



REPORTABLE

CASE NO: SA 48/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

BV INVESTMENT SIX HUNDRED AND NINE CC

Appellant

and

LETTY KAMATI

First Respondent

NEW LEAF INVESTMENT (PTY) LTD

Second Respondent

Coram: DAMASEB DCJ, MAINGA JA and FRANK AJA

Heard: 27 June 2017

Delivered: 19 July 2017

Summary: The appellant, plaintiff *a quo*, appeals against the High Court's decision dismissing a claim for damages arising from an alleged breach of a lease agreement. The claim was for unpaid rent for the unexpired portion of the lease agreement. The grounds for terminating the lease agreement advanced by the respondents are that the appellant failed to maintain the property leased in terms of an oral agreement and the terms of the lease and that the property could not be

utilised for the purpose it was leased. Evidence showed that the exterior of the property was in a very bad condition.

The court *a quo* made factual and credibility findings. In a nutshell, it found that the general state of the property was not up to standard and the termination of the lease by the respondents was justified. On appeal, the factual and credibility findings are challenged.

On appeal, the court emphasised that an appeal court will not readily disturb the findings of a trial court on credibility and findings of fact because of the advantageous position the trial court finds itself. Appeal court upholding the conclusion that the leased property was unfit for the purpose it was rented; that sufficient notice had been given to the appellant to rectify and put right the interference with the respondents' use and enjoyment of the property; that the respondents were justified in terminating the lease agreement and that appellant's witness was a less credible witness than the respondents'.

The court commented on the record of appeal in respect of appeals in trial matter and laid down guidelines in this regard. Appeal dismissed with costs.

APPEAL JUDGMENT

DAMASEB DCJ (MAINGA JA and FRANK AJA concurring):

Basic facts: The context

[1] This is an appeal against a decision of the High Court (Masuku J) dismissing a claim for damages arising from an alleged breach of a lease agreement between the appellant (plaintiff *a quo* and hereafter referred to as such) and the first and second respondents (first and second defendants *a quo* and hereafter referred to as such or simply as 'defendants' where the circumstances permit).

[2] Relying on a written lease agreement between the plaintiff and the second defendant, the plaintiff, by combined summons, claimed unpaid rent for the unexpired portion of the lease agreement.

The written lease

[3] The plaintiff close corporation, represented by an estate agent (Mr Bambi) on instructions of one of its members (Mr Maurice Zide) on 27 June 2012, entered into a written lease agreement with the second defendant, (a private company), represented by Ms Letty Kamati. The lease agreement was in respect of Erf 6091 Bach Street, Windhoek West for a fixed period of 12 months commencing on 1 July 2012 and terminating on 30 June 2013. The agreed monthly rental was N\$9500. The written lease agreement includes a clause that a penalty of N\$35 is payable for every late payment.

[4] In clause 6(f) the lessee was required to 'Keep the property clean, habitable and tidy and care for and maintain the garden'.

[5] The lessor was obliged under clause 7(a) to 'Be responsible for the maintenance, and upkeep of the exterior of the property including the roof'; and in

terms of clause 7(e) to 'Forthwith repair any structure defects (sic) which appear in the property'.

[6] There is common ground that the defendants took possession of the property in mid-July 2012 and vacated it on 3 December 2012 before the agreed expiry date.

The pleadings

[7] The plaintiff instituted in the High Court a claim for damages suffered as a result of the defendants' termination of the agreement for the period November 2012 to February 2013. It is common ground that the plaintiff secured a new tenant for the property as from 1 March 2013. The plaintiff's particulars alleged that it had complied with its obligations in terms of the lease agreement and that the defendants breached same by failing to pay the rent due.

[8] The defendants pleaded that the plaintiff failed to comply with its obligations in terms of both the written lease and an oral agreement preceding it. In the plea the defendants rely on an oral agreement, supplementing the written agreement, allegedly entered into between Mr Zide and Ms Kamati to the effect that, at the time of the conclusion of the lease agreement, the plaintiff undertook to renovate and upgrade the exterior of the property by not later than end of July 2012.

[9] It is pleaded that the property could not be utilised properly by the defendants as the general state of the exterior of the property was in a very bad condition and that the plaintiff, despite the first defendant's requests, failed to rectify the situation.

Issue definition

[10] One of the bases on which the case was fought and decided in the High Court is whether there was an oral agreement that the plaintiff would 'renovate and upgrade' the exterior of the leased property by no later than the end of July 2012. The plaintiff's position, both in the court below and in the appeal court, is that such an alleged oral agreement offends the parol evidence rule which states that if there is a proposal in writing, and it is accepted simpliciter, the entire agreement is considered to be in writing, and no evidence is admissible to add to, diminish or vary the written proposal.

[11] Satisfied that the parol evidence rule did not apply on the facts of the case, Masuku J found that although the agreement of lease was for the large part written, there were certain parts of it that were oral and which became efficacious and a proper basis for the defendants to terminate the contract. One such issue, he held, is that the plaintiff had orally agreed to finish repair work on the perimeter wall by the end of July 2012 but failed to do so. The learned judge also found that the premises were unfit for the purpose for which they were rented in so far as the exterior of the building was concerned. The High Court held that the defendants were entitled to terminate the lease on the ground that the leased property was not fit for the purpose for which it was let.

[12] Under the common law, the lessor has the residual obligation to deliver the leased premises in a state fit for the purposes of which it is let. Unless it has contracted out of that duty, a lessor must deliver the leased property to the lessee in

a condition reasonably fit for the purpose for which it is let.¹ That, to repeat, is a duty that arises by operation of law and hence is an implied term of any agreement of lease unless contracted out of. In the present matter, the contract is silent on this aspect and the implied term thus operates to its full extent. The parol evidence rule would prohibit, the leading of any evidence to the effect that the implied term did not apply fully or that further rights and obligations were agreed to that went beyond what would normally be included in the implied term. This is so because implied terms are as much part of the written agreement as express terms.² What the parol evidence rule prohibits is evidence 'seeking to contradict, add to or modify the writing by reference to extrinsic evidence'.³

[13] In the view I take of the matter as regards this duty of the lessor, it is unnecessary for me to decide whether or not there was an oral agreement unrelated to the fit for purpose dispute and if it was breached.

Proceedings in the High Court

[14] Only two witnesses testified at the trial: Mr Maurice Zide for the plaintiff and Ms Letty Kamati for the defendants. In his analysis of the evidence, Masuku J found the protagonists' versions on the matters in dispute irreconcilable and adopted the well-established principle for resolving factual disputes⁴ which is also applied by our courts⁵; made credibility findings and considered the probabilities of the competing

¹ *Harlin Properties (Pty) Ltd & another v Los Angeles Hotel (Pty) Ltd* 1962 (3) SA 143 (A), per Caney J in the court below, approved at 150H.

² *Kadel (Pty) Ltd v Van Wyk* 1938 TPD 305, *Reid v Roder* 1946 WLD 294 and *Van Nieuwkerk v McCraye* 2007 (5) SA 21 (W) at 28-29.

³ *Johnstone v Leal* 1980 (3) SA 927 (A) at 943B.

⁴ *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others* 2003 (1) SA 11 (SCA).

⁵ *Shikale NO v Universal Distributors of Nevada South Africa (Pty) Ltd & others* 2015 (4) NR 1065 (SC).

versions. The learned judge found Mr Zide to be 'a poor witness' who contradicted himself in material respects, was vague, denied evident facts, and displayed 'extreme poverty as a witness of truth'. It was based on these credibility findings that the court *a quo* concluded that the evidence on behalf of the plaintiff was not reliable and was less probable compared to that of the defendants.

[15] On appeal the trial judge's factual findings are challenged as are the associated credibility findings. In essence, we are being asked to substitute the trial court's findings that the property was not fit for the purpose it was let, that the plaintiff failed to put right the defects in the exterior of the property, that the defendants were justified to terminate the lease and, most importantly, that on the disputed issues the plaintiff's Mr Zide was a less credible witness than the defendants' Ms Kamati.

[16] An appeal court will not readily disturb the findings of a trial court on credibility and on questions of fact. The rationale of this rule is that the trial court has the advantage of seeing and hearing the witnesses and being steeped in the atmosphere of the trial. The appeal court does not have that advantage.⁶ The reluctance of an appellate court to interfere with findings of fact is not an immutable rule, especially because on appeal an aggrieved appellant is entitled to a rehearing as of right. That right should not be rendered illusory by an inflexible rule that the appeal court will under no circumstances interfere with the first instance court's findings of fact. If, based on the probabilities of the case, the trial court's conclusion is clearly wrong, the appellate court is duty bound to interfere. The South African

⁶ *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) 1999 (10) BCLR 1059 para 79.

Constitutional Court case relied on by Mr Marcus appearing for the appellant in his written heads of argument therefore reflects the law also applicable in Namibia.⁷

[17] Both sides agree that despite the oral agreement relied upon, which now becomes unnecessary to decide, an important issue that fell for decision is whether the property was fit for the purpose rented and whether the defendants were entitled to terminate the lease. The defendants had pleaded that 'the property in question could not be utilised properly by the defendants as the general state of the exterior of the property was in a very bad condition' and that the 'defendants had no other option than to vacate the premises during November 2012 as defendants' numerous attempts to address the issues of the condition of the exterior of the leased property with the plaintiff was unsuccessful'.

[18] I am alive to the principle that a party must be kept to its pleaded case, but it is equally trite that if an issue has been sufficiently traversed in the trial, a litigant cannot be heard to complain that the pleadings were not explicit enough.⁸ In the present case the plaintiff requested trial particulars before trial and got very specific answers which are directed at the plaintiff's residual obligation to deliver a property fit for its purpose. In answering the plaintiff's request for trial particulars, Ms Kamati stated that she was too ashamed of the general condition of the leased property to see her clients and/or prospective clients at the premises; the gate was in a state of disrepair, did not open properly and/or at all and actually fell on her injuring her; she and her employees and/or her clients and/or prospective clients could not park their

⁷ *Bernert v ABSA Bank Ltd* 2011 (3) SA 92 (CC) para 106.

⁸ *Robinson v Randfontein Estates G M Co Ltd* 1925 AD 198 cited with approval in *Shill v Milner* 1937 AD 101 at 105.

vehicles inside the property as the entrance (gate) of the property was in a state of disrepair and/or could not open properly; the plaintiff and/or his designated employees and/or contractors and/or agents caused a trench to be dug on the property in a manner which was unsafe; plaintiff and/or his designated employees and/or contractors and/or agents cut down a tree on the property and failed to remove the branches and leaves for weeks on end causing the property to be in a state of disarray.

[19] We now have to consider the disputed matters based on the facts and assess whether the trial judge's conclusions are, as suggested by the plaintiff, unsustainable. I will start off by briefly summarising the evidence.

Mr Maurice Rueben Zide

[20] It is common ground that the leased property had a boundary wall encircling it and which was in need of repair at the time the defendants leased the property. Mr Zide testified that several renovations were done on the property since the plaintiff bought it in 2011. During February 2012, sewage works were carried out at the premises and raw sewage, dirt and stones were placed against the boundary wall and in the process damaged the exterior boundary wall surrounding the property. A contractor, Mr Shigwedha, was tasked during June 2012 to repaint the wall before the defendants took occupation of the property. On 27 July 2012, whilst still abroad, Mr Zide informed Ms Kamati via email that he will be 'finishing the boundary wall when we return back at the end of July'. According to Mr Zide, although work on the boundary wall was expected to be completed by end of July, only the re-plastering was completed by August 2012.

[21] Mr Zide denied that he undertook to complete the repairs by the end of July stating that he had not given any undertaking to Ms Kamati when the renovations would be completed. The replacement of some gates commenced during August 2012 and as a result holes were dug to remove the foundation of the old gates. The person doing the work however resigned on 31 August 2012 and the work could not be completed. In correspondence of 8 September 2012 to Ms Kamati, Mr Zide admitted that he was experiencing difficulties in completing the work as the contractor was unreliable. That resulted in the appointment of another contractor on 16 September 2012, Mr Michael Kukeinge, to continue the repairs and to clean the yard. On 29 September 2012, Mr Zide informed Ms Kamati that the replacement of the gates will be completed by November 2012. Mr Gebhardt Nakashole was the next contractor employed from early October 2012 to clean the yard but he only cleaned the yard seven separate days in October 2012. Replacing of the gates commenced on 13 October 2012, and again, holes were dug. On 16 October 2012, Ms Kamati complained by email that she was unable to use the property for the purpose it was intended and terminated the lease.

[22] According to Mr Zide, Ms Kamati was fully informed by him of the renovations that were taking place and that she at no stage expressed dissatisfaction.

Ms Letty Kamati

[23] Ms Kamati's depiction of the state of the property broadly fits its characterisation by Mr Zide. According to her, the property was in a dilapidated state when she first inspected it before signing the lease: the exterior of the property

needed renovation as the paint was fading and wearing off, the front gate was not working and needed replacement, and there was a lot of rubbish and filth in the yard as well as big holes inside the yard. According to her, she reached an oral agreement with Mr Zide that he would repair that which was in a state of disrepair. She testified that she continuously reminded Mr Zide of the promise but he persistently apologised for the failure to complete the work but to no avail. This evidence relates to the lessor's duty to deliver the property in a state fit for its purpose and in my view does not offend the parol evidence rule. It is a duty implied in a contract of lease upon a lessor. The evidence led does not contradict, add to or modify the written agreement. It simply gives content to what the parties considered the plaintiff's duty was so as to render the premises fit for the purposes for which it was leased. It follows that the evidence did not offend the parol evidence rule. It was tendered on a twofold basis. First as an aid to interpret the content of the implied term taking cognisance of the particular circumstances of the case and was on this score admissible.⁹ Secondly, to establish a breach of the implied term which the defendant had to do to lay the basis for the termination of the contract on which basis the evidence was likewise admissible.

[24] Mr Zide dug a trench alongside the boundary wall making the pathway narrower rendering it impractical to drive through from both gates; electrical wires as well as water pipes were exposed. On one occasion, whilst attempting to open one of the gates, it fell on her injuring her. Another concern that Ms Kamati testified about was the fact that the property was opposite a bar posing a danger to her

⁹ R H Christie *The Law of Contract in South Africa* 6 ed p 226 and the cases there cited.

vehicle which could only be parked outside in the street, and to herself as she would at times work until midnight.

[25] Ms Kamati testified that the state of the property caused her embarrassment to the extent that she could not use it for business as intended and preferred to meet clients away from office at coffee shops. According to her, the state of the property was hurting the image of the business. Her version is that it was because of the plaintiff's breach of the agreement to renovate the exterior of the property that she terminated the lease. She maintained that it was the plaintiff's obligation in terms of the oral agreement and clause 7(a) of the lease to maintain the property.

Was the exterior in a state that rendered the property unfit for purpose?

[26] The use to which a property is to be put is at the core of a contract of lease and without that being given effect to it loses its substratum. As Pothier states:¹⁰

'22. It is of the essence of the contract of lease that there be a certain enjoyment or a certain use of the thing which the lessor undertakes to cause the lessee to have during the period agreed upon, and it is actually that which constitutes the subject and substance of the contract.'

[27] The purpose of a lease must be determined by considering the use the lessee intends to put it to, either by reference to the terms of the lease if in writing, the intention expressed by the lessee to the lessor, or by considering all the circumstances.¹¹ As I understand the plaintiff's position, the defendants leased the premises for use as an administrative centre since their operations were carried on in

¹⁰ Approved in *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A) at 785G.

¹¹ A J Kerr *The Law of Sale and Lease* (1984) p 200.

the regions; implying that there could not be the kind of embarrassment in operating from there as suggested by the defendants.

[28] In an email sent by Mr Mbambi to Mr Zide on 20 June 2012, he states the following concerning the defendants and their renting the leased premises:

'The new tenants is going to use the property for OFFICE PURPOSES ONLY. Examples, property development, investment, contractions (sic) real estate and wills'.

[29] That obviously stemmed from what Ms Kamati had advised Mr Mbambi in an email message of the same date (20 June 2012) describing their main business activities as: construction and renovation, property management, real estate investment consultants, project management, real estate agency, property designs and decoration, curtaining. She added:

'Our work is mainly in the Regions, but in Windhoek we have our head office which we run as administrative center for all our projects, our purpose for acquiring the office is mainly for that.'

[30] Masuku J held:

[44] I also find for a fact that the premises were unfit for the purpose for which they were rented in so far as the exterior of the building was concerned. Ms. Kamati's evidence that the premises were under constant renovation do not appear to have been false nor an exaggeration in the circumstances. Her evidence was corroborated by pictures that were captured at different times and Mr. Zide himself failed to convincingly deny that the place was being renovated, choosing for convenience, to call the exercise one of maintenance and not renovation.

[45] Some of the pictures captured and admitted in evidence make a sorry sight to behold with gravel, holes and trees and leaves all over the place, the fence to the premises precariously hanging for dear life as it were. No less important is the undeniable fact that the 1st defendant's inability to park her vehicle within the premises and that the gate fell upon her, injuring her in the process. Although these latter events may not have been the direct cause of her decision to terminate the agreement, it is clear that on the whole they played and were entitled to create a compelling mass that led to her decision to terminate the contract.

[46] On all accounts, I can say that Ms. Kamati was incontrovertibly not treated fairly by the plaintiff. The email communication between the parties also bears testimony to the truth and plausibility of the defendants' case and correspondingly, does the plaintiff's case a great deal of harm as one sugar-coated apology followed another for failure to perform. I am of the view that given her business of running a contractor business and an estate agent, the exterior of the premises could do very little to attract potential clients but would be, likely to have constituted a repellent. I say this because it was very clear in the inception of the agreement what the premises were aimed for, thus necessitating the change in the permission sought from the City Council of Windhoek.'

[31] According to Mr Marcus, the main issue which the High Court had to decide was whether the defendants put the plaintiff on notice to finalise the building works and whether the works were completed when the defendants vacated on 3 December 2012. Without conceding that upon delivery the property was dilapidated, Mr Marcus argued that the defendants 'were quite happy to lease the property' because of its ideal location and the low rent. He submitted that the defendants 'were content not to insist on a deadline for the renovations, as the property was merely to serve as an administration centre for the projects in the regions'. According to counsel, the plaintiff 'was attending to renovations and maintenance, in accordance with its obligation under the lease' but that Ms Kamati 'appears at some point' to have become 'unhappy as the renovations were taking too long (never ending).

[32] I will accept as correct for present purposes that the defendants' estate agency business was not carried on from the leased premises but was used as an administrative centre. That said, it is indisputable that it was meant for use as an office to further the defendants' businesses and not as an idle space where no business was conducted. Why rent an office in the first place at a cost of N\$9500 if you are not able to meet clients there?

[33] Should it really matter that it was an administrative centre as opposed to an estate agency business? I think not. The evidence makes clear that from the very moment that the defendants took occupation until they gave notice to vacate, the premises were a hive of activity and interfered with the defendants' full enjoyment of it as an office. It is no answer, in my view, to suggest that it mattered not what state the property was in or what activities went on at the plaintiff's behest because it was an office and not an estate agency business. Holes dug on premises, exposed electric pipes, debris strewn all over the premises, incomplete works which remained unattended due to resignation by contractors, present no less an inconvenience to a tenant renting an office than one running an estate agency business. A lessor has a common law duty during the currency of lease to allow a tenant to have peaceful enjoyment of the rented property.

[34] The evidence of Ms Kamati is that she chose not to meet clients at the premises because she was too embarrassed to (and that there was reason to be embarrassed seems obvious from the pictures presented in evidence); she could not park inside the yard because of Mr Zide's activities and not parking inside the yard posed a risk to her safety and her car. It is common ground that the exterior wall of

the property was in a state of disrepair. The photos speak for themselves and there was no dispute they related to the property during the material time. It will be recalled that the gate was in such bad state that it even fell on Ms Kamati and injured her. The holes around the premises are common cause as are the incessant but abortive renovations at the behest of the plaintiff's Mr Zide.

[35] The High Court's conclusion that the premises were not only unfit but unsafe for occupation therefore is grounded in fact. Even on the assumption that the premises were let as an administrative centre, it cannot be right that the lessor's duty to deliver the property in a state that is fit for use as an office and not as an estate agency business allows it to create the kind of inconvenience the defendants were subjected to.

[36] I therefore find no basis for faulting the conclusion reached by the trial judge that the leased property was unfit for the purpose it was rented. That the leased premises were in a disagreeable state from the onset is apparent not only from Mr Zide's own testimony, that of Ms Kamati and from the pictures led into evidence. It is not a case where there was deterioration only sometime after the defendants had taken occupation. The right to cancel therefore arose upon the property being delivered to the defendants and without affording the lessor the opportunity to remedy the defect. In any event, according to Ms Kamati, she did complain to the plaintiff's Mr Zide who did not keep his promises resulting in her giving notice when she did. I next turn to that issue.

Did the lessor have notice?

[37] The correct statement of the law on notice is this:

'It is a general rule of the South African law of contract that a contracting party is entitled to cancel a contract if the performance tendered by the other party is so defective that the first (the innocent) party cannot reasonably be expected to be satisfied with it. Since this rule is of general application, it applies naturally where a lessor fails to carry out the duties to deliver or to maintain the thing let in a proper condition. Consequently, if the thing is so defective that when it is tendered to the lessee he or she cannot reasonably be expected to accept it, he or she may elect to cancel the contract and, it would appear clear, without having given the lessor an opportunity to remedy the defect. If during the currency of the lease the thing let falls into so serious a state of disrepair that it cannot reasonably be expected of the lessee to continue with the lease, he or she may elect to cancel the contract, but in this event the lessor must first have been a reasonable time to repair the defect.'¹² (Footnotes omitted).

[38] It was suggested by Mr Marcus in argument that the defendants ought to have recorded their dissatisfaction in writing and that such unhappiness appears nowhere in email exchanged between her and Mr Zide and that the alleged unsatisfactory condition of the property was only a ruse to terminate the lease. In the first place, I reject the suggestion that Ms Kamati conjured up some ruse to extricate the defendants from the lease. The evidence demonstrates that the defendants were punctual in the payment of the rent. Given what I had earlier described one would have expected a lessee seeking to avoid its obligations holding back rent in protest, which was not the case.

[39] Besides, as found by the trial judge, the email correspondence is only part of the story. As the court *a quo* found Ms Kamati made clear that she and Mr Zide were in constant physical contact. According to Masuku J:

¹² Kahn *et al.* . . . *Principles of the Law of Sale and Lease* (1998) p 56.

[28] Ms. Kamati also testified that she did not find it necessary to reduce to writing what the oral parts of the agreement were because she saw Mr. Zide on a daily basis as he resided on the property and he kept on making verbal promises regarding attending to the contentious issues. It was her evidence that Mr. Zide promised her verbally when she complained about the premises that he would finish the wall by the end of July. It was her evidence that as a contractor, the work outstanding was minor and it would not have taken long to finish. It was put to her that she did not do enough to show that she was unhappy with the state of the property particularly because in her reply to an email on p.29 she merely said 'Ok!' It was her evidence that the emails did not accurately and fully reflect the contents of their conversations because they met very regularly and spoke about these issues which were of concern to her and at times, she dealt with the plaintiff's agent regarding those issues.'

[40] Mr Marcus suggested in argument that the defendants had to give notice to the plaintiff if they had any complaints and to only terminate after the plaintiff had failed to put right the source of complaint, suggesting that some special rule applies in the case of agreements of lease.

[41] On the very day (27 June 2012) that Ms Kamati paid the deposit for the lease, Mr Zide by email advised her that he would be 'finishing' the boundary wall when he and his wife return from overseas 'at the end of July'. When informed by Ms Kamati on 16 July 2012 that they had moved in and were struggling to get the keys for the entrance of the cars, Mr Zide by email on the same date informed her (apparently having returned in the meantime) that there was a problem with the remote controlled gate which 'broke frequently' acknowledging that using the entrance to Bach Street may not be 'convenient'. On 18 July 2012, Mr Zide by email informed Ms Kamati that they would be 'renovating' the perimeter wall and install a

motorised gate facing Bach Street. On 8 September 2012, Mr Zide by email apologised for the 'status of the yard' and explained it was because of the 'caretaker' not meeting his obligations. On 29 September 2012 Mr Zide informed Ms Kamati they would be replacing the gate in October and probably install the motor in November.

[42] On 16 October 2012, Ms Kamati gave notice of termination of the lease effective end of November 2012, citing the following reasons:

'This letter serves to inform you that ever since we move in the premises, we are unable to utilise it to the maximum the reason being:

1. The area around the office is always dirty rubbishes moving around the yard, leaves all over the place. There is completely no maintenance.
2. The premise seem to be on non-ending renovation, its holes dug left and right, trenches, falling gates, I had a gate falling on me, Thursday last week. At times these work comes to a complete standstill. The lessor has been doing small ad hoc renovations since the day we moved in, we thought he will finish but it seems the Lessor uses different method of piece by piece work.

Work which takes two days to do is taking forever we specialise in construction and we know the span it takes to complete a job.

4. I have spoken to the landlord about this but there is no improvement or progress.' (Emphasis supplied).

[43] According to Mr Marcus, the defendants were obliged to put the plaintiff on terms to finish the work within a reasonable time before they could terminate the lease. It is not altogether clear to me whether he says she did not, or did not do so vociferously enough. As Mr Marcus puts it in the written argument, 'Although Kamati

raised the state of the yard and the length of construction work with Zide at some point, we submit that these went never further than mere discussions'. He then invites us to substitute the trial judges' credibility findings and make adverse credibility findings against Ms Kamati because, *inter alia*, her testimony was 'inconsistent', her explanations were 'ludicrous and exposed the untruthfulness of her story' and fraught with internal and external contradictions – all intended, it seems, to show that Ms Kamati never put the plaintiff's Mr Zide on terms to finish the ongoing works at the premises.

[44] The submissions I just referenced are materially irreconcilable with Mr Zide's posture and Mr Marcus' power of departure, that the property was perfectly fit for the intended purpose and that the defendants were happy with the state they found it and reconciled themselves to the fact that, upon delivery, the property's exterior 'needed to be fixed before they concluded the lease'. Either the property was fit or it was not fit! If it was it required no fixing and therefore the issue of notice is moot. The suggestion that notice was required is in my view a concession that the property was not in the impeccable condition that Mr Zide said it was.

[45] According to Mr Small for the defendants, the seven photographs tendered into evidence clearly show that the exterior of the property was dilapidated and that the inference is inescapable that there was an undertaking that the plaintiff would 'renovate and upgrade' it. He also poses the question, albeit to seek to justify the existence of an oral agreement, why the plaintiff repeatedly apologised about the state of the exterior, the inconvenience and the length of the constructions and renovations if the property was fit for its intended purpose. He argued that the

evidence shows that Ms Kamati afforded Mr Zide sufficient time and opportunities to upgrade the exterior but that she eventually realised that it was to no avail.

[46] Mr Small argued that Mr Zide's insistence that the property was 'acceptable' in the face of the exterior's apparent bad condition shows Mr Zide's testimony was 'unsustainable'. He added that the state of the property's exterior rendered it unfit for the intended use. According to counsel, that Ms Kamati complaint to Mr Zide about the poor state of the exterior is apparent from the fact that Mr Zide in numerous emails 'freely' apologised on more than one occasion about the condition of the leased property.

[47] Counsel for the defendants also referred to the fact that Mr Zide in his email of 19 October 2012 admitted that Ms Kamati spoke to him about how dirty the yard was. Mr Small argued that the defects in the exterior were of such material nature as to render the leased property 'practically useless' to the defendants, that even on being put on terms, the plaintiff failed to rectify within a reasonable time. Counsel supports the trial judge's credibility findings and asks that the appeal be dismissed.

Disposal

[48] We were able to see for ourselves in the record the seven photographs depicting the exterior of the property. They come nowhere near portraying the idealic place Mr Zide sought to present at the trial. Suffice it to say that they give one no cause to fault the impression they created on the trial judge that the property was unfit for the purpose it was let.

[49] That observation fits in with the tenor of the evidence that the exterior of the property was in a bad condition that made it unfit for use as an office- a condition which existed from the inception of the lease and, it seems clear on the evidence, worsened as it continued.

[50] Having regard to the correspondence showing that Ms Kamati expressed dissatisfaction to Mr Zide about the state of the exterior, his at times unsolicited apologies about the exterior's condition which is irreconcilable with his insistence that the property was in good order, his admission in correspondence about ongoing renovations of a property he insisted was in good condition, I am satisfied that the High Court was justified to conclude that Ms Kamati had put the plaintiff on notice to rectify the situation, and that the plaintiff failed to do so entitling the defendants to terminate.

[51] The proposition that where a defect occurs during the currency of a tenancy, the lessee must afford the lessor the opportunity to put it right is a trite one. In such a case, the tenant may only cancel the lease if, because of the defect, the lessee's use and enjoyment of the property had been substantially interfered with. On our facts, it was apparent to the lessor from inception that the property's exterior negatively affected the defendants' full use and enjoyment of the property as an office. Mr Zide himself broached the subject in just two days after the defendants took occupation. He then set in train a process which involved hiring contractors to come and work at the property. That process, rather than ameliorate the situation by improving the exterior, exacerbated it. He did not need any notice, he accepted responsibility and promised to put it right. The fact that those he contracted to do the work left him in

the lurch did not take away from the fact that the expectation he created, that the position would improve, was not met. A failed or abortive effort to repair is no different from a failure to repair after notice of the defect.

[52] Mr Marcus argued that by the time the defendants vacated the property on 3 December 2012, all the problems raised were addressed and that the defendants were thus not entitled to vacate the property. He relied on *Marcuse v Cash Wholesalers (Pty) Ltd* 1962 (1) SA 705 (F.C). However, that case does not support Mr Marcus' proposition that the defendants were not entitled to vacate by 3 December 2012. The case deals with the crucial date to terminate the lessees' liability to pay rent in terms of the lease, which is not the date of breach but the date on which the property was vacated. The same reasoning was adopted in *Sapro v Sclinkman* 1948 (2) SA 637 (AD) at 644-645: that the lessee who has indicated the intention to vacate the leased property is liable to pay rent while still inhabiting it and such obligation only ends upon vacating the leased property. That is not the issue in this case.

[53] Counsel further argued that the respondents did not prove that by 3 December 2012 the condition of the property was such as to render it wholly useless, implying that since all the problems were resolved by then, no reasonable ground existed for the respondents to vacate the property. Counsel relied on *Noble v Lowenthal* 1924 CPD 78 where the court stated at p 85 that:

' . . . in order to justify his (i.e the lessee) quitting possession during the subsistence of his lease, the tenant must prove that the defect relied upon by him was of so material a nature as to render the premise practically useless for the purpose for

which he had hired them. If he succeeds in his proof he is not liable for rent so long as the defect remains. If he fails in his proof he is liable for rent and must counterclaim for any damages done to him by reason of the defect.'

[54] The court highlighted that the lessee has an obligation to point out any defects in the premises to the lessor which he considered to not form part of his obligation under the lease, and if the lessor fails to repair within a reasonable time, and the defects are so serious that they substantially interfered with the lessee's use and enjoyment of the property, then the lessee is entitled to cancel the lease, but not before. It was held that the lessee was liable for the rent for the rest of the month because he failed to prove knowledge of the defect on the part of the lessor and a subsequent failure to repair. I agree with the legal principles as stated in the *Noble* case. The facts are, however, distinguishable from the present case given my conclusion that the plaintiff had notice of the defects from inception of the lease and was the author, to Mr Zide's and Ms Kamati's knowledge, of the very acts which exacerbated the defects in the exterior.

[55] I subscribe to the view expressed by Zulman JA that an appeal court has greater flexibility to disturb findings of credibility where findings of fact do not essentially depend on personal impressions made by a witness' demeanour.¹³ Masuku J made credibility findings not least based on the demeanour of the witnesses. He said:

[34] Having had the privilege to see, hear and assess the witnesses as they adduced their respective pieces of evidence, I can say without fear of contradiction that the plaintiff's witness struck me as an extremely poor witness. He was given too

¹³ *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd* 2002 (4) SA 408 (SCA) para 24.

many words (not in and of itself bad or wrong) which eventually led to him spinning an intractable web around himself, resulting in him contradicting himself on a number of issues. In respect to others, he was deliberately vague, at times playing a game of semantics which did himself no world of good whatsoever, as a witness of truth. In other instances, he found himself in a tight corner where he had no other defence than to deny what was evident. The most obvious in this regard related to pictures which depicted the state of the yard of the premises and which Mr. Zide insisted was good to him when to the eye of the independent and detached was an atrocious sight for premises where a business was to be conducted and money therefor was being paid on time and regularly.

[35] In this regard, I will quote a few examples of his vagueness, contradictory evidence and display of extreme poverty as a witness of truth, particularly under scorching cross-examination from Mr. Small for the defendants. So irremediable was his position that it must have proved an uphill battle for Mr. Marcus to patch up the damage done to the plaintiff's case by Mr. Zide's woeful performance in the witness box. In this regard, no question was asked in re-examination that would have sought to ameliorate the damage done to the plaintiff's case by its star and only witness.

[36] Regarding the question of renovation on the premises, the following ensued in the battle of wits between Mr. Zide and Mr. Small.

Q. You are not aware of constant renovations on the premises?

A. No.

Q. Are you aware that the defendant had problems with trenches being dug?

A. No.

Q. Are you aware that the gate fell on the defendant?

A. I read that from her email.

Q. Are you aware that the defendant had concerns regarding the trenches?

A. Yes as per her statement but I am not aware of the trenches.

Q. Are you aware that the defendant was concerned about the constant renovations?

A. In her email she stated that. I don't know of the constant renovations. There was some renovation on the boundary wall and she didn't rent that.

Q. Was there constant renovations or not?

- A. Yes.
- Q. You said there were no constant renovations and now you say there were?
- A. I said no to constant renovations – 24 hours a day and 7 days a week.
- Q. If you read at p39 don't you see the defendant complained that the place was undergoing constant renovations?
- A. As stated, no constant renovations means continuously. It was two days a week and 8 times a month.
- Q. July, August, September and in October, still renovations?
- A. These were not constant renovations.
- Q. In November, you were still busy with renovations, maintenance or whatever you call it?
- A. Yes. We were renovating the boundary wall. (Evasive and pretended not to have heard the question posed to him, alleging the question was ambiguous.)

[39] On the other hand, perhaps for a few and minor incidences, the 1st defendant acquitted herself extremely well in the witness box. This was despite searching and relentless and at times brutal cross-examination by Mr. Marcus. Ms. Kamati was as constant as the Northern Star and stuck to her evidence like a postage stamp to an envelope. She showed a remarkable degree of cool headedness and consistency in her defence.

[41] Ms. Kamati made a favourable impression on me. She struck me as witness who showed remarkable understanding and patience and seems at times to have been unhinged and disarmed by Mr. Zide's demeanour and charm as a person who was not confrontational but always apologetic for any shortfalls in the promises he had made. I found it unfair, in the circumstances, for Mr. Marcus, to use that benevolence as a sword against her when she appeared to have been overly indulgent to the plaintiff in the light of the failure to comply with the undertakings made regarding the fitness of the premises for running her business. In this regard, I found her to be humane, with *Ubuntu*, a virtue to be praised and not condemned.'

[56] I am therefore satisfied that not only was Mr Zide aware of the poor state of the property's exterior which needed fixing but that to the extent notice was required, Ms Kamati put him on notice and that he promised to attend to the matters

complained of but did not put them right. The High Court's conclusion in that regard is sound and the complaints raised do not rise to a level that justifies appellate interference with findings of fact and credibility. The judge *a quo* was alive to the importance of balancing the conflicting versions. He applied the proper test in that regard and considered the possible inconsistencies in the defendants' version.

[57] For avoidance of doubt, Mainga JA and I fully endorse the remarks by Frank AJA in his concurring judgment.

Order

[58] The appeal is dismissed with costs, to include costs consequent upon the employment of one instructing and one instructed counsel.

DAMASEB DCJ

MAINGA JA

FRANK AJA:

[59] I have read the judgment of Damaseb DCJ and concur therewith. I however wish to comment on the record of the proceedings *a quo* filed with this court. Whereas some of my comments are pertinent to this appeal not all are. In my view comments of a more general nature are required as it seems the advent of the new High Court Rules¹⁴ has created uncertainty as to what the records of action proceedings (trials) should contain and how such records should be ordered. The matters raised below became evident through the records filed in appeals from the High Court. I emphasise that these comments are limited to appeals relating to actions heard in the High Court, ie where the matter went on trial.

[60] Evidence-in-chief is given by way of a witness reading out his/her witness statement and qualifying or correcting it where necessary. The witness statement should be handed in as an exhibit. Whereas it is correct that the transcribed record should reflect the evidence in chief, it is common practise that the legal practitioners appearing at the trial refer to the witness statements when examining witnesses. It is a matter of convenience in the High Court and it is simply easier to follow such examination in the record if the witness statement forms part of the record. I must emphasise again that the witness statement, once confirmed (unqualifiedly or not) is the evidence-in-chief of such witness.

[61] As a witness statement is read out by a witness there is simply no excuse for a record not to be complete when it comes to the evidence-in-chief. For a record to be replete with 'indistinct' inscriptions in this regard is unacceptable. The appellant's legal practitioner, who is responsible for the record and is paid to peruse it, can have this

¹⁴ The High Court Rules came into effect on 16 April 2014.

cleared up by reference to the witness statement which will make it obvious what the witness read out even though it is indistinct when listening to the recording of such evidence. The same applies where a witness reads from an exhibit when an indistinct recording can be cleared up by way of reference to the exhibit read from.

[62] The only exhibits which should form part of the record are those exhibits referred to and handed in at the hearing in the court *a quo*. To simply attach to the record all the discovery notices with all the documents accompanying them has never been allowed and is still not allowed. Discovered items not handed in as exhibits in the court *a quo* are not evidence in that court nor in the appeal court.

[63] Exhibits should be contained in a separate volume of the record on appeal and not included in the record as appendixes to the witnesses' evidence who hand these exhibits in or who are cross-examined with reference to such discovered documents and where the documents are handed in as a result of the cross-examination. Exhibits, irrespective of what numbered pages they form of the record, should in addition also reflect the numerals or letters they were referred to in the court *a quo*. Thus, if an exhibit containing a number of documents is admitted as such in the court *a quo*, eg 'B1' to '20', then that exhibit must be replicated in the record. It is time consuming to attempt to find the exhibit when preparing for the appeal where a witness refers to, say, exhibit 'B11' and one turns to the exhibit in the record only to find that exhibit 'B' (which may even contain more than 20 pages where the numerals refer to separate documents on the same subject matter) does not bear the markings that were used in the court *a quo*. One must then by way of inference from the evidence track down the specific document referred to. Apart from being time

consuming it is inconvenient and there is no reason for this as the exhibit was numbered in the court *a quo* but which marking is not reflected in the record. It is so that some of the exhibits will be annexed to the pleadings. This does not mean they should not form part of the separate exhibits volume on appeal because it is the most effective and convenient manner to peruse a record where the witnesses in the evidence deal with exhibits during all the phases of being examined by the legal representatives.

FRANK AJA

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