraph 61.

- [20] The defendant has therefore not raised any defence to the plaintiff's claim for improvements. This claim I conclude has been established.

The counter-claims

- [21] I now deal with the counterclaims. The first counterclaim, the defendant's claim A, is for the repayment of the deposit of R 50 000. This can be dealt with easily. The plaintiff has indicated that it has no objection to this amount being set off against the amount the defendant owes in terms of its Claim B. Since I have found for the plaintiff on its claim B I will credit the defendant with this amount.

- [22] The defendant's claim B is pleaded as follows:

"The Defendant has made major improvements and further maintenance on the said leased property in the amount of +/- R 583 462.00".

- [23] The claim is based on unjust enrichment. The defendant needed to do so given that the lease had the standard clause that no variation was valid unless reduced to writing. There is no evidence that any such variation was sought nor that consent was obtained from the plaintiff. The nearest the defendant got to this was an email it sent to the plaintiff, stating it needed to bring in plumbers to clear drains and asked if the plaintiff would provide the plumbers or whether it should do so itself. There is no evidence as to how this was resolved. Certainly, the document cannot be read as an attempt to obtain consent for all the expenses outlined, only some of which related to plumbing.

[24] The basis for this claim was pleaded as follows:

“The Plaintiff has been enriched by such improvements as the leased property is in a better state than what it was before the Defendant took occupation.”

[25] The defendant then set out 21 separate expenses it had incurred in that respect, from 4 December 2017 until 19 March 2021. Invoices were provided for each one. Although some of the most recent appear indistinct, I will give the defendant the benefit of the doubt that they were incurred on the dates and in the amounts alleged in the counterclaim.

[26] The first seven of these items were incurred more than three years before the counterclaim was instituted. The plaintiff took the point that these claims had prescribed. The law is clear that unjust enrichment claims prescribe in the way normal debts prescribe. In *Blue Financial Services Limited v ABSA Bank Limited (Van Niekerk as Third Party)* the court explained:

*“A debt arising from unjust enrichment runs from the date when the debtor receives the benefit to which he or she is not entitled, and the creditor acquires the right to claim restitution. Usually, the right to claim restitution is acquired, under the *condictio indebiti*, at the time that the mistaken payment is made. The period of prescription is three years. Section 12(3) of the Prescription Act provides that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and the facts from which the debt arises, provided that a creditor shall be*

deemed to have such knowledge if he could have acquired it by exercising reasonable care.”³

[27] The defendant’s response to this was that the claims despite arising from separate items should not be considered on a piecemeal basis. Rather it argued the repairs which it made to the premises over time, should be viewed as a continuous act and given that the whole claim included items that were incurred within the three-year period prior to the institution of the counterclaim, the claim had not prescribed. Again, this is an unorthodox claim, and I was given no authority for such an approach. The one case cited was not in point. It dealt with prescription allegations being made in vacuo but that is not the case here.⁴

[28] But even if for some reason the later claims can pull the earlier ones up by their bootstraps, the defendant has failed to establish the elements necessary for a claim of unjust enrichment. The elements of an unjust enrichment claim are well-known:

[29] They are:

- a. whether the plaintiff had been enriched by the improvements;*
- b. whether the defendant has been impoverished by procuring them;*
- c. whether the plaintiff’s enrichment was at the expense of defendant;*
- d. whether the enrichment was unjustified.⁵*

³ [2019] JOL 45871 (GJ)

⁴ *MEC for Health, Western Cape v MC* (1087/2019) [2020] ZASCA 165 (10 December 2020)

⁵ See for instance *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA)

[30] Under cross examination Bhengu conceded that the defendant had benefited from the improvements and that it could not claim that the plaintiff's enrichment was unjustified. Nor was it clear from the photographs that were shown to Bhengu that any of the alterations could be regarded as enriching the premises. At best, the earlier claim for construction of a gate might have. But that claim has prescribed as the work was done more than three years prior to the counter-claim. The elements for the claim of unjust enrichment have not been met. Nor is it necessary for this reason to consider the plaintiff's further argument that the basis for the *condictio* on which the defendant relied had not been pleaded.

[31] The defendant has thus not succeeded in proving the counter-claim.

Conclusion

[32] The plaintiff's is awarded damages of R 315 813 in respect of its claim B. This amount is reduced by the deposit of R 50 000, leaving the balance of R 265 813. The plaintiff had also claimed interest on this sum from date of mora. However, this demand was only made when the action was instituted. The particulars of claim was served on 4 June 2021. This would be the date the defendant would first have been aware of the demand. Thus, interest should run on the sum of R 265 813 from that date.

Costs

[33] The plaintiff has succeeded in proving both its Claim B and dismissing the defendants' Claim B. It seeks attorney client costs for both given that this is provided for in the lease. While the lease provides for this, it applies when the

plaintiff acts to enforce its rights; it is silent on whether it applies when the defendant brings a claim that does not rely on the terms of the lease. Given that the two claims were heard together it would be difficult for a taxing master to disentangle one from the other. I consider that an award of party and party cost on Scale B would suffice for both.

ORDER:-

[34] In the result the following order is made:

1. The defendant is indebted to the plaintiff –
 - a. In the sum of R 265 813; and`
 - b. For interest on the said sum in sub-paragraph (a) at the rate of prime plus 2 %, from 4 June 2021 to date of payment.
2. The defendant's counter claim B is dismissed.
3. The plaintiff is awarded costs in respect of its Claim B and for the dismissal of the defendant's Counter Claim B, on a party and party scale, in accordance with scale A.


N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

Date of hearing: 04 to 06 November 2024

Date of Judgment: 08 November 2024

Appearances:

Counsel for the Applicant: C Prinsloo

Instructed by. Eversheds Sutherland KZN Inc

Counsel for the Respondents: RV Mudau

Instructed by: Makuta Attorneys