

SOUTH AFRICA / JUDGMENT

van Staden v van Staden N.O and Others
(12229/2022) [2023] ZAWCHC 105;
[2023] 3 All SA 307 (WCC) (15 May 2023)
[2023] ZAWCHC 105

COURT

Western Cape High Court, Cape Town

BEFORE

Adhikari

CASE / FILE NUMBER

12229/2022

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No:12229/2022

REPORTABLE

In the matter between:

JURGEN JOHANN VAN STADEN Plaintiff versus MICHAEL MULLER VAN STADEN N.O. First Defendant ELEANOR VAN STADEN N.O. Second Defendant GIDEON BEKKER JAMES N.O. Third Defendant

HEARING DATE: 25 April 2023

JUDGMENT DELIVERED ELECTRONICALLY ON 15 MAY 2023

ADHIKARI, AJ

- [1] The defendants except to the plaintiff's particulars of claim on the basis that it fails to disclose a cause of action.
- [2] The plaintiff instituted action against the first to third defendants, the trustees for the time being of the JP Milley Trust

(‘the trustees’ and ‘the Trust’) seeking declaratory relief against the Trust in consequence of an agreement

concluded between the plaintiff and the Trust relating, inter alia, to certain immovable property owned by the Trust.

- [3] The plaintiff is a beneficiary of the Trust. During 2020 the Trust was considering making a distribution of certain Trust assets to the plaintiff, having made similar distributions to other Trust beneficiaries. In particular, the Trust was minded to purchase a house with the distribution of the Trust assets and to transfer the house to the plaintiff.
- [4] Consequently, in 2020 the Trust purchased Erf 3[...], Eversdal ('the property') and permitted the plaintiff and his family to take occupation thereof.
- [5] During 2021 the Trust approached the plaintiff and proposed that the plaintiff make a financial contribution toward the purchase of the property in that the property was more valuable than the distributions that had previously been made to other Trust beneficiaries and the Trust wanted to ensure equity among the Trust beneficiaries.
- [6] Consequently, the Trust and the plaintiff entered into the written agreement that is the subject of the action proceedings.

THE AGREEMENT

- [7] On or about 31 August 2021, the Trust and the plaintiff entered into an agreement governing the terms of the provisional

distribution to the plaintiff of the property and the plaintiff's occupation thereof ('the agreement').

- [8] The agreement in relevant part provides as follows:

[8.1] The Trust is the owner of the property.

[8.2] The trustees intended to distribute the property to the plaintiff subject to the terms of the agreement.

[8.3] The Trust and the plaintiff agreed to a provisional distribution of the property to the plaintiff, subject to the condition that the property would only be distributed to the plaintiff in the event that the plaintiff complied with all of the terms of the agreement.

[8.4] The Trust, in principle, agreed to make a distribution to the value of R3 million to the plaintiff.

[8.5] A value of R4 139 642.91 was assigned to the property.

[8.6] The plaintiff was required to make a financial contribution toward the purchase of the property, in the amount of R972 642.91 ('the contribution').

[8.7] The plaintiff would make payment of the contribution in instalments, with interest at a rate of 1% above the prime rate, over a period of 20 years ('the instalments').

[8.8] The first instalment was to be paid on 1 September 2021, in the amount of R8 135.00.

[8.9] The plaintiff was to make payment of the instalments monthly in advance, to the Trust's bank account.

[8.10] The monthly instalments amount would fluctuate based on the applicable interest rate from time to time.

[8.11] The plaintiff was responsible for effecting, inter alia, all routine repairs and maintenance to the property necessary due to normal wear and tear, as well as for the maintenance of the garden and lawn on the property.

[8.12] Prior to the coming into operation of the agreement, the plaintiff was required to ensure that an inspection of the property was conducted together with Ms Sonja Dunn of Property Cleaning and Inspection Services.

[8.13] The plaintiff was required to ensure that a complete inspection of the property was conducted every three months ('the periodic inspections') together with Ms Dunn or another agent appointed by the Trust.

[8.14] In the event that any of the periodic inspections revealed that the condition of the property had deteriorated, and that maintenance/repairs were needed, the plaintiff was required to ensure that such maintenance/repairs were done within 5 working days after the completion of the relevant periodic inspection.

[8.15] In the event that the plaintiff failed to pay the monthly instalments or to fulfil any of the other conditions of the agreement after being given at least 14 working days' written notice, the Trust would be entitled to advise the plaintiff in writing that the terms of the agreement had not been fulfilled and that the Trust was not obliged to give effect to its decision to distribute the property to the plaintiff.

[8.16] In the event that the maintenance/repairs required after the completion of any of the periodic inspections were not effected by the plaintiff within the 5-day period provided for in the agreement, the Trust would be entitled to add the cost of the maintenance/repairs to the next monthly instalment due in terms of the agreement.

[8.17] In the event that the plaintiff breached the agreement, the Trust would be entitled, but not obliged, to:

[8.17.1] Inform the plaintiff that it no longer intended to distribute the property to him; and

[8.17.2] Inform the plaintiff that his right of occupation of the property had been terminated and that the plaintiff was to vacate the property on the first day of the second calendar month after being so advised.

[8.18] In the alternative, and in the event that the Trust elected to exercise its right to cancel the agreement the plaintiff would not forfeit the R3 million distribution, but the Trust would be entitled to deduct arrear rental in the amount of R25 000.00 per month from the R3 million distribution.

THE PLAINTIFF'S PLEADED CASE

[9] The plaintiff alleges that the Trust breached the agreement by interfering with his exclusive and undisturbed use of the property

from the inception of the agreement to July 2022, by:

[9.1] Conducting certain building and related work at the property;

[9.2] Damaging the plaintiff and his life partner's personal property;

[9.3] Vandalising the property;

[9.4] Taking an order in terms of s 32 of the Magistrates Court Act 32 of 1944, attaching the plaintiff's property for arrear rental, despite there being no lease agreement in place;

[9.5] Instructing the Sheriff to remove the attached property on false pretences; and

[9.6] Removing certain items from the property.

[10] As a consequence of these breaches, the plaintiff contends that he was entitled to withhold the monthly instalments due for the period October 2021 to July 2022, both months inclusive.

[11] The plaintiff further pleads that the Trust repudiated the agreement by purporting to cancel the agreement, that he disputes the efficacy of the purported cancellation, has rejected the repudiation and that he insists that the Trust render performance in terms of the agreement.

[12] The plaintiff pleads that the agreement is not subject to the provisions of the National Credit Act 32 of 2005 ('the NCA') in that the agreement is a lease of immoveable property as contemplated by s 8(2)(b) of the NCA and was not concluded at arms' length as contemplated in s 4(2)(iv) of the NCA.

[13] The plaintiff seeks the following declaratory orders:

[13.1] An order declaring that the Trust's interference with his peaceful, undisturbed possession of the property amounted to a breach of the agreement;

[13.2] An order declaring that the Trust's breach of the agreement entitled the plaintiff to withhold payment of the monthly instalments;

[13.3] An order declaring that the Trust's purported cancellation of the agreement amounted to a repudiation of the agreement which was not accepted; and

[13.4] An order declaring that the agreement remains valid, and that the plaintiff is entitled to claim transfer of the property against full performance by the plaintiff of the agreement.

THE DEFENDANTS' EXCEPTIONS

- [14] The defendants except to the particulars of claim on five separate grounds, on the basis of which the defendants contend that the particulars of claim lack the averments necessary to sustain the plaintiff's cause(s) of action.
- [15] The first exception is that the term pleaded in paragraph 11.7 of the particulars of claim, that the Trust was obliged to provide the plaintiff with exclusive, undisturbed use and enjoyment of the property is not an express term of the agreement and that the plaintiff is impermissibly seeking to import a tacit term which is irreconcilably at odds with the express terms of the agreement, contained in clauses 5, 6 and 7.1.2 thereof.
- [16] The second exception is that it is pleaded in paragraph 18.1 of the particulars of claim that the agreement is a lease of immovable property, and it is pleaded in paragraph 11.4 of the particulars of claim that the agreement obliges the plaintiff to make payment to the Trust of the amount of R8 135.00 in advance on the first day of every month. The defendants contend that the terms of the agreement render the principle of reciprocity inapplicable to the agreement and further that any remission of payments that the plaintiff may be entitled to are not readily ascertainable from the breaches alleged in the particulars of claim. As a consequence, the defendants contend that the *exceptio non adimpleti contractus* ('the exceptio') is not available to the plaintiff and that the plaintiff is thus not entitled to withhold the monthly payments due as or in lieu of rental.
- [17] The third exception is that the plaintiff has failed to allege that he has been entirely prevented from using the property. Further, the conduct of the Trust as pleaded in paragraphs 12.1 to 12.13 of the particulars of claim and the allegation that the plaintiff has been using the property from the date of inception of the agreement, and continues to do so, are irreconcilable with an allegation that the plaintiff has been entirely prevented from using the property. Consequently, the plaintiff is not entitled to withhold the monthly payments due as or in lieu of rental.
- [18] The fourth exception is that the breaches pleaded in paragraphs 12.1 to 12.3 and 12.6 to 12.9 of the particulars of claim relate to renovations, repairs or maintenance of the property, alternatively are not actions which by their nature interfere with the plaintiff's exclusive and undisturbed use of the property. Consequently, the plaintiff is not entitled to withhold the monthly payments due as or in lieu of rental.
- [19] The fifth exception is that the breaches pleaded in paragraphs 12.2 to 12.13 of the particulars of claim relate only to the months of October 2021, January 2022 and July 2022, thus the plaintiff has only alleged interference for these specific months. Consequently, the plaintiff has failed to plead any grounds that would entitle him to withhold the monthly payments for the entire period of October 2021 to July 2022 or to withhold any monthly payments due after

July 2022, even if the plaintiff was entitled to withhold payment, which the defendants do not concede.

THE APPLICABLE LEGAL PRINCIPLES

- [20] An exception is a legal objection intended to address a defect inherent in the other party's pleadings. The defect must appear *ex facie* the pleadings and no extraneous facts may be adduced or relied on by the excipient to show that the pleading is excipiable.[1]
- [21] The Court must accept as correct the allegations in the particulars of claim and determine whether those allegations are capable of supporting a cause of action.[2]
- [22] The pleading must be looked at as a whole. A charitable test is applied on exception, especially in considering whether a cause of action is established. Where there is uncertainty in regard to a pleader's intention an excipient cannot succeed unless it demonstrates that upon any construction of the pleading the claim is excipiable.[3]
- [23] As regards exceptions that no viable cause of action has been pleaded, an excipient therefore has a duty to persuade the Court that upon every interpretation which the particulars of claim can reasonably bear, no cause of action is disclosed.[4] Failing discharge of this onus, an exception ought not to be upheld.[5]
- [24] An over-technical approach should be avoided because it runs counter to the purpose of the exception procedure, which is to weed out cases without any legal merit.[6]
- [25] In the context of written agreements, a commercial document executed by the parties with a clear intention that it should have commercial operation should not lightly be held to be ineffective.[7]
- [26] Moreover, Courts are rightly reluctant to decide upon exception, questions concerning the interpretation of a contract.[8]
- [27] The principle that Courts are reluctant to decide issues concerning the interpretation of contracts upon exception is, however, not an all-encompassing principle. As was stated by Appellate Division (as it then was) in *Sun Packaging (Pty) Ltd Vreulink*,[9] this approach does not apply where the meaning of the contract is certain:

'Difficulty in interpreting a document does not necessarily imply that it is ambiguous ... Contracts are not rendered uncertain because parties disagree as to their meaning ... Counsel was probably right in saying that the letter is not a lawyer's contract. But this is no reason for interpreting it differently. For the reasons given, I do not find the meaning of clause 3 doubtful. Properly interpreted, it has only one meaning.'

DISCUSSION

The first exception

- [28] The first exception turns on whether the agreement can be interpreted as containing a tacit term that the Trust must provide the plaintiff with exclusive, undisturbed use and enjoyment of the property and if so, whether such tacit term precludes the Trust from effecting repairs/maintenance to the property where the plaintiff is required to but has failed to do so.
- [29] The plaintiff contends that the first exception is unfounded because none of the express terms of clauses 5, 6 and 7.1.2 of the agreement contradict the allegation that the Trust is required to provide the plaintiff with exclusive, undisturbed use and enjoyment of the property, despite the absence of an express term in the agreement to this effect, and that these clauses do not entitle the Trust to effect maintenance/repairs to the property without the plaintiff's consent.
- [30] It is common cause that the agreement does not contain an express term permitting the Trust to conduct repairs/maintenance to the property. However, that is not the end of the matter.
- [31] Meaning must be given to clause 7.1.2 of the agreement which provides that in the event that the repair/maintenance work required after the completion of any of the periodic inspections is not effected by the plaintiff, the Trust is entitled to add the cost of the repair work to the next monthly instalment due in terms of the agreement. This provision would be rendered superfluous if the agreement does not permit the Trust to effect such repairs/maintenance in the event that the plaintiff fails to do so.
- [32] This conclusion is bolstered by the fact that the agreement places comprehensive obligations on the plaintiff in respect of maintenance/repairs to the property and provides a specific timeframe within which the plaintiff is to effect such repairs/maintenance following the completion of any of the periodic inspections.
- [33] Consequently, the only sensible interpretation of the agreement is that the parties agreed that ongoing maintenance/repairs had to be effected at the property, within a particular timeframe, either by the plaintiff or failing the plaintiff, by the Trust.
- [34] Thus, on a reasonable and businesslike consideration of the terms of the agreement in light of the relevant surrounding circumstances, I am constrained to find that by necessary implication, the parties intended to contract on the basis that the plaintiff bears the primary obligation to effect the necessary repairs/maintenance to the property, but that the Trust may effect such repairs/maintenance in the event that the plaintiff fails to fulfil his obligations in this regard. To find otherwise would render the agreement insensible.
- [35] Put differently, in order to give meaning to clause 7.1.2 of the agreement, the Trust must be entitled to enter the property and effect repairs/maintenance without the consent of the plaintiff in circumstances where the plaintiff is required to effect repairs/maintenance but has failed to do so within the 5-day timeframe stipulated in the agreement.

- [36] Further, it is trite that a tacit term cannot be imported into a contract in respect of any matter to which the parties have applied their minds and for which they have made express provision in the contract.[10]
- [37] In this matter, the parties applied their minds to, and made provision in the agreement for the eventuality that the plaintiff would not effect the necessary repairs/maintenance following on a periodic inspection and in that event, the Trust would be entitled to effect such repairs/maintenance and to recover the costs thereof by adding such costs to the next monthly instalment due in terms of the agreement. The purpose of including these provisions in the agreement is to ensure that the property is regularly maintained and does not become dilapidated.
- [38] As a matter of logic, the Trust can only recover the costs of maintenance/repairs that it has effected, at its own expense. Put differently, the Trust would first have to incur the maintenance/repair costs before it could add such costs to the instalment due for the following month.
- [39] If the plaintiff's contention that the agreement prohibits the Trust from effecting repairs/maintenance unless the plaintiff permits it to do so is accepted, the effect would be that if the plaintiff refuses to effect the necessary repairs/maintenance and refuses to permit the Trust to do so, the property would simply not be maintained.
- [40] Any such clause clearly conflicts with the terms of the agreement, which require maintenance/repairs to be undertaken at regular intervals based on the outcome of the periodic inspections, and also undermines the purpose of the provisions in the agreement relating to maintenance.
- [41] I am consequently unable to find that that the agreement contains a tacit term that requires the Trust to provide the plaintiff with exclusive, undisturbed use and enjoyment of the property.
- [42] Further, the plaintiff's contention that a contractual term that excludes a party's right to occupy their home 'with exclusive, undisturbed use and enjoyment' must do so in express terms, does not withstand scrutiny.
- [43] The soundness of a contractual term does not depend on whether the term is tacit or express. A tacit term[11] is nothing more than an unexpressed provision of the contract which derives from the common intention of the parties. Once a tacit term is found to exist in a particular contract, that term 'is simply read or blended into the contract: as such it is 'contained' in the written deed'.[12] The Court, in supplying a tacit term, 'in truth, declares the whole contract entered into by the parties'.[13]

[44] For these reasons I find that the allegation in paragraph 11.7 of the particulars of claim, that the Trust was obliged to provide the plaintiff with exclusive, undisturbed use and enjoyment of the property is untenable on the pleadings in their present form and in effect amounts to the plaintiff seeking to import a tacit term which is irreconcilably at odds with the terms of the agreement.

[45] Accordingly, the particulars of claim fail to disclose a cause of action against the defendants.

The second and third exceptions

[46] The second and third exceptions turn on whether the terms of the agreement render the principle of reciprocity inapplicable to the agreement, and whether the exceptio is thus unavailable to the plaintiff as the basis for his cause of action.

[47] The exceptio is usually raised a defence, however, in this matter the plaintiff seeks, inter alia, a declaratory order that due to the Trust's alleged breach of the agreement, he was entitled to withhold payment of certain of the monthly instalments. Consequently, the plaintiff relies on the exceptio as the basis for the claim that he was entitled to withhold payment.

[48] In paragraph 11.4 of the particulars of claim it is pleaded that the agreement obliges the plaintiff to make payment of the instalment amount in advance, on the first day of every month. In paragraph 12.11 of the particulars of claim it is pleaded that there was no lease agreement between the parties, but in paragraph 18.1 it is pleaded that the agreement is a lease of immovable property.

[49] Much of the debate during argument centred on whether the agreement constitutes a lease and if not, whether the principles relating to reciprocity of contractual obligations find application in this matter.

[50] The plaintiff contended in argument that the Court must accept that the agreement is not a lease because this is the plaintiff's pleaded case and because the terms of the agreement are not consonant with those found in what the plaintiff refers to as a 'common law lease'. I am not persuaded that these contentions take the matter any further.

[51] First, the particulars of claim are contradictory in that on the one hand the plaintiff pleads that the agreement is a lease of immovable property and thus not subject to the provisions of the NCA, but on the other pleads that there is no lease agreement between the parties. As Mr van der Merwe for the defendants correctly submitted, the agreement cannot be a lease for one purpose but not a lease for any other purpose. Consequently, it is at best unclear what the plaintiff's pleaded case is in regard to whether the agreement constitutes a lease agreement or not.

[52] Second, the submission by Mr van Aswegen for the plaintiff that the principles relating to reciprocity of contractual obligations and the applicability of the exceptio find application only in lease agreements does not accord with the settled case law. On the contrary, it appears from the settled case law that the general principles applicable to reciprocal contractual obligations have been applied by the Courts to a variety of agreements and are not limited to lease agreements.[14]

[53] It is consequently not necessary for me to resolve the question as to whether the agreement constitutes a lease or not in order to determine whether exceptio is available to the plaintiff. The question to be determined is whether, on any interpretation of the agreement, the terms thereof are reciprocal. If the terms are not reciprocal, then the exceptio does not find application and vice versa.

[54] The defendants contend that the plaintiff is not entitled to withhold the monthly contribution payments due as, or in lieu of, rental in that:

[54.1] The terms of the agreement render the principle of reciprocity inapplicable;

[54.2] Any remission of payments that the plaintiff may be entitled to is not readily ascertainable from the breaches alleged in the particulars of claim; and

[54.3] The conduct of the Trust as pleaded in paragraphs 12.1 to 12.13 of the particulars of claim as well as the allegation that the plaintiff has been using the property from the date of inception of the agreement, and continues to do so, are irreconcilable with an allegation that the plaintiff has been entirely prevented from using the property.

[55] In order to determine whether it is open to the plaintiff to rely on the exceptio it is first necessary to determine whether the agreement is one to which the principle of reciprocity applies. This is a question of interpretation,[15] bearing in mind the presumption that in any bilateral contract, the common intention is that neither party should be entitled to enforce the contract unless that party has performed or is ready to perform its own obligations.[16]

[56] The plaintiff may rely on the exceptio as the basis on which he claims an entitlement to withhold payment of the monthly instalments if the Trust's performance fell due prior to, or simultaneously with the plaintiff's performance.

[57] As the Court in *ESE Financial Services (Pty) Ltd v Cramer*[17] stated:

‘In a bilateral contract certain obligations may be reciprocal in the sense that the performance of the one may be conditional upon the performance, or tender of performance, of the other. This reciprocity may itself be bilateral in the sense that the performance, or tender of performance, of them represent concurrent conditions; that is, each is conditional upon the other. ...

Alternatively, the reciprocity may be one-sided in that the complete performance of his contractual obligation by one party may be a condition precedent to the performance of his reciprocal obligation by the other party. In other words the obligations, though inter-dependent, fall to be performed consecutively. An example of this would be a *locatio-conductio operis*

whereunder the conductor operis is normally

obliged to carry out the work which he is engaged to do before the contract money can be claimed. In such a case the obligation to pay the money is conditional on the preperformance of the obligation to carry out the work, but, of course, the converse does not apply ... For reciprocity to exist there must be such a relationship between the obligation to be performed by the one party and that due by the other party as to indicate that one was undertaken in exchange for the performance of the other and, in cases where the obligations are not consecutive, vice versa ... '

[58] The overriding consideration in determining whether the performance of respective contractual obligations is reciprocal in nature, is the intention of the parties as evident from the terms of their agreement seen in conjunction with the relevant background circumstances.[18]

[59] Clause 4.1 of the agreement provides that payment of the monthly instalment is to be made on the first day of the month, in advance. This is pleaded in paragraph 11.4 of the particulars of claim.

[60] As authority for their stance that the exceptio is not available to the plaintiff in this matter, the defendants rely on the judgments of the Supreme Court of Appeal ('SCA')

in *Baynes Fashions (Pty) Ltd t/a Gerani v Hyprop Investments (Pty) Ltd*[19] and *Tudor Hotel and Brasserie and Bar (Pty) Limited v Hence Trade 15 (Pty) Limited*.[20]

[61] *Baynes Fashions*, involved a dispute about the entitlement of a lessee to withhold rental payment or claim for losses to a business due to the lessor

having interfered with the lessee's beneficial occupation by effecting building works on the property on which the leased premises were located. The SCA accepted that the common law principle of reciprocity would ordinarily entitle the lessee to claim a reduction of rent for the deprivation of, or interference with its beneficial occupation but found that a contrary intention appeared from two clauses of the lease in question. One of the clauses stipulated that all rentals were to be paid 'monthly in advance without any deduction or set off' and another stipulated that the tenant would not have any claim against the landlord 'by reason of any interference with his tenancy or his beneficial occupation of the premises' caused by repairs or building works. The SCA found that the terms of the lease excluded the principle of reciprocity.

[62] In *Tudor Hotel*, the SCA relying on *Baynes Fashions*, found that a lessee was not entitled to withhold rental on the basis of the exceptio where the lease made it clear that the obligations were not reciprocal, stating as follows:[21]

‘The agreement that the rent was payable ‘monthly in advance’ had the effect of altering the usual position, that in the absence of contractual provisions, rent is payable in arrear at the end of each period in the case of a periodical lease, after the lessor has fulfilled his obligation. The lease agreement therefore altered the reciprocal nature of the obligations of the lessor and the lessee. The obligation of the lessee to make payment of the rent was no longer reciprocal to the obligation of the lessor to grant beneficial occupation of the premises to the lessee.

The application of the principle of reciprocity to contracts is a matter of interpretation. It has to be determined whether the obligations are contractually so closely linked that the principle applies. Put differently, in cases such as the present the question to be posed is whether reciprocity has been contractually excluded.

...

The provision that the rental was to be paid ‘on or before the first day of each month’ had the effect that it was to be paid in advance by the appellant. The obligation of the appellant to pay the rental was accordingly not reciprocal to the obligation of the respondent to provide beneficial occupation of the entire premises.’

[63] In light of the aforementioned authorities it is clear that the provision in the agreement that payment is to be made monthly in advance has the effect of altering the usual position as regards the reciprocal nature of the contractual obligations. The plaintiff’s obligation to make payment of the monthly instalment is thus not reciprocal to the obligation of the Trust to grant beneficial occupation of the property to the plaintiff. On this basis alone the plaintiff is not entitled to rely on the Trust’s defective performance as a basis on which to withhold payment of the monthly instalments.

[64] In argument, Mr van Aswegen contended that the payment of the monthly instalments was a single indivisible and continuous obligation, not linked to the plaintiff’s right of occupation, but rather that such payments are instalments in respect of the purchase price of the property, and not akin to periodic payments for rental.

[65] I agree with Mr van der Merwe’s submission that the position adopted by the plaintiff in this regard is destructive of the contention that the agreement is reciprocal in nature. The Trust’s obligation to give the plaintiff beneficial occupation cannot be reciprocal to the plaintiff’s obligation to make payment of the monthly instalments if these obligations are independent from one another as the plaintiff contends.

[66] Further, if regard is had to the nature of the breaches pleaded in paragraphs 12.1 to 12.13 of the particulars of claim, it is clear that the extent of any remission of payments that the plaintiff may be entitled to is not readily ascertainable. As the SCA held in *Ethekwini Metropolitan Uicity Municipality (North Operational Entity) v Pilco Investments CC*[22] where remission of rent is applicable, a Court must be approached for the computation of the remission if the amount of the remission is not promptly ascertainable. In such instances, the lessee may not simply deduct what it conceives to be an amount that

represents the remission.

[67] Given that the terms of the agreement render the principle of reciprocity inapplicable to the agreement and any remission of payments that the plaintiff may be entitled to is not readily ascertainable from the breaches alleged in the particulars of claim, I find that the particulars of claim fail to disclose a cause of action entitling the plaintiff to withhold the monthly instalments due in terms of the agreement.

The fourth exception

[68] The fourth exception turns on whether the conduct pleaded in paragraphs 12.1 to 12.3 and 12.6 to 12.9 of the particulars of claim, by their nature interfere with the plaintiff's exclusive and undisturbed use of the property.

[69] In paragraphs 12.1 to 12.3 and paragraphs 12.6 to 12.9 of the particulars of claim the plaintiff contends that the Trust has:

[69.1] Done 'extensive building works at the property' since the inception of the agreement;

[69.2] Removed the back door of the property and replaced the back door with a 'garage door';

[69.3] Removed blinds, burglar bars, pavement from the driveway, and a washing line from the property; and

[69.4] Changed the street facing door of the property as well as the locks of the front and back doors of the property.

[70] Given that I have found that the agreement cannot sensibly be interpreted as requiring the Trust to provide the plaintiff with exclusive, undisturbed use and enjoyment of the property or precluding the Trust from conducting repairs/maintenance at the property, the plaintiff's contention that the breaches by the Trust 'interfered with the plaintiff's exclusive and undisturbed use of the property' is untenable.

[71] Further, given that the Trust's obligation to provide beneficial occupation of the property to the plaintiff is not reciprocal to the plaintiff's obligation to make payment of the monthly instalments, the particulars of claim do not disclose a cause of action that would entitle the plaintiff to withhold payment of the instalments.

[72] Mr van Aswegen contended that even if the Trust is entitled in terms of the agreement to conduct repairs/maintenance on the property, it could only do so if the periodic inspections had been done and the plaintiff had failed to effect the necessary repairs/maintenance. As that there are no allegations in the particulars of claim that these prerequisites have been met, Mr van Aswegen argued that the defendants could not assert that the Trust's actions as pleaded in paragraphs 12.1 to 12.13 of the particulars of claim, were lawful.

[73] This contention too is misconceived. The lawfulness or otherwise of the Trust's actions is not in issue. I must assume for the purposes of determining the exceptions that the Trust has breached the agreement in the manner pleaded and that its actions are thus

impermissible. The question remains whether the obligations of the Trust and those of the plaintiff are reciprocal. Given that I have found that the obligations are not reciprocal, the fact that the Trust has breached its obligations does not entitle the plaintiff to withhold payment of the instalments.

- [74] It is telling that the plaintiff does not allege that any or all of the Trust's pleaded breaches were rectified after July 2022, or that the plaintiff is entitled to withhold payment of any of the monthly instalments post July 2022. Indeed, Mr van Aswegen was at pains to point out that it is not the plaintiff's case that he is entitled to withhold any payments due after July 2022 and that the plaintiff tenders full performance of his contractual obligations going forward. Consequently, I am constrained to find that notwithstanding the Trust's breaches as alleged in the particulars of claim, the plaintiff has nonetheless enjoyed and continues to enjoy beneficial occupation of the property.
- [75] For these reasons too, I am unable to find that the particulars of claim disclose a cause of action in terms of which the plaintiff is entitled to withhold the monthly payments due as or in lieu of rental.

The fifth exception

- [76] On a plain reading of the particulars of claim the breaches pleaded in paragraphs 12.2 to 12.13 of the particulars of claim relate only to the months of October 2021, January 2022 and July 2022.
- [77] I am in agreement with the defendants' submission that even if the plaintiff was in law entitled to withhold payment, he has failed to plead grounds that would entitle him to withhold the monthly instalments for the entire period of October 2021 to July 2022.
- [78] Mr van Aswegen submitted that the allegation in paragraph 12.1 of the particulars of claim that the Trust has interfered with the plaintiff's exclusive use and occupation of the property '[s]ince inception, by doing extensive building works at the property without the consent of the plaintiff' is sufficient to disclose a cause of action in respect of withholding of the monthly instalments for the entire period of October 2021 to July 2022.
- [79] This contention does not withstand scrutiny in light of the findings above that the agreement does not contain a tacit term requiring the Trust to provide the plaintiff with exclusive, undisturbed use and enjoyment of the property, that the agreement permits the Trust to effect repairs/maintenance in the event that the plaintiff fails to do so and that the plaintiff has despite the Trust's pleaded breaches enjoyed and continues to enjoy beneficial occupation of the property.
- [80] For these reasons the fifth exception is upheld.

CONCLUSION

- [81] In the result the following order is made:

1. The first to fifth exceptions are upheld with costs;
2. The plaintiff's particulars of claim is set aside;
3. The plaintiff is granted leave to amend the particulars of claim by the procedure prescribed in Rule 28 if so advised, the notice of amendment to be served within 15 days of the date hereof.

APPEARANCES:

Plaintiff's Counsel: Adv. Andries Van Aswegen Defendant's Counsel: Adv. J Van Der Merwe (SC)

[1] Barnard v Barnard 2000 (3) SA 741 (C) at para [10].

[2] Steward v Botha

[2008] ZASCA 84; 2008 (6) SA 310 (SCA) at para [4].

[3] Nel and Others NNO v McArthur 2003

(4) SA 142 (T) at 149E-G.

[4] Lewis v Oneanate (Pty) Ltd and Another

[1992] ZASCA 174; 1992 (4) SA 811 (A) at 817F.

[5] First National Bank of Southern Africa Ltd v Perry NO 2001

(3) SA 960 (SCA) at para [6]. See also Ocean Echo Properties 327CC & Another v Old Mutual Life Assurance Co (SA) Ltd 2018 (3) SA 405 (SCA) at para [9].

[6] Telematrix (Pty) Ltd v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at para [3].

[7] Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd 1991 (1) SA 508 (A) at 514E – F.

[8] Deltmann v Goldfain & Another 1975

(3) SA 385 (A) at 400A-B.

[9] Sun Packaging (Pty) Ltd Vreulink 1996 (4) SA 176 (A).

[10] Ashcor Secunda (Pty) Ltd v Sasol Synthetic Fuels (Pty) Ltd(624/10) [2011] ZASCA 158 (28 September 2011); Robin v Guarantee Life Assurance Ltd

[1984] ZASCA 72; 1984 (4) SA 558 (A) at 567C-D.

[11] The second category described by Corbett AJA (as he then was) in Alfred Mcalpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at 531H ('Alfred Mcalpine & Son'), being an 'unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances'.

[12] Wilkins v Voges

[1994] ZASCA 53; 1994 (3) SA 130 (AD) at 144C-D.

[13] Alfred Mcalpine & Son at 531H – 532A.

[14] See Miloc Financial Solutions (Pty) Ltd v Logistic Technologies (Pty) Ltd & others 2008

(4) SA 325 (SCA); Smith v Van den Heever NO & others 2011

(3) SA 140 (SCA); Kalahari Resources (Pty) Limited v Arcelormittal SA and others

[2012] 3 All SA 555 (GSJ).

[15] Rich v Lagerwey 1974 (4) SA 748 (A) 761H. See also BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A) 418B.

[16] Cradle City (Pty) Ltd v Lindley Farm 528 (Pty) Ltd 2018 (3) SA 65 (SCA) at para [20].

[17] ESE Financial Services (Pty) Ltd v Cramer 973

(2) SA 805 (C) at 808H – 809E.

[18] Grand Mines (Pty) Limited v Giddey NO

[1998] ZASCA 99; 1999 (1) SA 960 (SCA) at 966C - E

[19] Baynes Fashions (Pty) Ltd t/a Gerani v Hyprop Investments (Pty) Ltd [2005] JDR 1382 (SCA) ('Baynes Fashions').

[20] Tudor Hotel and Brasserie and Bar (Pty) Limited v Hence Trade 15 (Pty) Limited

[2017] JOL 38843 (SCA); [2017] ZASCA 111 ('Tudor Hotel').

[21] Tudor Hotel at para [11], [12] and [17].

[22] Ethekwini Metropolitan Uicity Municipality (North Operational Entity) v Pilco Investments CC (320/06)

[2007] ZASCA 62; [2007] SCA 62 (RSA) (29 May 2007) at para [22]

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