IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: **4305/2017**

IN THE MATTER BETWEEN:

ROUNDTOP TRADING 37 (PTY) LTD Plaintiff

and

ITLHATLHOSE TRADING CC First Defendant

BOLAOMA RUTH TSESE Second Defendant

JUDGMENT BY: MPAMA, AJ

DATE HEARD: 01, 02 &14 NOVEMBER 2022

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 16 March 2023. The date and time for hand-down is deemed to be 16 March 2023 at 15h00.

---

[1] The plaintiff instituted an action against both defendants seeking an order for the payment of damages pursuant to a breach of contract contained in a

lease agreement between the plaintiff and the first defendant. The plaintiff is suing the defendants for the following amounts:

i) CLAIM 1: for the payment of R266 878.82 for arrear rental and interest thereon for the period ending August 2017.

ii) CLAIM 2: for the payment of R34 245.53, an amount quoted by Centlec, a service provider for electricity for the purposes of reconnecting electricity after an electric metre box was tampered with.

iii) CLAIM 3: for the payment of R9 553.90 for rental for the month of September 2017. When the first defendant failed to make payments in terms of the lease agreement the plaintiff elected to cancel the agreement and notified the first defendant of such cancellation. The amount is for damages suffered by plaintiff as a result of early cancellation of the agreement.

[2] The defendants defended the action and denied that the plaintiff was entitled to an order for the payment of arrear rental as the plaintiff "failed to afford a beneficial occupation of the property to the first defendant". The defendants further denied that they were responsible for tampering with the metre box and therefore liable for the payment of R34 245.53, an amount quoted by Centlec for tempering with an electric meter box at the leased property

[3] The genesis of this case is that the plaintiff and the first defendant concluded a lease agreement (agreement) on 29 September 2016 whereby the plaintiff, agreed to lease Shop no. 1, 26 Bastion Street, Bloemfontein (the property) to the first defendant from 1 October 2016. The contract was to endure until 30 September 2017.The second defendant, Ms Tsese stood surety for the first defendant's obligations towards the plaintiff.

[4] In terms of the agreement the first defendant would pay the plaintiff a monthly rental in the amount of R9 553.90 payable in advance from 1 October 2016. In the event of non-payment or late payment of rent the plaintiff would apply interest on the outstanding amount until it is fully paid. The first defendant would also be responsible for payment of municipal charges, including water and electricity consumed at the property. *Inter alia,*

the contract provided for remedies available to each party in the event of non-compliance or breach of any terms of the agreement.

[5] In addition the following clauses in the agreement provided:

CLAUSE 2.12

> "The tenant's obligation to pay any and all amounts under clause 2 shall survive any termination of this agreement."

CLAUSE 3.12

> "The tenant shall not have the right to withhold, set of or reduce any payment in terms of this agreement by reason of any claim which the tenant may have or purport to have against the landlord"

CLAUSE 4.2

> "The landlord does not warrant that the premises are fit for the purpose which they are let…. There shall be no obligation on the landlord to do any work or make any alterations or repairs to the premises to comply with the requirements of any relevant authority."

CLAUSE 10.2

> "The tenant shall have no claim of any nature whatsoever whether for damages, remission of rent or otherwise, against the landlord, for any failure or interruption in the amenities and services provided by the landlord and/or any statutory authority to the premises and/or the building, notwithstanding the cause of such failure or interruption."

CLAUSE 10.3

> "The tenant shall not to be entitled to withhold or defer payment of any amounts due in terms of this agreement for any reason whatsoever."

[6] At the commencement of the proceedings I was advised that the following issues are common cause between parties:

i) The parties entered into a valid lease agreement and the terms of the agreement.

ii) The second defendant stood surety for the first defendant's responsibilities.

iii) That electricity was disconnected in the rented premises in December 2016.

iv) The amounts being claimed by the plaintiff.

[7] It was agreed by the parties, that the only issues for determination during trial are as follows: Whether the use and enjoyment of the property was interrupted by the plaintiff when the electricity was disconnected and if so, whether such disruption constitutes a defence to the defendants for non-payment of rent. Whether the first defendant tampered with the electric metre box and is liable for the payment required by Centlec for the damage made to the metre box.

[8] The evidence of the plaintiff is as follows: Ms Natalie Gouws was employed as an administrator at Matrix Property Management t/a CMS Property Agency. The plaintiff was their client and involved in leasing out properties. Her company managed some property on behalf of the plaintiff. Her duties included issuing statements to the tenants and their clients (landlords), collecting rental payments on behalf of their clients and communicating with clients in respect of outstanding payments. She would also handle all complaints with regard to the defects in the leased property.

[9] Prior the agreement at hand the plaintiff and the first defendant entered into a lease agreement which lasted for five years between 2011 and 2016. The first defendant was running a fish and chips franchise in the property.

[10] In May 2014 there was a problem with an electric meter box. Centlec had removed the box on allegations of tampering and/or illegal connections and disconnected electricity. There were some engagements between her and Ms Tsese who represented the first defendant. At the end the plaintiff made a payment of R3 146.40 to Centlec to have electricity reconnected. The disconnected electricity was a three phase power supply and when it was reconnected by Centlec a single phase power supply was installed. The

result was that the first defendant was unable to use the stoves to run its fish and chips business at plaintiff's leased property. There were further talks between Ms Tsese and the plaintiff's representative and it was agreed that the first defendant will use gas for the stoves. The first defendant remained at the property running its business using gas to burn the stoves.

[11] In September 2016 the first defendant entered into another agreement (the one in question) with the plaintiff. It was a year's agreement to end in September 2017. The first defendant was given consent by the plaintiff to sublet the property to one Mr Prince. Mr Prince only occupied the property for few months and vacated it as electricity was cut off from the premises in December 2016. Ms Tsese visited her offices in December 2016, made an undertaking that she will go to Centlec and sort out the issue of electricity. The first defendant had so far fallen behind with the payments. As provided in the agreement they started charging the first defendant interest on the outstanding payments.

[12] During cross examination it was disputed that Ms Tsese made an undertaking to go to Centlec in order to have electricity reconnected. It was further put to Ms Gouws that due to non-availability of electricity, the first defendant and Mr Prince were unable to continue with their business at the property and the first defendant stopped paying rent as there was no beneficial occupation of the property.

[13] This concluded the case for the plaintiff.

[14] Ms Tsese testified as follows: The first defendant was owned by her and her late husband. They bought a fish and chips franchise. In 2011 the first defendant entered into a lease agreement with the plaintiff which endured for five years. From the onset there were some problems, Centlec came and disconnected electricity at the property on allegations of tampering with the metre box. The plaintiff's representative went to Centlec and made payment. Electricity was restored at the property. However, the electricity that was reconnected was a single phase power whereas the one that was

disconnected and was used for the stoves was a three phase power. After engagements with the plaintiff the first defendant agreed to use gas to burn the stoves. This impacted negatively on the first defendant's business.

[15] The first defendant entered into a new lease agreement in September 2016 effective from the 01 October 2016 and she stood surety for the first defendant's obligations towards the plaintiff. As far as she can recall the contract was for a period of six months. As a representative of the first defendant she only signed the agreement on behalf of Mr Prince who wanted the premises but the plaintiff had suggested that because Mr Prince was a foreigner the first defendant should be the one entering into the contract on behalf of Mr Prince. She also intended to sell the business to Mr Prince. Electricity was disconnected by Centlec in December 2016. Mr Prince vacated the premises due to non-availability of electricity as he could no longer run the business. Ms Tsese denied that she made an undertaking to go to Centlec in order to make arrangements for reconnection of electricity. She testified further that the metre box allegedly tampered with was not at the property rented by the first defendant, however in another shop and the first defendant had no access to the box as it was not in their shop. She denied that the first defendant was responsible for tampering with the metre box.

[16] It was put to Ms Tsese that she entered into an agreement with the plaintiff on behalf of the first defendant and not Mr Prince for a year and was allowed by the plaintiff to sublet the property to Mr Prince. She also testified that the first defendant's business failed due to non-availability of electricity and as such the first defendant was justified in not paying the rent.

[17] Mr Mbuyiselo May is an employee of Centlec. He has been employed for a period 14 years occupying different portfolios at Centlec. His evidence was that Centlec had quoted the plaintiff an amount of about R34 000.00 for the installation of a 3 phase power in the rented property. This amount was never paid to Centlec. A random inspection by Centlec in 2014 revealed that a 3 phase power was illegally connected at the property. As a result Centlec

removed the meter box and disconnected electricity at the property. He also testified that he is unable to comment on who might have tampered with the metre box but according to him the person who stood to benefit from tampering was the tenant occupying the property. He was also unable to comment on what could have led to Centlec removing the metre box in 2016 and suggested that maybe it was another case of an illegal connection. This concluded a case for the defendants.

[18] The defendants' defence to non-payment of rent is that the plaintiff is not entitled to the payments as the plaintiff failed to provide electricity in the property. The defendants have taken a position that due to non-availability of electricity, the first defendant is justified in not paying rent. The terms of the lease agreement (in spite of Ms Tsese's evidence that the agreement was for 6 months), the amount owed by the first defendant to the plaintiff and that the second defendant stood surety for the first defendant's obligations towards the plaintiff are not in dispute. To me, the central issue for consideration is whether the first defendant's obligation to pay the plaintiff was reciprocal to the plaintiff's obligations in terms of the agreement. Were obligations undertaken by the parties in the lease contract reciprocal, such that malperformance or non-performance by the plaintiff entitled the defendants to raise the *exception non adimpleti contractus* as a defence against the claim for the payment in terms of the contract?

[19] It is well entrenched in our law that the *exception* finds its application to contracts to which the principle of reciprocity applies. The general principles governing the determination whether the obligations of parties to a contract are reciprocal are set out in the case of **GRAND MINES (PTY) v GIDDEY NO** 1999 (1) SA 960 (SCA) where Smallberger JA at para 11 (delivering judgment of the majority of the court) said the following:

> "Where the common intention of parties to a contract is that there should be a reciprocal performance of all or certain of their respective of their respective obligations the *exceptio* operates as a defence for a defendant sued on a contract by a plaintiff who has not performed, or tendered to perform, such of his obligations as

> are reciprocal to the performance sought from the defendant. Interdependence of obligations does not necessarily make them reciprocal. The mere non-performance of an obligation would not *per se* permit of the *exceptio*. It is only justified where the obligation is reciprocal to the performance required from the other party. The exception therefore presupposes the existence of mutual obligations which are intended to be performed reciprocally, the one being intended exchange for the other……"

[20] In **MAN TRUCK & BUS (SA) (PTY) LTD v DORBYL LTD t/a DORBYL TRANSPORT PRODUCTS AND BUSAF** ALL SA 113 (SCA) it was held:

> "In contracts which creates rights and obligations on each side, it is basically a question of interpretation whether the obligations are so closely connected that the principle of reciprocity applies: BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391(A) at 418B and the authorities there quoted. Where a contract is bilateral the obligations on the two sides are prima facie reciprocal unless the contrary indication clearly appears from a consideration of the terms of the contract: Rich and Others v Lagerwey 1974(4) SA 748 (A) at 761 in fine -762A; Grand Mines (Pty) Ltd v Giddey NO 1999 (1) SA 960 (SCA) at 971 C-D"

[21] The determination of whether the obligations of the parties in terms of the agreement are reciprocal depends on the interpretation of the terms of the agreement. My considered view is that the clauses of the agreement reproduced above clearly show that the performance of the first defendant in terms of the agreement was not dependent on the plaintiff making electricity available at the property. There is no express provision relating to reciprocity recorded in the agreement.

[22] It is common cause that this was not the first lease agreement entered into by the parties. History between the parties suggests that when electricity was disconnected in 2014, the defendant continued occupying the property and paid rent despite non-availability of electricity. Even when it was restored and the first defendant was unable to use the stoves, the first defendant had no issue with that hence it opted to use gas for its stoves. In spite of this the first defendant went further and concluded another

agreement with the plaintiff. This shows that no correlation existed between the payment of rent and provision of electricity.

[23] I am unable to find that the payment of the rental depended on the plaintiff providing beneficial occupation to the defendant by providing electricity. The plaintiff had leased the property to the first defendant who was expected to pay in terms of the agreement on occupation of property. There are remedies available to the parties in the event of breach of the terms of the agreement. Nothing precluded the first defendant from enforcing its rights in terms of the agreement if the plaintiff was not adhering to the terms of the contract.

[24] I am satisfied that the defendant cannot raise the *exception non adimpleti contractus* as a defence against the claim for payment in terms of the contract.

[25] The second issue to be decided is whether the first respondent should be liable for the payment of amount quoted by Centlec for the reconnection of electricity. The unrebutted evidence of Ms Tsese is that the metre box in question was not situated at the property the first defendant occupied but few shops away from the property. There is no evidence to show that the first defendant had any form of access to the area that had the box allegedly tampered with. In addition there is no evidence presented by the plaintiff to show what had actually happened to this box. Other than what happened to the box being referred to as ‘tampering’ no one knows what the actual diagnosis in this box was as no expert evidence was presented. The plaintiff’s contention was that the only person who benefitted when the metre box was tampered with was the first defendant and the court should find that it is the first defendant who tampered with the box. There is not a shred of evidence against the first defendant to support the plaintiff’s claim other than a suspicion on the part of the plaintiff. The first defendant cannot be held liable for the payment of damages in the metre box.

[26] The last issue to be decided is the issue of costs (including the costs occasioned by a postponement on 10 March 2020). The award of costs is always at the discretion of the court. The general rule in litigation is that costs 'follow the event'. A successful party must be awarded costs unless the court considers it appropriate to make a different order. I find no reasons to deviate from the general rule. However the plaintiff is to pay costs of the postponement on the above date as it was occasioned by non-compliance with the rules of the court on the part of the plaintiff.

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

27.1 The defendants shall pay the plaintiff an amount R100 944.81 for claim 1 and R 9553.9 for claim 3 together with interest thereon at a rate of 2% per month a tempore morae plus costs, jointly and severally the one paying first to absolve another.

27.2 Claim 2 is dismissed.

27.3. The plaintiff shall bear the costs occasioned by a postponement on 10 March 2020.

_____

L. MPAMA, AJ

On behalf of the plaintiff:	Adv. S. Tsangarakis
Instructed by:	Honey Attorneys
	Bloemfontein

On behalf of the defendant:	Adv. P.S. Mphuloane
Instructed by:	Gcasamba Incorporated
	Bloemfontein