REPUBLIC OF SOUTH AFRICA

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

Case Number: **22321/2018**

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

21 April 2023 _____
DATE SIGNATURE

In the matter between:

NADINE ORKIN Plaintiff

and

GOLDLEAF INVESTMENTS (PTY) LTD Defendant

NEUTRAL CITATION: *Nadine Orkin v Goldleaf Investment (PTY) LTD* (Case No: 2018/22321) [2023] ZAGPJHC 356(21 April 2023)

JUDGMENT

MIA, J

Introduction

[1] The plaintiff instituted an action against the defendant for breach of a contract. She claimed damages pursuant to the breach in the amount of R1 012 859.92. The plaintiff is a retiree, residing at Erf 238 Sandown Ext 28. The defendant is Goldleaf Investments (Pty) Ltd, a company duly registered in terms of the laws

of South Africa. In its plea, the defendant denied liability and counterclaimed on a ceded right seeking that the plaintiff should remove a boundary wall and reduce the height of a wall that encroached over the building line onto the common property; and directing that the plaintiff removes an air conditioning unit; satellite dish and aerial on her roof as well as the electric fence surrounding her unit.

Background Facts

[2] The following facts are common cause between the parties. The plaintiff purchased a vacant stand from the defendant, a developer in terms of an agreement concluded on 14 November 2014 (the agreement). Clause 4.1 of the agreement provided that the purchaser agreed to conclude a separate agreement with Galencia Construction Proprietary Limited, Registration No 2002/004107/07 (Galencia Construction) to erect a dwelling on the property. An addendum to the agreement was effected on 12 April 2015 that provided for Claycon Proprietary Limited, to replace Galencia Construction. The addendum replaced the contractor only and provided that all of the terms not amended by the addendum would remain in full force and effect. The plaintiff paid the purchase price for the property and took transfer of the property on 9 May 2016. The building plans for the house were approved on 22 July 2016. According to the agreement the contractor would complete the building within nine months from the date of commencement, ie approval of the building plans, 22 July 2016, which presupposed the building would be completed by April 2017[1].

[3] The major building structure was completed in April 2017. The contractor could not hand over the property as the electrical points could not be checked and tested. At that point, there was no electricity provided to the site. The bulk supply was connected by Eskom in December 2017.At this stage, the builder's holiday had commenced. The bulk supply was only available from 18 January 2018 and was connected to the plaintiff's reticulation system on 25 January 2018. Eskom issued a section 82 certificate on 2 February 2018 and the City of Johannesburg issued an occupancy certificate on 22 February 2018.

[1] This took into account the three weeks' builders holiday in December.

Issues in Dispute

[4] The issues for determination were:

4.1 whether the defendant was required to supply the necessary infrastructure so as to provide a fully serviced site in respect of municipal services and electrical services;

4.2 whether the defendant was required to ensure that all the necessary infrastructure was in place so as to provide a fully serviced site both in respect of municipal and electrical services;

4.3 whether the defendant breached the sale agreement by failing to provide, alternatively to ensure the supply of electricity to the site which caused a delay in the completion of the building work;

4.4 whether the plaintiff is liable for the respondent's costs on the counter claim?

[5] The plaintiff led the evidence of three witnesses, Mr. Michael Eric Parsons, Ms. Diane Forstman and Mr Ivan Orkin. The defendant led the evidence of Mr James Robinson and Mr Eran Michaeli.

Plaintiff's claim in convention

[6] The plaintiff's claim is based on a tacit term. In her particulars of claim she pleaded that the defendant was to provide infrastructure which included a fully serviced site in respect of municipal services and electrical services; the provision of bulk supply of electricity alternatively would ensure all the necessary infrastructure was in place so as to provide a fully serviced site both in respect of municipal and electrical services.

The law

[7] The Court in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*[2] per Corbett said:

> "[An] implied term is used to denote 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."
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> …
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> the Court does not readily import a tacit term. It cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before it can imply a tacit term the Court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of the surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term, (See Mullin (Pty.) Ltd. v Benade Ltd., 1952 (1) SA 211 (AD) at pp. 214 - 5, and the authorities there cited; S. A. Mutual Aid Society v Cape Town Chamber of Commerce, 1962(1) SA 598(AD)). The practical test to be applied and the one which has consistently been approved and adopted in this Court- is that formulated by SCRUTTON, L.J. in the well-known case of Reigate v Union Manufacturing Co., 118L.T. 479 at p483:
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> …
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> You must only imply the term if it is necessary- in the business sense to give efficacy to the contract; that is if it is such a term that you can be confident that if at the time the contract was being negotiated someone had said to the parties:" What will happen in such case? They would have both replied: Of course so and so; we did not trouble to say that. It is too clear. "
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> This is often referred to as the "bystander test". "

[8] The plaintiff's case is the following: In terms of the sale agreement the purchaser must pay for water and electricity connected to a defined property,

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[2] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974(3) SA 506 A at 531

Erf 238 Sandown Extension.[3] Thus, the agreement presumes that bulk electricity is supplied to the site. Without the supply of electricity, the plaintiff or any of the other purchasers and residents to pay for water and electricity connected to the defined property.[4] Thus, the agreement presumes that bulk electricity is supplied to the site.

[9] Counsel for the defendant submitted that the defendant was not liable to do so and was not responsible for the lack of supply of electricity. The problem was with Eskom and with the plaintiff who harassed Eskom. Counsel for the defendant conceded, however, that the defendant was responsible for the reticulation, internally, in Bellisimo complex. The delay in April and May, counsel submitted was as a result of changes at Eskom which required documents which should have been demanded in 2014. The incompetence could not be visited upon the defendant. Counsel submitted that the defendant appointed an electrical engineer at its own cost to facilitate the application for the installation and it was not due to its inexperience that the installation did not occur as the plaintiff suggested.

[10] In his evidence, Mr Robinson, who was contracted to build the units, confirmed that the developer was responsible for the bulk supply of electricity or to ensure all the necessary infrastructure was in place so as to provide a fully serviced site both in respect of municipal and electrical services. Mr Michaeli's evidence was that Claycon was introduced to him through the estate agent Ms du Toit. Mr Robinson who may initially have been "the bystander" confirmed that in his view that this was what was implied. He, thus, confirmed the tacit term. He also confirmed that this was the usual practice and it was how the bulk supply infrastructure was delivered to the site, i.e. by the developer. Later he, assisted the developer, when the building operations were nearing its completion, when he approached Eskom with Mr Michaeli. It was also Mr Robinson who introduced the electrical engineers to the developer to submit the drawings to Eskom to facilitate the installation. The conclusion to be drawn from this is that a fully serviced site in respect of electrical and municipal services would have to be present to enable the

[3] Clauses 5, 6.5, 15,2
[4] Clauses 5, 6.5, 15,2

purchasers to occupy their homes. This could not occur without the internal reticulation. This required specific submissions which the developer had not made.

[11] He stated that, Eskom connection was required to enable the builder to test the electrical points to be in a position to hand over occupancy certificates. The purchasers could not apply for their individual electrical and municipal accounts. Thus the express terms, the bystander test and the surrounding circumstances as well as the evidence all point to the developer being responsible for having a fully serviced site in place once the construction was completed to enable the plaintiff to take occupation of the home.

The Breach

[12] In determining whether there was a breach of the agreement this court must have regard to the agreement between the parties. "The general rule is that contractual obligations for the performance of which no definite time is specified are enforceable forthwith; but the rule is subject to the qualification that performance cannot be demanded unreasonably so as to defeat the objects of the contract or to allow an insufficient time for compliance (See *McAlpine*).

[13] Reverting to the facts of this matter, in 2014, the developer made an application for the supply of bulk electricity to the defined property. However, when the contractor commenced building and when the construction was completed it had not been made. The developer appears not to have appreciated the requirements and an electrical engineer was appointed to attend to this in 2017 after the plaintiff and the plaintiff's advisor Mr. Parsons[5] enquired about the electrical connection.

[14] It is evident that the developer incorrectly believed he did all that was required by making payment in 2014. He was not aware that there were further documents to be furnished and he had no idea about Eskom's requirements. These were dealt with by the electrical engineer whom the developer eventually appointed in 2017. The electrical engineer prepared the

[5] Mr Parsons raised the issue as a concern in February 2017.

submission of the proper design, construction drawings, the summarised specifications which included cabling routes up to the end line of the main distribution board to meet Council requirements. This referred to the layout of the internal reticulation to meet the Eskom connection. The engineer's service included site meetings, coordination with the supplier Eskom and co-ordination with Eskom.[6] These preparatory documents would have had to be submitted between 2014 and 2016 to ensure the Eskom electricity connection in 2017. Nothing happened during this period. The engineers took over and attended to the submission in March 2017 and after the presentation; Eskom indicated in August 2017 that installation would take place in December 2017.

[15] The developer appeared to be under the impression he had paid Eskom to attend to the project and that it included addressing the specifications for the internal reticulation in the development. Moreover, the developer laboured under the impression that it was an instant service akin to a "plug and play" option. It is not surprising that nothing happened until the electrical engineers were appointed and the delay is foreseeable. The defendant did nothing to enquire about that, to follow up on or to contact the relevant office in relation to the complex whilst aware the building was nearing completion. There is no evidence that the developer took any steps to ensure the supply was connected as this was necessary to test plug points and connections. The developer's response that Eskom was to blame does not absolve the developer of its own obligations in the contract. It was required to do what was necessary to ensure the supply to the complex as required by the agreement.

[16] The developer's indication that it was not responsible for Eskom's program between June and December 2017 does not excuse the developer from performing in terms of its own agreements especially where it was aware of its obligations and did nothing from 2014 other than make payment. The developer was required to perform timeously to ensure that it could meet its obligations in terms of the agreement. That it deflects responsibility to Eskom suggests that the developer was unaware of Eskom's requirements relating to the internal reticulation and that it expected to jump the queue in terms of service delivery also assuming that the service was an instantly available "a

[6] Caselines Correspondence 012-139

plug and play" over the counter paid service. When advised of the installation date to fit in with Eskom's own programme the developer attributed the delay to Eskom without appreciating that the delay was due to its late own submission through the electrical engineer which was only handed to Eskom in March 2017, despite the payment being made in 2014.

[17] It is not clear how this development was to be prioritised in a developing city such as Johannesburg where other developments were occurring on a daily basis and the demand for electrical installation and connection is in demand. For the installation to meet the contractor's needs the developer was required to submit the documents and specifications long before it did to ensure it would be accommodated in Eskom's program and that both the Council's requirements, the contractor's requirement and Eskom's programme aligned.

[18] As demonstrates above, the defendant's deflection of responsibility to Eskom is disingenuous. The developer was responsible for ensuring a fully serviced site both in respect of municipal and electrical services by the time the construction was complete. This would in turn enable the electrical connections to be tested and the electrical compliance certificate to be issued and an occupancy certificate to be issued. This plaintiff could not take occupation from July 2017 when the construction was complete until February 2018 when the occupancy certificate was issued. The developer did not manage or facilitate the process during this period to ensure the plaintiff could take occupation.

[19] The defendant's claim that the plaintiff delayed the installation is simply without merit. The electrical engineer's application clearly indicates that there was a submission required by Eskom which involved technical and or professional input from an engineer which the developer did not submit. The plaintiff could not alter the defendant's failure to submit the documents earlier and to present them to the Eskom forum and facilitate the installation. The plaintiff's application for services had to wait because the bulk installation was delayed by the defendant's belated submission as is evident from Ms Forstman's evidence. The suggestion that the occupancy certificate was based on outstanding monies fails to appreciate that the balance of monies

was due upon receipt of the certificate of occupation. After the lengthy delays and with the builder gone on holiday in December 2017, it was unlikely that the plaintiff would pay over any monies until she received all that was required to enable he to move into her home that she paid a substantial amount for.

Causation and Damages

[20] Counsel for the defendant submitted that the plaintiff failed to prove causation or any damages except rental damages. The general rule is that contractual damages must flow from the breach. I have already found for the plaintiff above that the breach occurred from July 2017. I proceed to consider which damages flow from the breach.

[21] In *Sandlundlu v (Pty) Ltd v Shepstone and Wylie Incorporated*[7], the court said

> "The general rule in relation to contractual damages is that the appellant is entitled to be put in the position it would have been in if the respondent executed its mandate properly. The general rule suggests that some line needs to be drawn to ensure that the respondent should not be caused undue hardship. The line is drawn with regard to broad principles of causation and remoteness. In *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 687C-F [also reported at [1977] 4 All SA 94 (A) - Ed], the rationale for the rule in regard to an award of damages for breach of contract was eloquently stated as follows:
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> "The fundamental rule in regard to the award of damages for breach of contract is that the sufferer should be placed in the position he would have occupied had the contract been properly performed, so far as this can be done by the payment of money and without undue hardship to the defaulting party . . . . To ensure that undue hardship is not imposed on the defaulting party the sufferer is obliged to take reasonable steps to mitigate his loss or damage. . . and, in addition, the defaulting party's liability is limited in terms of broad principles of causation and remoteness, to (*a*) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (*b*) those damages that, although caused by the breach of

[7] [2011] 3 All SA 183 SCA

contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties"

[22] The parties agreed on extensions until July 2017, the breach occurred from July 2017. This meant that the plaintiff's rental, if calculated over a period of seven months at R41 800 amounted to R 292 600. The cost of the Project Manager at R19 152 is permitted from July 2017 to February 2018 for the three months. The amounts prior to this period are not permitted as they do not flow from the breach.

[23] The further damages claimed are for the items installed on the premises and which the plaintiff did not have the use of over a period of six months which the plaintiff paid for and incurred interest on. The plaintiff was given a credit of one million for PC items. Had the items been purchased by the defendant the claim would not arise or would be subsumed under rental costs. The plaintiff must thus, be liable for the interest on these items in any event. She did produce the bank statements which reflected the interest claimed. She only discovered a table of amounts relating to the PC items. This cannot satisfy the requirement that a plaintiff must prove her damages claim in this regard or in the amount claimed. As I result, the conclusion that must be drawn is that the plaintiff has not proved the amount of R 355 524. 56.

[24] The further damages relate to the legal costs the plaintiff incurred whilst addressing the issues prior to initiating summons in the matter in order to protect her rights. These costs do not arise in connection with the action however they flow from the breach. I have perused the list attached to the heads of argument and am satisfied that the costs from March 2017 to February 2018 relate to the plaintiff addressing her rights in relation to the installation and the breach. The fee is R130 494.36. The full amount of damages includes rental for the period R290 021.32, the project manager's cost from July 2017 to February 2018 R57 456, the gardener R6000, legal costs R130 494 36 yielding a total of R486 550 36; excluding the R 355 524.56 which the plaintiff has not proven.

Claim in reconvention

[25] In respect of the claim in reconvention counsel for the defendant/ plaintiff in reconvention informed the court that this issues had become resolved and the only issue that remained was the costs. Counsel submitted that as the plaintiff had addressed the issues, the defendants were successful and entitled to costs. In relation to the issue of *locus standi* counsel submitted that the plaintiff was misguided in its submissions to submit that the defendant could not amend its pleading as it had not objected to the amendment and had not raised any issue regarding prejudice. The plaintiff raised the issue of *locus standi* of the developer. It was submitted that the HOA association board of directors could litigate without the consent of individual members of the HOA. Counsel submitted further that it was a valid and binding cession. Counsel for the defendant submitted furthermore, that the plaintiff had not made out a case for the breach and if the court found that it had, the plaintiff had not proved damages beyond rental and was not entitled to damages that it did not prove referring to the decision of *Holmdene and Sandlundlu.*

[26] Counsel for the plaintiff submitted that the defendant did not have *locus standi* to proceed. The cession counsel continued, was in valid. Counsel referred to the decision of *Propell Speciallised Finance (Pty) Ltd v Attorneys Insurance Indemnity Fund NPC*[8] where the Court reiterated it this as follows:

> "This court in *Densam*[9] at 112A-D held that:
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> 'The question whether a claim (that is, a right flowing from a contract) is not cedable because the contract involves a *delectus personae* falls to be answered with reference, not to the nature of the cedent's obligation *vis-à-vis* the debtor, which remains unaffected by the cession, but to the nature of the debtor's obligation *vis-à-vis* the cedent, which is the counterpart of the cedent's right, the subject-matter of the transfer comprising the cession. The point can be demonstrated by means of the lecture-room example of a contract between master and servant which involves the rendering of personal services by the servant to his master: the master may not cede his

[8] *Propell Speciallised Finance (Pty) Ltd v Attorneys Insurance Indemnity Fund NPC* 2019(2) SA 221 (SCA)
[9] Id.

right (or claim) to receive the services from the servant to a third party without the servant's consent because of the nature of the latter's obligation to render the services; but at common law the servant may freely cede to a third party his right (or claim) to be remunerated for his services, because of the nature of the master's corresponding obligation to pay for them, and despite the nature of the servant's obligation to render them.'

[27] In the present matter the HOA has right which it has ceded to the developer. The rights which they ceded to the defendant is a cession, assignment and delegation. These obligations require that committees be established in managing the complex Bellisimo so as to address the various issues that may arise with the home owners. Counsel for the plaintiff submitted that the deed of cession which entailed a cession, assignment and delegation and ceded both rights and obligations, could not occur without the agreement of the plaintiff as a homeowner. Moreover, the cession, counsel submitted only occurred on 16 July 2019, well after the counterclaim was filed, it followed that the defendant did not have standing and did not seek the court's leave to proceed with the counterclaim of the HOA against the plaintiff. Consequently, the claim should be dismissed. The counter claim was brought *in terrorem* against the plaintiff and used to bully the plaintiff. He also requested that the scale of costs reflect the time that the plaintiff was required to invest in defending a matter which was not capable of succeeding from the onset.

[28] In addition, counsel submitted that the defendant did not tender any expert evidence to identify the common property or boundary line in order to support the relief sought namely tearing down a boundary wall, which protected an elderly resident. The building plans despite not being approved by the municipality were to be submitted for approval as the builder was working with the plaintiff throughout. The second change did not require municipal approval. The plaintiff could regularise the boundary wall rather than tear down the wall. Mr Michaeli's eventually conceded during cross examination that the walls need not be torn down which indicated that the relief sought was unnecessary. The issues raised by the defendant could be addressed with cladding and regularised. The counterclaim in prayers two and three were

thus petty. The defendant thus utilised court time to litigate against the plaintiff to harass an elderly resident where the plaintiff rights were infringed.

[29] The defendant capitulated and said it had to go to a vote and that could not decide when the right had been ceded to it. There was no reason why demolition of wall was necessary. Counsel for the defendant conceded that much. On entering the complex, the units appeared similar with the L shaped wall which connected the gate house. The forfeiture of a parking was only to the detriment of the Orkin family. The counterclaim was a bullying tactic and should be dismissed with attorney client costs.

[30] Having regard to the decision in *Propell*, the cession by the HOA to the defendant was not competent as the HOA obligations could not be transferred to the defendant *vis-a-vis* the plaintiff. The defendant did not have *locus standi* to pursue the counterclaim on behalf of the HOA.

[31] Even if the defendant had *locus standi*, the defendant did not lead evidence in relation to the boundary wall to obtain the relief it sought. The evidence in relation to the second internal wall which effectively removed a parking bay affects only the Orkins property and is not prejudicial to any other property owner. The conversion of the home from a four bedroom to a three-bedroom home is an internal change and no evidence was led to indicate that it required either the HOA or the Municipality's approval. Having regard to the evidence led by the in the claim in reconvention, the claim is dismissed.

Costs

[32] Costs remain in the discretion of the court. I have considered the manner in which the litigation has proceeded and the evidence of the plaintiff and defendant witnesses. Many concessions were made during cross-examination. A reasonable approach by the defendant would have resolved all of the issues addressed in re -convention as ultimately occurred and was finally resolved by the end of the trial had the defendant adopted a different attitude toward the plaintiff. Three days were allocated to the matter and a further three days were utilised to accommodate the matter during recess and between other matters. The development of residential estates entails a huge responsibility where

other people's lives are concerned and is not a fiefdom with no accountability. The developer resides in the complex owns units in the estate and still controls hold the controlling vote on the HOA. It is important that there be accountability with regard to what occurred. In this matter an attorney and client costs order is appropriate having regard to the conduct of the defendant.

[33] For the reasons above, I make the following order:

Order

1.The defendant is to pay the plaintiff the sum of R 486 550.36.

2. Interest on the aforesaid sum at the prescribed rate of interest from 1 March 2018 to date of final payment.

3. The claim in reconvention is dismissed.

4. The defendant/ plaintiff in reconvention is ordered to pay the costs of suit on an attorney and client scale.

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SC Mia

JUDGE OF THE HIGH COURT

JOHANNESBURG

Appearances

For the Plaintiff:	Adv. D Vetten instructed by Martini-Patlansky Attorneys
For the Defendant:	Adv. M Nowits instructed by Hirschowitz Flionis Attorneys

Hearing: 16,17,18,19 November 2021 & 11, 12 January 2022

Judgment: 21 April 2023