IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

01 March 2022
DATE SIGNATURE

CASE NO: 22428/2019
DATE: 01/02/2022

In the matter between:

NATIONAL STADIUM SOUTH AFRICA First Plaintiff

SAIL RIGHTS COMMERCIALISATION (PTY) LTD Second Plaintiff

and

ZYLEC INVESTMENTS (PTY) LTD Defendant

Date of hearing: 01 February 2022
Date of judgment: 01 March 2022

Summary: Contract - Defendant in *mora* - *mora ex re* – Plaintiffs claim for damages - non-fulfilment of terms of contract – damages awarded

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JUDGMENT

PHOOKO AJ:

INTRODUCTION

[1] This matter concerns failure by the Defendant to pay a sum of R592 025.18 due to the Plaintiffs as per the agreement concluded between the parties about the premises leased to the Defendant. At the commencement of the trial, Counsel for the Plaintiffs asked this Court for an amendment and reduction of the original amount claimed from R592 025.18 to R591, 674, 90. I granted this request.

[2] The matter came before me sitting in the Civil Trial Court on 01 February 2022. All the parties were represented. On 03 February 2021, I granted an Order in favour of the Plaintiffs. This judgment sets out the reasons for my Order against the Defendant.

[3] It is important to mention at the outset that even though the Defendant was represented, Defendant's Counsel did little to assist this Court. The evidence presented by the Plaintiffs' witnesses went unchallenged. Further, despite an undertaking made before this Court on 01 February 2022 to submit heads of arguments, Defendant's Counsel has not done so.

THE PARTIES

[4] The First Plaintiff is National Stadium South Africa (Pty) Ltd "the First Plaintiff" a private company with limited liability, registered, and incorporated in terms of the company laws of the Republic of South Africa. The First Plaintiff is the proprietor of the historic venue situated in Nasrec which hosted South Africa's World Cup opening soccer match against Mexico in 2010.

[5] The Second Plaintiff is Sail Rights Commercialisation (Pty) Ltd (the Second Plaintiff), a private company with limited liability dully registered and incorporated in terms of the company laws of the Republic of South Africa. The Second Plaintiff is an agent of the First Plaintiff and the holder of all commercial rights such as advertising, naming rights of the stadium, and leasing of suits for generating income. As an agent of the First Plaintiff, the duties of the Second Plaintiff include invoicing and collecting rent from lessees such as the Defendant.

[6] The Defendant is Zylec Investments (Pty) Ltd (The Defendant), a private company with limited liability, registered, and incorporated in terms of the company laws of the Republic of South Africa.

JURISDICTION

[7] The Defendant's registered business address is situated within the jurisdiction of this Court. Therefore, this Court has the competency to adjudicate over this matter.

THE ISSUES

[8] The issues to be decided by this Court were as follows:

(a) Whether there was a novation of the agreement,

(b) Whether notice of breach of contract was given to the Defendant as per the signed agreement, and

(c) Whether the amount of R592 025.18 [591, 674, 90] reflected on the invoice claimed by the Plaintiff was correctly calculated?

[9] At the commencement of the trial, Counsel for the Defendant abandoned the novation defence as set out in (a) above. Therefore, the issues that were left for determination by this Court are (b) and (c) in the preceding paragraphs.

BACKGROUND FACTS

[10] In October 2013, the First Plaintiff concluded a written agreement (the agreement) with the Defendant for a period of 3 years. The agreement was operational from 24 October 2013 until 22 October 2016.

[11] The agreement was subsequently amended via two addendums. The first addendum, which was concluded on 04 November 2013, introduced interest payable on default in payment of rent at "an interest rate equal to the prime overdraft rate levied by the Lessor's Bank plus 2% which interest shall be payable from the date on which such payment became payable" until settled for late payment of rent.[1] The second addendum which was signed on 23 October 2016, extended the agreement from 23 October 2016 until 22 October 2019. These amended terms were not disputed by Counsel for the Defendant.

[12] In terms of the agreement, the First Plaintiff let Suit Number US90 to the Defendant (the Suit). The Suit was utilised by the Defendant for concerts, soccer, and rugby matches. In return, the Defendant was required to pay annual rent and, a general service levy, including a once-off payment for furniture. Certain amounts due, such as the annual rent and levies, were

[1] Clause 6.5 of the Addendum to the Suit Agreement dated 4th November 2013.

payable annually and in full by no later than 01 October of each year unless the parties agreed and decided otherwise. Furthermore, the agreement authorised the Plaintiffs to recover legal fees, on an attorney and own client scale, incurred to recover outstanding rent or general service levies from the Defendant.

APPLICABLE LAW

[13] Our law of contract stipulates various forms of *mora* such as *mora ex re* and *mora ex persona.*[2] On one hand, *mora ex re* relates to a contract wherein the parties have expressly or impliedly stated a fixed time in the agreement for performance.[3] As a result, demand is not necessary to place the debtor in *mora*.[4] The "failure by the debtor to perform on or before the due date automatically places him [or her] in *mora ex re*".[5] It is said that "the fixed time, figuratively makes the demand that would otherwise have had to be made by the creditor".[6] On the other hand, *mora ex persona* is a contract that has no fixed time for performance.[7]

[14] The relevant question to ascertain the type of *mora* (*mora ex re or mora ex persona*) applicable in the present case is whether there is a specific time for performance that is fixed in the agreement? The answer can be sourced from the agreement itself.

[15] Clause 6.2.3 of the agreement provides that "in respect of each subsequent annual year's Rental and General Service Levy and Television Fee, the Rental

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2 Hutchison D *et al The Law of Contract in South Africa* (Oxford University Press, 2017) at 294.
3 Ibid at 294.
4 *Laws v Rutherfurd* 1924 AD 261 at para 262.
5 Hutchison D *et al The Law of Contract in South Africa* at 294.
6 *Scoin Trading v Bernstein* (29/10) [2010] ZASCA 160 (1 December 2010) at para 11.
7 Hutchison D *et al The Law of Contract in South Africa* at 294.

shall be payable in full in one instalment on or before 1 November of each year" and/or upon the receipt of the tax invoice".[8] The Defendant's defence included challenging the correctness of the Plaintiffs' demand. I fail to understand this position. In my view, the agreement has a fixed date regarding the payment of rent and levies (i.e., 1 November of each year). This is a clear case wherein *mora ex re* is applicable. Therefore, from the 1st of November 2018, the Defendant had to pay. In other words, *mora* arises from the contract itself and there is no need for the Plaintiffs to place the Defendant in *mora*.[9]

[16] In the papers and during oral proceedings before me, the Defendant has not pointed to the terms of the agreement that the Plaintiffs would have allegedly been required to abide yet failed. Moreover, in this case, the Plaintiffs went further than what is required of them by additionally placing the Defendant in *mora*. I deal extensively with this aspect in assessing the Plaintiffs' evidence below.

EVIDENCE

[17] At the commencement of the trial, Counsel for the Plaintiffs indicated that he had the duty to begin, and the onus of proof rested with the Plaintiffs in so far as the quantum and the manner of demand for performance are concerned. The Plaintiffs called two witnesses to testify, namely, Mr. Jaco Beukes and Ms. Sunaina Singh.

(a) *Mr. Jaco Beukes*

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8 Second Addendum to the agreement dated 23 October 2016 at 001-53.
9 *Scoin Trading v Bernstein* at para 11.

[18] Mr. Beukes' testimony can be summarised as follows; he is the Chief Executive Officer (CEO) for the Second Plaintiff and they possess commercial rights for generation of income through various activities including letting Suits. Additionally, he testified that the Second Plaintiff invoices its clients as per the effective date of their contracts. He testified that an invoice was issued to the Defendant on 12 October 2018. According to Mr. Beukes, they usually send reminders to clients before the due date. This gives their clients enough time to settle the invoice and/or enables clients to communicate with them and enter acknowledge of debt agreements if there are challenges with payment. He further testified that if four weeks passed by without any form of feedback from clients, they send a letter of demand through their attorneys.

[19] Regarding the invoicing, Mr. Beukes testified that an email was sent by the Second Defendant's debtor's clerk to one Mr. Metse who is the nominate contact person of the Defendant, reminding him about the invoice (INVCIR34833) that was due and payable on 01 November 2018. The said Mr. Metse's email address was contained in the agreement. These are the internal processes undertaken by the Plaintiffs to try to have the rent paid timeously, he proclaimed. Despite these measures, Mr. Beukes stated that the Defendant has to date failed to pay the rental due. Mr. Beukes further indicated that even though their clients such as the Defendant have not paid rent, they still grant them access to the premises. For example, Mr. Beukes stated that the Defendant had access to the Suits during the Global Citizen Festival whilst still owing rent.

(b) *Ms. Sunaina Singh*

[20] Ms. Singh testified to the effect that she is the head of finance in the employ of the Second Plaintiff. Her duties include ensuring that proper accounting procedures are adhered to.

[21] Ms. Singh further testified that the total amount due on the invoice was calculated by considering the CPI of 5.1% amongst other things. The method of calculation of the invoice is as follows:

> "Suite rental: R473,696.00 + (5.1% x R473,696.00) = R497,854.50 (excl VAT)
> General service levy: R14,277.95 + (5.1% x R14,277.95) = R15,006.12 (excl VAT)
> Television fee: R1,537.42 + (5.1% x R1,537.42) = R1,615.82 (excl VAT)
> Total amount: R514,476.44 (excl VAT) + 15% VAT".
> Total including VAT: R591,647.90".[10]

[22] Finally, Ms. Singh also testified that for the present case, she used the FNB Historical Prime Rates.

EVALUATION OF EVIDENCE

[23] I now turn to consider the plaintiffs testimony. The fact that the Defendant did not call any witnesses does not mean that the Plaintiffs have automatically proved their case. The Plaintiffs still bear the civil standard of proving on a balance of probabilities that notice of breach was provided per the agreement and that the amount claimed is correct.

[24] Mr. Beukes was a credible witness. He eloquently testified that the Defendant

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[10] Plaintiff's Written argument at para 11.

was notified about the due date of the invoice. Further, a reminder[11] was sent to the Defendant through different means including a letter of demand.[12] In addition to these measures, the Plaintiffs issued Summons. What more do the Plaintiffs need to do for the demand to be "correct"? The extent to which the Second Plaintiff went in this regard was, in my view, a courtesy extended to the Defendant by the Plaintiffs. I say this because the agreement stipulated the due date for performance and therefore there was no need for the Plaintiffs to issue another demand. The Defendant's mora automatically originated from the contract when they failed to pay on 1 November 2018. All the evidence points to one direction, that a demand was made as per the contract and/or originated from *mora ex re*. In any event, the Defendant has not denied that it owes the Plaintiffs the amount claimed.

[25] The Plaintiffs further testified that the Defendant was allowed to make use of the Suit despite being in arrears on the third year of the agreement.[13] This on its own refutes the Defendant's claim that the Plaintiffs prevented them from attending the Global Citizen Festival. All the above was not contested by the Defendant.

[26] I, therefore, find the testimony of Mr. Beukes coupled with supporting documents reliable and acceptable.

[27] Ms. Singh also testified about how she arrived at the total amount due. The calculations speak for themselves at para 21 above. Even though Ms. Singh had conceded an oversight on their part by excluding the CPI (4,80%) in some

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[11] See Plaintiff's Bundle Vol 2 at 004-64.
[12] Id at 004-58.
[13] Id at 004-56.

of the items such as the General Service Levy and Television Fee[14], she was able to take this Court into confidence about how the total amount was calculated. Her evidence was clear and showed a deep understanding of the interest rate applicable to various amounts. Counsel for the Defendant did not contest Ms. Singh's evidence.

[28] Turning to the issues before me, I am of the view that the Plaintiffs have adduced evidence on the balance of probabilities that the notice of breach of the agreement was given to the Defendant in line with the contract. Additionally, the amended sum of R591, 674, 90 claimed by the Plaintiffs was correctly calculated.

COSTS

[29] During oral argument, Counsel for the Defendant submitted that costs should be on a party and party scale. Put differently, Counsel was asking this Court to change what the parties had concluded in the agreement about costs.

[30] However, Counsel for the Plaintiffs submitted that the issue of costs was provided for in the agreement. Consequently, Counsel for the Plaintiffs argued that it was not for this Court to interfere with what the parties had agreed to. Counsel, therefore, submitted that costs on a scale as between attorney and own client were justified as per the agreement if they were to be successful. When this Court asked Counsel for the Plaintiffs whether the agreement took away this Court's discretion to determine costs, Counsel answered in the affirmative. I do not entirely agree with Counsel for the Plaintiffs in that this

[14] Zylec Inflation Calculation 004-60.

Court's discretion has been completely taken away by the agreement. In certain circumstances, the courts may override a contractual term.[15] However, the current case is not one that justifies such intervention by this Court.

[31] Clause 28.4 of the agreement provides that in the event of breach by the Defendant "…the Lessor's rights under the Agreement or to recover such outstanding monies, the Lessee shall pay to the Lessor such collection charges and all or any legal and other costs, reasonably incurred on attorney and own client scale….". This is a clear-cut contractual term that needs to be adhered to.

[32] Our jurisprudence requires that a party seeking to avoid a contractual term show good reason for failing to comply with the term. Counsel for the Defendant did not take this Court into confidence as to why this Court should interfere with an unambiguous contractual term. In *Napier v Barkhuizen*[16], Cameron AJ [as he then was] with the support of all members of the court warned that:

> "…intruding on apparently voluntarily concluded arrangements is a step that judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements".

[33] Considering the above, if this Court was to easily interfere with voluntary contractual terms without good cause, then there would be no need for parties to conclude agreements that would be ignored. Therefore, to accept the

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[15] *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* (CCT109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC) para 71.

[16] 569/2004) [2005] ZASCA 119; [2006] 2 All SA 469 at para 13; see also *Barkhuizen v Napier* (CCT 72 of 2005) 2007 (5) SA 323 (CC) at para 12.

submissions of Counsel for the Defendant would be contrary to the doctrine of *pacta sunt servanda*.[17] It is pivotal for any contracting party to honour their agreement.

CONCLUSION

[34] After having heard the evidence and listened to both Counsels for the parties, and my reasons above, I grant judgment in favour of the Plaintiffs as follows:

1. Payment in the amount of R591 674.90 (five hundred and ninety-one thousand six hundred and forty-seven rand and ninety cents)

2. Interest on the amount of R591 674.90 (five hundred and ninety-one thousand six hundred and forty-seven rand and ninety cents) at a rate equal to the prime overdraft rate levied by the First Plaintiffs bank plus 2% from 1 November 2018 until date of final payment.

3. Costs of the suit on a scale as between attorney and own client.

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M R PHOOKO AJ

ACTING JUDGE OF THE HIGH COURT, GAUTENG DIVISION, PRETORIA

[17] See *Beadica 231 CC* above n 7 para 12.

APPEARANCES:

Counsel for the Plaintiffs:	ADV HP WESSELLS
Instructed by :	Van Der Merwe & Associates Attorneys for the Plaintiffs
Counsel for the Defendant:	ADV P MARX
Instructed by:	Olivier Attorneys