IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: 1582/2015

In the matter between:-

ROSES UNITED FOOTBALL CLUB (PTY) LTD **APPLICANT**

and

ST ANDREWS SCHOOL **RESPONDENT**

CORAM: MOLOI, ADJP

HEARD ON: 05 MAY 2017

DELIVERED ON: 18 MAY 2017

MOLOI, ADJP

[1] In this matter the plaintiff, St Andrews School, issued summons against Roses United Football Club (Pty)Ltd, as the first defendant and Mangaung Metropolitan Municipality

as the second defendant. No relief was, however, claimed against the second defendant which was joined merely for any interest it might have in the relief claimed. The claim was for cancellation of an agreement of sub-lease and payment of arrear electricity account in breach of the agreement. The first defendant (hereinafter the defendant) sought absolution from the instance at the close of the plaintiff's case.

[2] The claim of the plaintiff against the defendant is couched in paragraph 5 of the plaintiff's Amended Particulars of Claim as follows:

> "5. *The Defendant has, since 27 September 2013, been in breach of the sub-lease agreement in that:*
>
> *5.1 It failed to keep and maintain the field and more specifically the cricket pitch, at a level comparable to the main cricket field situated at St. Andrews School.*
>
> *5.2 The First Defendant has, on an on-going basis, refused reasonable on timeous requests by Plaintiff for the use of the field for its own learners.*
>
> *5.3 First Defendant has failed to pay the outstanding electricity account totalling R65 279, 02 as at 31st December 2014.*

5.4 *First Defendant has been using the playing fields on an on-going basis not only for training but for league fixtures as well."*

The above allegations were denied by the defendant in its amended plea.

[3] The defendant had been using the sport field with the approval of the Mangaung Municipal council from 2007 according to Mr Hickling, a member of the plaintiff's board of governors for 46 years prior to the conclusion of the sub-lease between the plaintiff and the defendant signed on 2 February 2013. The defendant installed the sprinkler system to maintain the fields, and paid for the electricity it used. According to Mr Thomas, the principal of the plaintiffs' school the cricket field and the pitch were in a poor state of repair when the sublease was signed. The defendant was supposed to use the soccer field on the western side of the field. According to Mr Hickling the cricket pitch had been neglected for 8-9 years before the conclusion of the sub-lease – "*there was no maintainable pitch*" until it was re-laid in July\August 2013.

[4] The relevant parts of the sub-lease that was drawn up by the plaintiff's own attorneys read as follows:

"1. *SAINTS will sub-lease the LEASED AREA to ROSES UNITED for the duration of the Head Lease SAINTS has with the Mangaung Municipality, rent free.*

2. *ROSES UNITED shall maintain THE LEASED AREA at their cost and in particular the fields at a standard or level comparable to the St Andrews A cricket field situated on SAINTS School Grounds. The maintenance of THE LEASED AREA shall include the change rooms, the borehole and pump used to water the filed as well as the flood lights. If Municipal Water is to be used to water the fields, the cost of the consumption of the water shall be for the account of ROSES UNITED.*

3. *ROSES UNITED shall only use THE LEASED AREA in the main for training purposes of its professional Soccer Team. This shall not however exclude non-professional soccer games and other activities for ROSES UNITED conditional upon the last two mentioned activities not clashing with any School activity nor be in contravention of the HEAD lease with the Mangaung Municipality or the South Africa Schools Act No 84 of 1996 ROSES UNITED shall not be entitled to sublet the LEASED AREA with prior written consent of SAINTS*

4. *It is recognised and agreed that SAINTS will also utilise the fields situated on THE LEASED AREA from time to time. Both SAINTS and ROSES UNITED shall make arrangements amongst themselves for the relevant time slots for the use of the fields by themselves. Whenever possible preference shall be given to SAINTS for the use of the fields with particular*

reference to their usage of the fields for cricket training and / or matches.

6. *The electrical supply for the flood lights on the field will be converted to pre-paid meters, the costs of which shall be borne by SAINTS, and ROSES UNITED will allow SAINTS use of the flood lights at the costs of ROSES UNITED"*

[5] The plaintiff contended that the defendant failed to maintain the leased area at its cost and, in particular, the fields at a standard or level comparable to the St Andrews A cricket field situated on SAINTS School Grounds. The sub-lease agreement defined the lease area as "*The cricket /football/ rugby field and the relevant change rooms at the Premises.*" The particulars of claim, however, added "more specifically the cricket '*pitch*' which was not mentioned in the sub-lease agreement. The evidence on behalf of the plaintiff through the principal of the plaintiff school, Mr Thomas, the cricket stadium manager, Mr Pretorius and the member of the school's governing body, Mr Hickling emphasised the difference between a cricket field and a cricket pitch. The evidence also shows that for 8 to 9 years before the conclusion of the sub-lease there was no cricket pitch to talk about that required maintenance. A cricket pitch was re-laid only in July/August 2013. What is more is that the evidence further shows that the defendant, being soccer club, cannot use a cricket pitch as that would lead to injuries on the players because it is harder than the normal cricket field.

Beside that there is no evidence at all as to in which respect was the leased area not maintained. After the pitch was re-laid it would even be more dangerous to play soccer on it. It is difficult to imagine, therefore, what maintenance it would require as it was never used as will be made clear hereunder.

[6] According to the plaintiff the defendant refused to allow its leaners the use of the field (the leased area) at all times and even chased them away contrary to clause 4 of the sub-lease agreement. The wording of clause 4 does not state that SAINTS must have access to the leased area on demand. On the contrary, it states that the use of the leased area must be negotiated between Saints and the defendant and preference shall be given to Saints *"whenever possible."* There is no evidence of the instances when the negotiations were conducted and this does not even appear in the minutes of the many meetings that were held. More than that there is no evidence of the reasons given by the defendant in refusing access to the leased area by Saints. It is therefore not possible to determine the rationale for the refusal nor the "*wherever possible"* provision in the sub-lease agreement. I do not agree with Adv Greyling's submission that these words in the agreement are vague and render the contract unenforceable as stated in Namibian Minerals Corporation Ltd v Benguela Concessions Ltd 1997 (2) 548 (A). On the contrary, I find that the words are clear and needs no interpretation as confirmed by Mr Thomas' answer to the question viz:

"Okay it seems to me that it is difficult for the Plaintiff and the Defendant to arrange time slots because they, they all needed the same time slots for practising purposes… I would agree there has been difficult, yes."

What that response does is, in fact, to emphasize that both parties understand the "*whenever possible*" the same way and that cannot be vague. Consequently that response, on the contrary, indicates that there were no *mala fides* on the part of the defendant to exclude the plaintiff from using the leased area and consequently the alleged breach by the defendant is negated.

[7] The third aspect raised in the particulars of claim is the failure of the defendant to pay for the electricity used the amount which was R65 279, 02 when the summons was issued and have since increased to R204 164, 38. It is common cause that in the dispensation the defendant had with Mangaung Council, the defendant was paying for the electricity used for the flood lights at the leased area. The plaintiff, through its own attorney, at the plaintiff's instruction drew up a lease agreement which he termed Heads of Agreement and provided in clause 6 thereof as follows:

"6. *The electrical supply for the flood lights on the fields will be converted to pre-paid meters; the costs of which shall be borne by SAINTS and*

ROSES UNITED will allow SAINTS' use of the flood lights at the cost of ROSES UNITED."

The factual position is that the flood lights were not converted to pre-paid meters by Saints and, Roses United failed to allow Saints to use the leased area as discussed in par. 6 above. The effect of the provision is that even if the flood lights were converted to pre-paid meters, the defendant had no obligation arising from the sub-lease agreement to pay for the electricity usage for the flood lights but only if it allowed Saints the use thereof. This is an agreement that totally replaced the one under which the defendant paid for the electricity usage for five years pre-ceeding the sub-lease. The relevant clause places no obligation on the defendant to pay for the usage of the electricity for the flood lights. The clause reads:

"*... and ROSES UNITED will allow SAINTS' use of the flood lights at the cost of ROSES UNITED.*"

On proper reading of clause 6 of the sub-lease agreement no obligation is placed on the defendant to pay for electricity usage except when it allowed Saints the use of flood lights in which event it would pay for that usage but the plaintiff says it was not allowed to use the flood lights nor the leased area. There is no other provision in the sub-lease agreement placing an obligation on the plaintiff to pay for electricity usage.

[8] From the above it is evident that no case was made on which the court applying its mind reasonably could or might find for

the plaintiff: De Klerk v Absa Bank Ltd 2003(4) SA 315 (SCA) Claude Neon Lights SA Ltd v Daniel 1976(4) SA 403 (A) at 409 G-H: Hanger v Regal 2015 (3) SA 115 FB at 117 F-118 B. Up to this stage the court cannot on any evidence find anything in favour of the plaintiff as the plaintiff's evidence does not at all support the grounds on which the claim is based: Du Toit v Vermeulen 1972 (3) SA 848 (A) at 855.
The sub-lease agreement on which the claim is based is beyond question not supported by the evidence adduced: Rosaville Vehicle Services (Edm) Bpk v Bloemfonteinse Plaaslike Oorgangsraad 1998 (2) 289 (O) at 293 G-I.

[9] In the premises the court has no other alternative than to grant absolution from the instance and order the plaintiff to pay the costs.

MOLOI, ADJP

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Instructed by
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On behalf of the defendant: Adv Greyling
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