THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 394/2015

In the matter between:

CAINE JASON HERR **APPELLANT**

and

INNOMET PROJECTS (PTY) LIMITED **RESPONDENT**

Neutral citation: *Herr v Innomet (Pty) Ltd* (394/2015) [2016] ZASCA 82 (30 May 2016)

Bench: Ponnan, Majiedt, Saldulker, Swain and Zondi JJA

Heard: 16 May 2016

Delivered: 30 May 2016

Summary: Contract: Lease agreement – landlord and tenant – reciprocity of obligations – obligation on lessor to provide peaceful and undisturbed occupation in return for rental from lessee.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Makhanya J and Ndamase AJ sitting as court of appeal).

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and in its stead the following order is substituted:

   'The appeal is dismissed with costs.'

JUDGMENT

Saldulker JA (Ponnan, Majiedt, Swain and Zondi JJA concurring):

[1] The appellant, Mr Caine Jason Herr (the lessee, Herr) instituted proceedings in the Boksburg Magistrate's Court against the respondent lessor, Innomet Projects (Pty) Ltd (Innomet) for payment in the sum of R64 000, being a rental deposit which he had paid to Innomet pursuant to a lease agreement entered into between them on 20 January 2010 (the lease). Innomet raised a special plea to the lessee's claim, which is not relevant for present purposes. It also instituted a counterclaim against the lessee. To the extent here relevant the counterclaim provides:

'19. In breach of the Agreement read together with the Addendum, the Plaintiff:

19.1 purported to give the Defendant written notice dated 5 December 2010 terminating the Agreement read together with the Addendum, which notice is annexe 'D' to the Particulars of Claim;

19.2 prematurely vacated the Premises on 28 February 2011.

20. The Plaintiff's conduct constitutes a repudiation of the Agreement read together with the Addendum, which repudiation the Defendant has accepted alternatively accepts subject to its rights to recover any damages it suffers as a result of the Plaintiff's unlawful conduct from the Plaintiff.

21.1 At the time that the Addendum was concluded it was contemplated by the Plaintiff and Defendant that the Defendant would suffer damages in the event that the Plaintiff breached the Agreement read together with the Addendum.

21.2 In order to mitigate its damages the Defendant entered into a written lease agreement with a tenant for the premises for the period 1 April 2011 to 31 March 2012 at a monthly rental of R 25 000.00. A copy of that lease is annexed marked "P1".

22. The Defendant has suffered damages as a result of the Plaintiff's breach which caused the premature termination of the Agreement read together with the Addendum in the form of lost rental income in the amount of R24 000.00 calculated as follows:

22.1 rental income due in terms of the Agreement read together with the Addendum for the period 1 March to 30 November 2011 at R32 000 per month in the sum of R288 000;

22.2 less rental income received and to be received by the Defendant in mitigation at R25 000 per month for the period 1 April to 30 November 2011 in the sum of R200 000;

22.3 less the Deposit of R64 000.'

[2] The magistrate's court found in favour of the lessee and the following order was made:

‘48.1 The special plea is dismissed with costs;

48.2 Defendant is to pay the amount of R 75 026,17 to plaintiff together with interest of 4.5% per annum from 26 June 2013 to date of payment;

48.3 The counterclaim is dismissed with costs;

48.4 Costs of suit including of costs of counsel.’

[3] Aggrieved by this decision, Innomet appealed to the Gauteng Local Division, Johannesburg. The appeal succeeded before Makhanya J (Ndamase AJ concurring), who set aside the magistrate’s court order and replaced it with the following order:

‘1. The appeal succeeds.

2. The order of the court a *quo* is set aside and replaced with the following order:

2.1 the appellant’s special plea is upheld;

2.2 the respondent’s claim in convention is dismissed with costs;

2.3 the appellant’s counterclaim against the respondent succeeds with costs;

2.4 The respondent is ordered to pay appellant the sum of R24 000-00 together with interest thereon at 15.5% per annum from 30 November 2011 to date of final payment;

2.5 Costs are to include the costs of counsel.’

The further appeal is with the special leave of this court.

[4] Before us, counsel for Innomet conceded that there was no basis for it to have withheld the deposit, which Innomet had been obliged to repay to Herr together with interest in terms of the lease agreement. In the light of that concession, it follows that the magistrates’ court had correctly entered judgment against Innomet for payment of the amount of R 75 026.17 together with interest and there was accordingly no warrant

for the high court to have overturned that order on appeal. That leaves Innomet's counterclaim.

Background

[5] On 20 January 2010, Herr, entered into a written lease agreement with Innomet, duly represented by Mr Martin van Wijngaarden, for the rental of an apartment situated at Heron Waters, in Clifton, Cape Town (the premises). The parties agreed that the lease agreement would commence on 1 February 2010 and terminate on 30 November 2010. It was further agreed that the monthly rental for the premises would be R32 000, and a deposit of R64 000, to be paid by the lessee in terms of the agreement, would be repayable by the appellant to the respondent, subject to the lease agreement, within 14 days after termination of the lease.

[6] On 24 August 2010 an addendum to the lease agreement was signed by the parties, for the renewal of the agreement on the same terms and conditions for a further period of twelve months from 1 December 2010 until 30 November 2011. In terms of the addendum, should the lessee require early termination of the agreement, he would give Innomet four calendar months' written notice which could only be given after 31 January 2011.

[7] However, during December 2010 Herr learnt that the owner of another unit in the same sectional title complex, Mr Gerald Goott, intended embarking on a major structural renovation of his unit in the complex, which was directly below Herr's unit and which

construction would commence in April 2011. Herr notified Innomet by e-mail on 5 December 2010 of Goott's planned construction and informed Innomet that it would be impossible to live on the premises with a newborn baby during the construction. Herr gave notice that he and his wife would be moving out of the apartment not later than March 2011. There was no response to this e-mail.

[8] On 28 January 2011 Herr, represented by his wife, Meagan, informed Innomet by e-mail that he had secured alternative accommodation in the light of the planned construction project, and notified Innomet that he would vacate the premises on 28 February 2011, which he did.

[9] Pursuant to such notification, Innomet instructed its duly authorised agent to conduct an inspection of the premises and to collect the keys to the premises. On 1 March 2011 a final inspection was carried out on behalf of Innomet, which recorded that the apartment had been left in an excellent condition by the Herrs.

[10] Subsequent to the Herrs vacating the apartment, Innomet entered into a lease agreement with a new tenant, a Mr David Cook, at a rental of R25 000 per month for the period of 1 April 2011 to 31 March 2012.

Legal Principles

[11] In argument before us it was accepted that the lease agreement imposed reciprocal obligations on the parties. In R H Christie & GB Bradfield *Christie's The Law of Contract in South Africa* 6 ed (2011) at 437, the authors state the following:

'In *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A) the Appellate Division reviewed in some detail the history and scope of what have come to be known as the principle of reciprocity and the *exceptio non adimpleti contractus*. The principle of reciprocity recognises the fact that in many contracts the common intention of the parties, expressed or unexpressed, is that there should be an exchange of performances, and the *exceptio* gives effect to the recognition of this fact by serving as a defence for the defendant who is sued on the contract by a plaintiff who has not yet performed or tendered to perform.'

[12] This court explained the duties of a landlord in *Sishen Hotel (Edms) Bpk v Suid-Afrikaanse Yster en Staal Industriële Korporasie Bpk* [1987] ZASCA 20; 1987 (2) SA 932 (A) where the facts were briefly as follows: the lessor let a hotel to the lessee for twenty years. When entering into the lease the lessee acquired the previous lessee's interest in the building and the hotel business for a substantial sum (R350 000). At the same time the parties orally agreed that the lessee would construct additional accommodation and upgrade other facilities, upon which the lessee spent R360 000. The lessor conducted mining operations in the surrounding district and, to ensure that hotel accommodation of a high standard was available for visiting officials, the lease embodied provisions which obliged the lessee to conduct its business according to certain high standards. The lease prohibited the removal or transfer of the hotel liquor license without the lessor's written consent. The hotel was situated next to the national

road between Kuruman and Upington and, because of its situation, attracted considerable custom. Eight years after the parties had entered into the lease the lessor, with the approval of the provincial administration, diverted the national road so that it could extend its mining operations. The diversion had an immediate impact on the profitability of the lessee's hotel business. The hotel attracted considerably less custom than before, and its profits dropped - a thriving business changed into an unprofitable one and the lessee was eventually forced to close the hotel. The lessee sued the lessor for damages. The trial court non-suited the plaintiff.

[13] The plaintiff appealed to the Appellate Division. The essence of the plaintiff's cause of action was that by causing the diversion of the road, the lessor was in breach of a tacit term that it would not take any steps which would interfere with access to the hotel site and prevent the flow of custom to the hotel and therefore interfere with the plaintiff's use of the premises. This court found that the lessor's breach of contract was of such a serious and material nature that the lessee was entitled to cancel the lease. This court held further that the lessor had committed a breach of its common law obligation to afford the lessee the *commodus usus* of the leased premises. (See also *Ashcor Secunda (Pty) Ltd v Sasol Synthetic Fuels (Pty) Ltd* [2011] ZASCA 158; 2011 JDR 1208 (SCA)).

[14] In *Thompson v Scholtz* [1998] ZASCA 87; 1999 (1) SA 232 (SCA) at 247A-D, this court said the following:

'Where a lessee is deprived of or disturbed in the use or enjoyment of leased property to which he is entitled in terms of the lease, either in whole or in part, he can in appropriate

circumstances be relieved of the obligation to pay rental, either in whole or in part; the Court may abate the rental due by him *pro rata* to his own reduced enjoyment of the *merx*. This is true not only where the interference with the lessee's enjoyment of the leased property is the result of *vis major* or *casus fortuitus* but also where it is due to the lessor's breach of contract, e.g. because the leased property is not fit for the purpose for which it was leased or, as in this case, because the performance rendered by the lessor is incomplete or partial. . . The lessee would be entirely absolved from the obligation to pay rental if he were deprived of or did not receive any usage whatsoever.'

Conclusions

[15] Applying the legal principles to the facts it is clear that Innomet cannot succeed in its claim for contractual damages. As landlord, Innomet was obliged in terms of the lease to provide the Herrs with peaceful and undisturbed occupation. Innomet failed to respond to the e-mails sent by the lessee on 5 December 2010 and 28 January 2011. The e-mails gave a graphic account of the effect of the planned construction which would have deprived the Herrs of the use and enjoyment of the premises. Photographs handed in as exhibits during the hearing depict the magnitude of the construction which, inter alia required the use of a large crane, and a large construction crew would have required direct access to the building on a daily basis. Furthermore building ramps down to the pool area for concrete and equipment had to be installed for easy movement up and down on the construction site. All of this would have taken place directly below Herr's apartment. The resultant noise and inconvenience would undisputedly render the premises uninhabitable. This was conceded under cross examination by Mr van Wijngaarden, who stated that had he been in a similar situation as Herr he would

probably have found alternative accommodation and that the Herr's concerns that the apartment would be 'unliveable from April onwards' were not baseless.

[16] Innomet had an obligation towards Herr to object to the planned construction by Goott, by raising it with the trustees of the sectional title complex. The conduct rules of the body corporate of Heron Waters state that 'an owner shall not make alterations to his section, which are likely to impair the stability of the building or the amenity of other sections or the common property'. Herr as lessee could not himself invoke these conduct rules. It was for Innomet to do so. That it failed to do even after the planned construction had been brought to its attention by the Herrs. It follows that Innomet's counterclaim had to fail.

[17] The following order is made:

1. The appeal is upheld with costs.

2. The order of the court a quo is set aside and in its stead the following order is substituted:

'The appeal is dismissed with costs'

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HK Saldulker
Judge of Appeal

APPEARANCES:

For Appellant	C J Bresler Instructed by: Smit Jones & Pratt Attorneys, Johannesburg Symington & De Kok. Bloemfontein
For Respondent:	R H Wilson (Heads of argument prepared by E Fasser) Instructed by: Webber Wentzel Attorneys, Johannesburg Honey Attorneys, Bloemfontein