IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN CASE NO. CA180/2017

In the matter between:

GENBIZ TRADING 1001 (PTY) LTD trading as XEROX **Appellant**

and

DUPLIGATE PROPERTIES **Respondent**

APPEAL JUDGMENT

Bloem J.

[1] This is an appeal against a judgment by the magistrate, East London in terms whereof she awarded judgment in favour of the respondent, Dupligate Properties CC, against the appellant, Genbiz Trading 1001 (Pty) Ltd, trading as Xerox, for payment of the sum of R109 002.72, interest thereon and costs. I shall refer to the parties as they have been referred to in the court *a quo*, namely the respondent as the plaintiff and the appellant as the defendant respectively.

[2] The plaintiff's cause of action arose from a lease agreement in terms whereof it leased a certain immovable property in East London (the property) to the defendant from 1 February 2013 to 31 January 2014. In terms of clause 7.2 of the lease agreement the defendant:

> *"… shall at the termination of the lease redeliver the leased premises to the Lessor in the same order and repair as existing at the time of the commencement of this lease, or, as regards alterations or additions, at the time of completion thereof, subject to such fair wear and tear as may be reasonable notwithstanding compliance with the aforegoing provisions of this sub-clause. In the event of the Lessee failing to effect repairs to the leased premises the Lessor may call upon it to do so or the Lessor may effect the same and the Lessee shall refund the cost thereof to the Lessor on demand."*

[3] It is common cause that the defendant vacated the property on or before 31 January 2014. The plaintiff pleaded that at the termination of the lease the defendant did not return the property to it in the same order and repair as existing at the time of the commencement of the lease, that it only returned the property in the required order on 21 May 2014, and that it was accordingly entitled to damages for holding over for the period from 1 February 2014 to 31 May 2014. At a pre-trial conference the parties agreed that, if the plaintiff were to be successful in proving that the defendant was liable to pay damages to it, such damages would be quantified at R27 250.68 per month, being the monthly market rental value of the property.

[4] In its plea the defendant denied that it was liable to the plaintiff. It pleaded that it vacated the property upon the termination of the lease; that it engaged a contractor to effect repairs to the property; and that, while its contractor executed the repairs, the plaintiff engaged him (the defendant's contractor) to attend to dampness in the walls and other work on behalf of the plaintiff.

[5] At the hearing Ms Mostert, counsel for the defendant, submitted firstly, that, in terms of the lease agreement, the defendant was not required to effect any repairs to the property; secondly and in the alternative, that the parties agreed before the termination of the lease that the defendant would only, after the termination thereof, effect repairs to the property so as to put it in the same order and repair as existing at the time of the commencement of the lease; and thirdly, that it could not effect the repairs earlier than 25 May 2014 because the plaintiff first had to repair the dampness in the four internal walls before the defendant could complete the work that it had undertaken to do.

[6] Ms Mostert relied on clause 6 of the lease agreement for the submission that the defendant was not required to effect repairs to the property. Clause 6 reads as follows:

> *"The Lessee with the Lessor's consent shall be entitled to affix such fittings and fixtures to the Leased Premises as may be necessary for its business therein and shall on the termination of this Lease be entitled at its option either to remove them in which case it shall be obliged to repair and make good any damage occasioned by such removal or to leave them in which case it shall not be entitled to any compensation from the Lessor. Any fixtures, fittings or partitions not removed by the date of termination of this Lease shall be deemed abandoned by the Lessee and the lessor shall be entitled in tis discretion either to retain such fixtures, fittings or partitions or any of them or to remove same and to recover the cost of doing so and of making good any damage occasioned by such removal from the Lessee".*

[7] The first point to make is that clause 6 deals only with fixtures and fittings. It does not deal with the repairs necessary to deliver the property in the "*same order and repair as existing at the time of the commencement of this lease*" as envisaged in clause 7.2 above, for instance, the painting of the internal walls and the replacement of damaged carpets. If the first submission is sound, the reliance on clause 6 will limit its soundness to fixtures and fittings. Neither the pleadings nor the evidence supported the submission that the defendant was not required to return the property, save for the fixtures and fittings, in the same order and repair as existing at the time of the commencement of the lease.

[8] In this case it must be accepted that the plaintiff consented to the particular way in which the defendant caused the property to be wired. Such wiring was necessary for the defendant's business. In terms of clause 6 the parties agreed that at the

termination of the lease the defendant could do one of two things with the fixtures and fittings. It could either remove them from or leave them attached to the property. If it elected to remove them then it had to repair the damage caused to the property by such removal and make good any damage occasioned by such removal. If the defendant elected to leave the fittings and fixtures, then it would not be entitled to compensation. The plaintiff would have an election should the defendant elect to leave the fixtures and fittings which were attached to the property. It could either retain them or it could remove them. In the case of removal the plaintiff would be entitled to recover from the defendant the cost of such removal as well as the cost of making good any damage occasioned by the removal. The parties accordingly agreed that should the fixtures and fittings be removed at the termination of the lease, be it by the plaintiff or the defendant, the defendant shall be obliged to make "*good any damage occasioned by such removal*". The contention that the plaintiff requested the defendant to remove the wiring is accordingly irrelevant.

[9] The defendant's financial director, Bradley Birkholtz, testified that, because of the longstanding relationship that the defendant had with the husband of Johanna Gates, the latter being the plaintiff's managing member, "*we felt that it was fair, right, to remove the cabling. She had asked us to do it, and we complied. And, to be honest, we never – you know, we never thought about the contrary, to be honest*". The last sentence can only be interpreted to mean that the defendant always believed that it would remove the wiring. It decided not to rely on clause 6 of the agreement. That is confirmed by the following exchange between Ms Mostert, who appeared on behalf of the defendant also in the magistrate's court, and Mr Birkholtz:

> *"So when she asked that, because of the relationship you had, you said, I'm not going to rely on paragraph 6 here; we will do that. We will amicably remove it. Is that correct? --- That's right, yes".*

[10] The first submission is accordingly clearly not based on the defendant's own, or any other, evidence. It can accordingly not be sustained.

[11] The effect of the second submission is that before 31 January 2014 the parties had agreed to amend clause 7.2 of the lease agreement which required the property to be returned at the termination of the lease "*in the same order and repair as existing at the time of the commencement of the lease*". There are difficulties with that submission. Firstly, the defendant did not plead that it was agreed that it could effect repairs after the termination of the lease. Secondly, when Mrs Gates was questioned in this regard, her evidence was that, before the termination of the lease, she met one of the defendant's representatives, a certain Mr Schuline. They agreed on the nature of the repairs that the defendant would effect. Her evidence was that they did not discuss when the defendant would effect the repairs because Mr Schuline knew that, in terms of the lease agreement, the repairs "*had to be done before they vacated*" the property. That evidence was unchallenged.

[12] Thirdly, and perhaps most importantly, in clause 25 thereof the parties specifically agreed that the lease agreement constituted "*the sole memorial of the contract agreed to by them and that no representations or warranties or statements attributed to the Lessor or any one purporting to act on its behalf will have any bearing or effect on the terms and conditions of the Lease*". The defendant did not adduce evidence that, if it was possible, clause 7.2 of the lease agreement was amended to provide for the defendant to effect repairs to the property after the termination of the lease agreement. For the above reasons the second

submission can also not be sustained.

[13] I now deal with the third submission. The plaintiff's claim was that it was entitled to damages for holding over because the defendant did not return the property to it on 31 January 2014 in the same order and repair as existing at 1 February 2013. It claimed that wiring had to be removed, ceilings or portions thereof had to be replaced and painted, walls had to be painted and carpets had to be replaced. The issue regarding the carpets was resolved between the parties during the trial. Nothing further needs accordingly be said about the carpets. In terms of clause 7.3 of the lease agreement, unless otherwise recorded in writing within 30 days of commencement of the lease, the property shall be deemed to be in a good order and repair at the commencement of the lease. There was no evidence of a record of any defect at the commencement of the lease.

[14] In the light of Mr Birkholtz's unchallenged evidence that the defendant commenced negotiations with the plaintiff during January 2014 as to what had to be done to have "*that property in a perfectly lettable condition*", there can be no doubt that the property was not in the same order and repairs as existing as at 1 February 2013. If that was not so, the defendant would not have employed a contractor, Michael Kretzmann, to effect certain repairs. Mr Birkholtz testified that the contractors were on site to effect repairs from February until May 2014. That evidence is consistent with the plaintiff's particulars of claim. That was also Mrs Gates' evidence. The defendant can accordingly escape liability only if it established that on 31 January 2014 the property was returned to the plaintiff in the same condition existing as at 1 February 2013, subject to fair wear and tear. That was plainly not the case, hence the employment by the defendant of Mr Kretzmann.

[15] Ms Mostert submitted that the defendant was not liable because it could not complete the required repairs to return the property in the same condition existing at the commencement of the lease. The reason for the defendant's inability to complete the repairs, so the submission went, was the plaintiff's failure to first repair the dampness in the walls. It was submitted that the defendant could only complete the required repairs after the plaintiff had repaired the dampness in the walls. The submission was that the plaintiff therefore only had itself to blame for any damages that it might have suffered.

[16] The above submission is not foreshadowed in the plea. Mrs Gates was also not confronted with that version when she was cross-examined. In this regard the defendant pleaded as follows:

> *"The Plaintiff and Defendant discussed at length, the requirements regarding the maintenance, repairs and renovations and it was always agreed between the parties that the Plaintiff would attend to the repairs of certain substantial areas in the building, which had not been repaired for a considerable amount of time, more particularly the amount of dampness that was present throughout the building.*
>
> *It was agreed between the parties that the Plaintiff would attend to the repairs of the aforementioned dampness as it would be futile for the Defendant to commence painting and repairing under these circumstances."*
>
> and
>
> *"It is specifically recorded that the Plaintiff approached the Defendant's contractor and hired him to attend to work on their behalf, on the premises.*
>
> *The Defendant's work was side lined as a direct result of the Plaintiff hiring the Defendant's contractor. This later led to a situation where the Defendant's contractor advised the Defendant that he was no longer prepared to work on site with the Plaintiff, due to various "clashes" that he had had with her.*
>
> *The Defendant then had to proceed and engage a further contractor,*

> *by virtue of the aforementioned, which delays were caused both by the Plaintiff's failure to attend to the repairs that were originally agreed upon, together with the latter conflict with the contractor, which led to the contractor refusing to complete the work on the premises."*

[17] The above quoted sections of the plea, stripped of its duplicated allegations, means that the parties agreed that the plaintiff would attend to the dampness of the walls. The reason for that agreement, according to the plea, was that it would be futile for the defendant to commence painting and repairing under those circumstances. The work that the contractor was employed to do for the defendant was side-lined because the plaintiff employed the contractor. The contractor did not complete the work that he was employed to do for the defendant firstly, because he was not prepared to work on the same site with the plaintiff, due to various clashes he had with Mrs Gates; and secondly, because the defendant's work was side-lined. The result of the above is that the defendant had to employ another contractor. The defendant pleaded that the plaintiff's failure to attend to the agreed repairs and the conflict between Mrs Gates and the contractor, caused delays.

[18] If it was the defendant's case that, before it could complete the repairs to the property, the plaintiff first had to complete the repairs to the damp walls and that the plaintiff delayed to repair the damp walls, one would have expected the defendant to have specifically pleaded that defence. Pleading that it would, according to the defendant, be futile for it to *"commence painting and repairing"* before the dampness had been repaired, does not mean that the repairs of the dampness of the walls was a prerequisite for the defendant to commence painting and repairing or that the parties had an agreement to that effect. The defendant's failure to plead that the plaintiff agreed to first repair the dampness of the walls

before it could commence painting and repairing, precludes it from making such a case, on appeal.

[19] But, assuming that the above portions of the plea may be understood to mean that the defendant could finalise the repairs only after the dampness had been repaired, one would have expected Mrs Gates to have been cross-examined in that regard and that that defence would have been put to her. At no stage was it put to Mrs Gates that the completion of the repairs by the defendant was dependent on the completion of the repairs of the damp walls. She testified that she met Mr Schuline and told him that she would attend to the dampness. She then employed Werner Haggard after Mr Kretzmann had stopped effecting repairs. Her unchallenged evidence in this regard was:

> *"And it's not a case that if he was busy with the dampness that he would have interfered with any other contractor's job, because there was a lot more to do in the building than just concentrate on the two walls or four walls that needed painting and dampness repaired."*
>
> and that Mr Kretzmann commenced with the repairs
>
> *"… somewhere in February. But [the dampness] would not have affected Mr Schuline's work at all. Then I went away and when I came back (intervention)*
>
> *When did you go away? --- In the month of February. When I came back I actually thought he's now – he should be finished with his work, because he's been on site for a long time. Anyway, when I came back (intervention)*
>
> *When did you come back? --- Towards the end of February.*
>
> *But then had Mr Kretzmann completed his work? --- No. Not at all. Not at all."*

[20] In his evidence-in-chief Mr Birkholtz did not testify about the completion of the defendant's work being dependent upon the completion of the repairs of the damp walls. The only evidence-in-chief he gave regarding the dampness in the walls

reads as follows:

> *"What were your concerns exactly? --- The main concern that we had, and this goes back way beyond this particular lease, is the dampness which we believe was a material, material defect in that building which, to the point – we had customers commenting on it, we were embarrassed by the state of it to the point that we had to put pictures and cupboards, filing cabinets, over it, so our customers didn't see it anymore.*"

[21] During cross-examination it was put to Mr Birkholtz that Mrs Gates testified that, in terms of the lease agreement, the defendant should have returned the property to the plaintiff in a lettable condition on 31 January 2014. He did not agree with what was put to him in that regard. He explained that the defendant employed Mr Kretzmann "*to complete the repairs that were required to be done by us which was various forms of painting, fixing a few doors, ceiling boards etcetera*". His evidence continued:

> *"The main issue of repair happened to be the dampness and I think we all know that we cannot paint unless the dampness has been attended to otherwise you would be duplicating work. Michael Kretzmann was employed by our landlord to continue to basically repair the dampness after we had engaged his services. So, it is impossible for us, on that presumption, to believe that we could have that property in a perfectly lettable condition when there was dampness repairs that had to be carried out by the landlord prior to us being able to complete painting."*

[22] Mr Birkholtz did not testify that the defendant informed the plaintiff or that there was agreement between the parties that the plaintiff would first repair the dampness in the walls before the defendant could complete the repairs that it had undertaken. That it was not necessary to first repair the dampness in the walls before the defendant could perform its duties to make the property lettable is supported by the evidence of Mr Haggard, which evidence was extracted from him during cross-examination by Ms Mostert. Mr Haggard testified that he was

employed by the plaintiff to repair the dampness in the walls. The record reveals the following exchange between them:

> *"You didn't fix the dampness in the time between February and May – is that correct? --- That's correct.*
>
> *Right. Why didn't you attend to the dampness in the period between March and May? --- Because I wasn't asked to do it then. This is what I had to do."*

[23] On the basis of Mr Haggard's evidence it must be accepted that he repaired the damp walls after 25 May 2014 when the defendant had completed the work on the property which it had undertaken to do. Although he was unsure of the exact dates when he effected the repairs to the damp walls, he testified that it was during either June or July 2014. It therefore means that repairing the damp walls was not a prerequisite for the defendant to complete the work that it had undertaken to enable it to return the property to the plaintiff in the same order and repair as existing at the time of the commencement of the lease.

[24] The allegation in the plea that one of the reasons that Mr Kretzmann did not complete the work that the defendant employed him to do was his refusal to work on the same site as the plaintiff, particularly Mrs Gates, due to various clashes between them, was shown by documentary evidence to be devoid of the truth. When the plaintiff's attorney wanted to confront Mr Kretzmann with an email that he had sent to Mrs Gates on 5 March 2014, Ms Mostert objected on the basis that Mr Kretzmann was not a party to the action, that the email contained hearsay evidence and that the contractual relationship between Mrs Gates and Mr Kretzmann had nothing to do with the issue between the parties. The entire contents of that email was read into the record when Ms Gates testified. Thereafter Ms Mostert objected on the above bases. The magistrate unfortunately

sustained the objection without giving reasons.

[25] That objection should not have been sustained because the email was sent by Mr Kretzmann to Mrs Gates, as it was clearly relevant to the issues raised. That is evident from the heading of the email. The contents thereof speak of Mr Kretzmann's own experiences and cannot be said to contain hearsay evidence. It is irrelevant that Mr Kretzmann was not a party to the dispute. The contractual relationship between Mr Kretzmann and the plaintiff is important to understand Ms Mostert's submission regarding the defendant's delay to complete the repairs. It is unfortunate that both Mrs Gates and Mr Kretzmann were denied the opportunity of responding to the contents of that email. I will have regard to that email as the contents speak for itself. An attempt to summarise the email will not do justice to its contents. The heading thereof is CLOSURE OF KRETZMANN. It reads as follows:

> *"Hi Linda*
>
> *This is by far the worst email I have ever needed to send.*
>
> *As of 8am this morning I have had to close my business with immediate effect, now I've never been in this position so I really don't know what happens from here, all I can say is I am so sorry that it had to happen while on your site, my arrogance yesterday was born of desperation and the realisation that I have failed myself and so many others.*
>
> *With regards to monies owing you I am not in a position to pay one cent at the moment but am hoping to negotiate a monthly payment so as to make sure I can pay back what we agree on.*
>
> *I will not be at the meeting this morning as quite frankly I am too embarrassed and ashamed of my failure, please find it in your heart to forgive me for doing this to you, but know that I will endeavour to repay what is owed.*
>
> *Kind regards and humblest apologies.*

MIKE KRETZMANN"

[26] The contents of that email make it clear that the alleged conflict between Mr Kretzmann and Mrs Gates had nothing to do with his failure to complete the work that the defendant had undertaken to do.

[27] Mr Kretzmann testified that he was employed by the defendant to attend to:

> *"… dirty walls, there was walk-off on the floors, there were picture nails that needed to be removed. There was dampness that we could see that needed to be attended to. Basically get the building looking in tip-top condition.*
>
> *Who gave you the instruction – let us break it down very carefully: what instructions were you given by Mr Birkholtz specifically? --- I was asked to make sure that if there's any damage on any walls, those were repaired. All picture rails were to be taken off."*

[28] He furthermore testified that he left the site because the relationship between himself and Mrs Gates turned sour. He received late night calls and early morning messages from her. He was not prepared to be treated like that or to work under those conditions, he testified.

[29] Mrs Gates was not requested to comment on Mr Kretzmann's above evidence which the latter was going to give after her evidence. His evidence was not put to her. Mrs Gates was not cross-examined about alleged clashes with Mr Kretzmann or that the work that the defendant employed him to do was side-lined. She was also not cross-examined about the reason for Mr Kretzmann not completing the work that the defendant employed him to do. She testified that Mr Kretzmann plastered a wall from which two air conditioners had been removed. She then went away for a short while. When she returned towards the end of February 2014 she realised that Mr Kretzmann was "*no further than what he was*" when she left. He was not on site. She made numerous telephone calls and sent text

messages to him. She also had meetings with Mr Birkholtz to inform him that, because Mr Kretzmann had not completed the work that the defendant had employed him to do, "*you are still indirectly occupying the premises because you are not getting it done, and where is Mr Kretzmann?*"

[30] Mrs Gates' unchallenged evidence, the failure to put to Mrs Gates the reason given by Mr Kretzmann for not completing the work that the defendant had employed him to do, as well as the contents of the email that Mr Kretzmann sent to her cast serious doubt on the creditworthiness of Mr Kretzmann's evidence about the reason for his failure to complete the work. In the light of the above, the (third) submission, being that the defendant could not complete the repairs earlier than 25 May 2014, is not based on the evidence and can also not be sustained. In the premises, the appeal must be dismissed. There is no reason why the general rule regarding costs should not apply.

[31] In the result, the appeal is dismissed with costs.

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G H BLOEM
Judge of the High Court

VAN ZYL, DJP

I agree.

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D VAN ZYL
Deputy Judge President of the High Court

For the appellant:	Adv D Mostert, instructed by Allams Attorneys, East London and McCullum Attorneys, Grahamstown.
For the respondent:	Adv K L Watt, instructed by Drake Flemmer and Orsmond Inc, East London and Netteltons, Grahamstown.
Date of hearing:	14 September 2018.
Date of delivery of the judgment:	2 October 2018.