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REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 15199/09

In the matter between:

TWP PROJECTS (PTY) LTD

First Plaintiff

TWP HOLDINGS LTD

Second Plaintiff

and

**OLD MUTUAL LIFE ASSURANCE COMPANY
(SOUTH AFRICA) LTD**

First Defendant

**OLD MUTUAL INVESTMENT GROUP
PROPERTY INVESTMENTS (PTY) LIMITED**

Second Defendant

INTAPROP (PTY) LIMITED

Third Defendant

J U D G M E N T

MBHA, J:

INTRODUCTION

[1] The plaintiffs sued the defendants for damages arising from breaches and cancellations of a written lease agreement and five addenda to that agreement, and of an oral development agreement.

[2] The first plaintiff alleges that an oral development agreement (*“the development agreement”*) was concluded between the first plaintiff and first defendant on 8 May 2008 in terms whereof:

2.1 the first defendant would develop an immovable property, to wit Erf 189, Rosebank, 33 Bath Avenue, Rosebank (*“Nedbank Gardens”*);

2.2 the plaintiffs or any of their subsidiaries would lease Nedbank Gardens after it had been developed by or on behalf of the first defendant.

[3] The first plaintiff also alleges that the first defendant breached a written short-term agreement of lease (*“the lease agreement”*) and its five addenda (concluded on 30 June 2008 to 29 July 2009), pursuant to which it leased premises in Nedbank Gardens.

[4] The plaintiffs have in addition pleaded, in the alternative, that the short-term agreement of lease should be rectified by incorporating the development agreement into the lease agreement.

[5] The plaintiffs aver that the defendants’ denials that the development agreement was concluded, constitutes a repudiation of the oral development agreement, which repudiation the plaintiffs have accepted. In the second instance, the plaintiffs aver that the first defendant breached the written short-

term agreement of lease and its five addenda pursuant to which it leased premises in Nedbank Gardens, in a number of respects. The alleged breaches are set out in paragraph 27 of the Particulars of Claim and will be dealt with later in this judgment.

[6] The first defendant has counterclaimed for rentals and other amounts due under the short-term agreement of lease, for the period September 2008 until the end of June 2009, being the date when the property was transferred to the third defendant.

[7] Pursuant to an order of court in terms of Rule 33(4) of the Uniform Rules of Court, the plaintiffs' quantum has been separated and plaintiffs' case only proceeded to determine the merits.

[8] For the sake of convenience, I have decided to address the issues under three separate heads, namely:

- 8.1 A. The lease agreement;
- 8.2 B. The development agreement; and
- 8.3 C. The first defendant's counterclaim.

A. THE LEASE AGREEMENT

[9] The plaintiffs allege that the first defendant breached the provisions of the lease agreement and its addenda in the respects set out in paragraph 27

of the particulars of claim. The plaintiffs also allege that in consequence of those breaches, the first plaintiff was entitled to cancel the lease agreement and its addenda. The said breaches are specified as follows:

“27. The first defendant has additionally breached the lease agreement in one or more of the following respects:

27.1 In terms of the requirements of SANS 10142-1, no electrical compliance certificate in respect of Nedbank Gardens existed, which is unlawful.

27.2 The electrical wiring in Nedbank Gardens constituted a personal safety risk.

27.3 No certificate of safety had been issued in respect of the lifts in Nedbank Gardens, which is unlawful.

27.4 Access control in Nedbank Gardens was of such a nature that the personal security of personnel and their assets were at risk.

27.5 The air conditioning was not working, which rendered Nedbank Gardens unfit for office work.”

[10] The following issues, relating to the lease agreement, have to be determined:

10.1 whether the first defendant has breached the lease agreement as alleged;

10.2 whether the first plaintiff had the right to cancel the lease agreement as a result of the said breaches; and

10.3 even if first defendant was in breach as alleged, and even if the first plaintiff was entitled to cancel the agreement, whether, in

terms of clause 10.1 of the lease agreement, the first plaintiff contracted out of the right to claim damages and is precluded by that clause from claiming against the first defendant.

[11] The breaches (as alleged by the plaintiffs) will now be considered in turn. Before doing so, however, it is necessary to highlight a few preliminary points which, flowing from the evidence led in the trial, are clearly common cause:

11.1 The plaintiffs are a blue chip multi-disciplinary company which is listed on the Johannesburg Stock Exchange;

11.2 The plaintiffs had required a particular of type rental space which would have enabled them to house all their group constituents under one roof and such need was somewhat immediate. Nedbank Gardens, which was owned by the first defendant, offered the sort of rental space that the plaintiffs required;

11.3 Nedbank Gardens, to the knowledge of plaintiffs, was at the time of the conclusion of the lease agreement and the addenda, over 30 years old and dilapidated;

11.4 because of its condition, Nedbank Gardens was scheduled either to be demolished or to be completely gutted and rebuilt;

11.5 in view of the condition of the building and the fact that it was due for demolition, the first defendant did not in fact wish to let the premises at all, but was prepared to provide the plaintiffs, who were in desperate need of additional space, with short-term accommodation in the premises on condition that the plaintiffs took occupation of the premises *voetstoots*;

11.6 in consequence of the generally dilapidated state of the building, the premises were let at the low rental of R45,00 per square metre, which would include operating costs, as well as municipal charges and insurance; and

11.7 the first defendant was not liable to contribute towards the tenant installation costs and this was the sole liability of the plaintiffs.

[12] The plaintiffs submitted that in terms of the lease agreement, the first defendant had a contractual obligation to maintain the air-conditioning plants, lifts and escalators. Furthermore, the first defendant could not avoid its obligations on the basis that it would be too expensive to maintain or repair them.

[13] The plaintiffs submitted further, that the following obligations of a landlord are, *inter alia*, implied by law in a lease agreement:

- 13.1 the premises must be in a condition reasonably fit for the purpose for which they are let;
- 13.2 the premises must comply with all statutory provisions;
- 13.3 a lessee is entitled to the full use and enjoyment of the property during the full term of the lease and this included the obligation that lessees shall not be exposed to any unnecessary risk to life or property, and that a lessee shall occupy the premises with safety; and
- 13.4 that there should be no substantial or material defects in the leased premises.

I consider it appropriate to set out in brief certain general principles governing leases which are relevant to the alleged breaches in this case.

[14] It is generally accepted that the landlord must deliver the premises let as described in the lease, and the premises must be in the condition they were in at the time of conclusion of the lease. In other words, there should be no material change to the condition of the premises between the time of the conclusion of the lease agreement, and the time when the tenant takes occupation. See W E Cooper "*Landlord and Tenant*", Second Edition pages 85-86.

[15] As I have already stated, at the time of the conclusion of the lease agreement and the addenda, Nedbank Gardens was, to the full knowledge of the plaintiffs, over 30 years old and scheduled either to be demolished or to be gutted and rebuilt. Furthermore, in view of the condition of the building, the first defendant was not keen to let the premises at all, but was prepared to provide the first plaintiff, which was desperately in need of rental space, short term accommodation in the premises on condition that the first plaintiff took occupation of the premises *voetstoots* and that the first defendant would not be obliged to expend substantial monies thereon. Obviously any such expenditure would have been wasted in view of the anticipated demolition, alternatively gutting of the building in due course.

[16] The plaintiffs are not in any way alleging that the premises were not delivered to the plaintiffs in the condition which they were at the time of the conclusion of the lease, or that any of the later complaints allegedly constituting breaches, did not pre-exist the time of the conclusion of the lease agreement. It is important to also note that subsequent to the conclusion of the lease agreement, five addenda to that agreement were concluded in terms of which additional office accommodation was let by the first defendant to the first plaintiff and taken up by the first plaintiff. These addenda were all concluded after the first plaintiff had already taken occupation of the 8th floor of Nedbank Gardens.

[17] Regarding any alleged latent defects, it is permissible with a lease, as with an agreement of sale, to agree that the premises be let *voetstoots*, excluding any liability for patent or latent defects. The effect of this is to contract out of any warranty by the landlord against defects in the premises.

[18] From the inception and by virtue of the foregoing, the parties agreed that the premises would be let *voetstoots*. It was in consequence of this, that the premises were let at the low rental of R45,00 per m² which included operating costs as well as municipal charges and insurance. The first defendant would also not be liable to contribute towards the tenant installation costs but these would be for the sole liability of the first plaintiff.

[19] The parties to the lease agreement competently contracted out of any warranty by the first defendant that the premises are in a condition fit for the first plaintiff's purposes. The lease agreement and the addenda contain the following provision:

"5.7 The Landlord does not warrant and this Lease is not entered into on the basis that the premises are suitable for the purposes of the Tenant or that the Tenant will be granted, any license or consent in respect of its business."

[20] Clause 5.7 above makes it clear that the first plaintiff took the premises without any warranty that they were suitable for the first plaintiff's purposes and at the first plaintiff's risk. Undoubtedly the lease was not entered into on the basis that the premises were suitable for the first plaintiff's purposes.

[21] The premises, which were old and dilapidated were let in the condition in which they were “*voetstoots*”, and on the basis that the landlord did not warrant that the premises were suitable for the purposes of the tenant. Clearly, the first plaintiff was aware of the condition of the premises but nonetheless took occupation of the premises with its eyes open and at its own risk.

[22] Clause 5.2 of the lease agreement effectively precludes implying into the lease agreement a term that “*the premises would be in a condition reasonably fit for the purpose for which they are let*”.

[23] With regard to the contention that it is implied that the premises had to comply with all statutory provisions, reliance was placed in the case of *Van Nieuwkerk v McCrae* 2007 (5) SA 21 (W), where Goldblatt J held that a purchaser intending to buy a residential property with a building on it, was entitled to assume that the building had been erected in compliance with all statutory requirements, and that it could be used to its full extent. The court also held that this assumption was so obvious that it was implied as a matter of law in any agreement of sale relating to such property. The court accordingly found that it was an implied term of the agreement between the parties that the alterations made to the building concerned had been effected in compliance with the applicable Act.

[24] In my view, *Van Nieuwkerk* was overturned by the Supreme Court of Appeal in the case of *Odendaal v Ferraris* 2009 (4) SA 313 (SCA) where Cachalia JA found, at paragraph [22] that:

“[22] ... the absence of the statutory approvals for building alterations, or the other authorisations that render the property compliant with prescribed building standards, such as were at issue in Van Nieuwkerk, and are at issue here, does not render the property unfit for the purpose for which it was purchased. The respondent does not allege, nor could he, that the permissions relating to the outbuilding and carport render the property unfit for habitation. Nor does he allege that the municipality proposes to enjoin him from living on the property, or that he is incapable of acquiring the permissions necessary to render the alterations compliant with statutory provisions. The appellant did not deliver to him 'something different from what was bought' ... On the contrary, he received exactly what he purchased, namely an ideally located, spacious dwelling house with ample parking space.”

[25] The court effectively rejected the suggestion that there was an implied term warranting any statutory compliances, even in cases of a sale of property. Clearly, statutory non-compliance in circumstances where a tenant is not deprived of the occupation and use of the premises in consequences of that non-compliance, cannot have any impact on the validity of the lease agreement. It is only the kind of defects impacting on the tenancy which might be material. Indeed *Odendaal v Ferraris* (*supra*) emphasised that lack of statutory authorisation would not always render a property unfit for the purpose it was purchased, for as long as what is ultimately delivered is not different from what was bought.

[26] With regard to the contention that it is implied that the lessee is entitled to the full use and enjoyment of the property, and that the lessee shall occupy the premises with safety, reliance was placed in the case of *Mpange and Others v Sithole* 2007 (6) SA 578 (W) where Satchwell J said (at paragraph 28) that:

“The respondent is ... under a duty to deliver and maintain the property in a condition reasonably fit for the purpose for which it has been let. The duty includes the obligation that lessees shall not be exposed to any unnecessary risk to life or property and that lessees shall occupy the premises with safety.”

[27] In my view *Mpange’s* case is clearly distinguishable primarily because the premises concerned in that case, which were an old warehouse that had been turned into boarded-up rooms, were completely dilapidated, unsafe and unfit as housing for men, women or children. The grossly inhumane conditions and defects are adequately described by Satchwell J in paragraph [29] of her judgment. The landlord was a slumlord who exploited indigent tenants desperately in need of a roof over their heads.

[28] As I have already pointed out, when the plaintiffs took occupation of the building, it was already 30 years old and quite dilapidated. Clearly the plaintiffs took over occupation of the building with their eyes wide open. They cannot now turn around and complain that the building was old and unsafe.

[29] I find it quite significant that Nedbank Gardens has survived intact in this condition for a period in excess of 30 years and that it was ultimately sold, in June 2009, to the third defendant, in the same condition. Significantly,

when the first plaintiff became aware of the first defendant's decision to sell the building in December 2009, the first plaintiff attempted and indeed negotiated to purchase the building, albeit unsuccessfully. In my view this is hardly consistent with the situation in which the first plaintiff regarded the building as unsafe and unfit for occupation.

[30] The contention that it is implied in the lease agreement that there shall be no substantial or material defects in the premises does not, in my view, find application in this case. I say so for the following reasons:

30.1 the parties competently contracted out of any warranty by the landlord that the premises are in a condition fit for the tenants' purposes. In this regard, clause 5.2 of the lease agreement is applicable. This clause effectively rejects any notion that it is implied that the leased premises shall not have any substantial or material defects;

30.2 the premises were given to the first plaintiff *voetstoots* in the same old and dilapidated condition as they were at the time the lease agreement was concluded. The first plaintiff was well aware of the condition of the building at the time. *Cooper (supra)* at page 93 correctly describes this type of situation as follows: "*By analogy it may thus be said that a lessee who accepts premises as they are on the date of occupation accepts them with all their faults as at that date.*"

FAILURE TO FURNISH THE ELECTRICITY COMPLIANCE CERTIFICATE

[31] The plaintiffs allege that the first defendant breached the lease agreement by its failure to furnish an electrical compliance certificate in respect of Nedbank Gardens, and that such failure is unlawful. The plaintiffs relied on Regulation 3 of the Electrical Installation Regulations which apply under the Occupational Health and Safety Act 85 of 1993, which provides, *inter alia*, that every user or lessor of an electrical installation shall have a valid certificate of compliance in respect of every such installation. The plaintiffs allege that it “*was an implied term*” of the lease that an electrical compliance certificate would exist.

[32] There is no express provision in the lease agreement that requires the first defendant to obtain or hold an electrical compliance certificate.

[33] Clause 21 of the lease agreement expressly provides as follows:

“21. WHOLE AGREEMENT

This Lease constitutes the whole agreement between the parties and no warranties or representations whether express or implied shall be binding on the parties other than as recorded herein ...”

[34] There is no such implied term in the agreement of lease as the plaintiffs would want to suggest. The suggestion that any such additional term warranting statutory compliance is implied, even in the case of a deed of sale, was rejected by the Supreme Court of Appeal in *Odendaal v Ferraris (supra)*.

[35] On the authorities, the only generally applicable implied terms, both of which may be contracted out of and were in fact contracted out in the present matter, are firstly that the premises would be free of latent defects and would be fit for the purposes for which they were let and, secondly, that if the use of the premises is governed by statute, for example requiring a business licence, the building would be in a condition enabling compliance with the relevant statutory provision. This is so because the defect would prevent the tenant from trading lawfully. See *Bahadur v Phillipson* 1956 (4) SA 638 (FC); *Weinberg v Weinberg Brothers* 1951 (3) SA 266 (C).

[36] That situation does not arise in the present matter and in any event, in terms of clause 5.2 of the lease agreement, the parties expressly contracted out of these terms.

[37] In my view, even if the parties had not expressly excluded a warranty that the premises were suitable for the purposes of the tenant, and even if the premises had not been let *voetstoots*, only a defect in the property which rendered the property unsuitable for the purposes of the tenant would be material. In my view, the alleged absence of an electrical compliance certificate does not impact on this at all. The presence or absence of an electrical compliance certificate does not in any way impact on the first plaintiff's rights as a tenant or its use of the premises. It is common cause that the electrical supply to the premises was uninterrupted throughout the duration of the lease agreement and at no stage was any objection raised by

any authority to the electrical installation. Importantly, the first plaintiff installed its own electrical equipment in the specific floors in the premises, in order to suit its tenancy. Furthermore, the first plaintiffs obtained electrical compliance certificates in respect of those installations without any difficulty.

[38] In the light of what I have stated above, I am of the view that the presence or absence of an electrical compliance certificate in respect of the distribution boards was accordingly immaterial to the tenancy.

[39] I need to also point out that the obligations of a landlord under an agreement of lease should not be confused with the obligations of a seller in respect of immovable property. In the case of a sale of an immovable property the seller, in the absence of a *voetstoots* clause, impliedly warrants the property sold to be free of latent defects and the seller may, depending on the facts, be liable for latent defects in the property sold. Such liability can be based on the *actio empti*, *actio redhibitoria* or *actio quanti minoris*. It is in this context that it was held that the absence of statutory approval for improvements would constitute a latent defect in the property sold. See *Odendaal v Ferraris supra* at 322C.

[40] In the instance of a lease, however, it is only defects impacting on the tenancy which might be material. Clearly, the absence of an electrical compliance certificate is not material to a tenancy, but would be to a sale where a compliance certificate is required as a condition of transfer to the new owner.

[41] In this case, any such alleged right is however subject to the express exclusion of warranties referred to in clause 5.2 of the agreement of lease.

[42] As I have already pointed out, it is common cause that the premises were let *voetstoots* and in the condition in which they were. A lessee who accepts premises as they are on the date of occupation, accepts them with all their faults as at that date.

[43] Cachalia JA held, in *Odendaal v Ferraris (supra)* at 322 C-E, that a *voetstoots* clause covers the absence of statutory authorisation comprising a latent defect in relation to a sale agreement. In this respect, he said the following:

“The lack of permission in respect of both the manhole over the sewer ... and the carport's irregular structure ... are defects which interfere with the ordinary use of the property ... and are therefore latent defects within the aedilician concept. The fact that they also contravene building regulations does not change their character. ... so, barring the supervention of public policy considerations, or of illegalities impacting on Constitutional prescripts - and none are alleged here - a voetstoots clause ordinarily covers the absence of statutory authorisations.”

[44] In the circumstances, and even if an electrical compliance certificate was required by law and did not exist, this would not constitute a breach of the lease agreement as it is covered by the *voetstoots* clause. The only consequence of the absence of such certificate is that the City Council could

require the first defendant to do whatever was necessary to obtain such a certificate.

ELECTRICAL INSTALLATION UNSAFE

[45] The second breach alleged is that the first defendant breached the lease agreement in that “*the electrical wiring in Nedbank Gardens constituted a personal safety risk*”.

[46] Significantly, the first plaintiff does not allege that any express term of the agreement of lease and its addenda applies in this respect. Instead, the first plaintiff seeks to rely on an alleged implied term that the premises would be suitable for its purposes and specifically that it would not be hazardous or dangerous to work on the premises.

[47] No such term is implied and the exclusion of the warranty against defects and the exclusion of the warranty that the premises were suitable for the purposes of the tenant, exclude any such implied term.

[48] The plaintiffs called van Heerden, an electrical engineer, and Quinton Hoffman, who is a master installation electrician, as expert witnesses on this aspect. van Heerden testified that the electrical installation was not safe, that an explosion could occur and that the consequences would be horrific and could lead to serious injuries, or even death as well as extensive damage to

the building. Hoffman also testified that the building was a “*time bomb*” and so unsafe that he would have refused to work there.

[49] A closer look at their evidence shows that the only defect complained of, effectively related to the main distribution board and that this defect was an initial design defect dating back over 30 years. It is noteworthy that despite the alleged existence of the defect for over 30 years, none of the dire predictions suggested by the plaintiffs’ experts, in particular Hoffman, in their evidence has eventuated.

[50] As I have pointed out earlier, all that first defendant was obliged to do was to place the plaintiffs in occupation of the premises in the condition in which they were at the time of the conclusion of the lease and it is common cause that this was done.

[51] Moreover, at no time in the correspondence written on behalf of plaintiffs, specifically by their representative, Jaco van Heerden, was it ever suggested that the electrical wiring constituted a personal safety risk. To the contrary, all the correspondence I was referred to, which was from van Heerden and which is attached to his expert report, is written simply in the context of an attempt by the first plaintiff to persuade the first defendant to pay for a standby electricity supply generator, and for electrical repairs necessary to accommodate this, something which the first plaintiff admitted it was not entitled to.

[52] The furthest van Heerden goes in any of the foregoing correspondence is the following which is contained in his letter dated 18 August 2008:

- “1. *TWP Consulting is investigating the technical requirements to install standby electrical power at the Nedbank Gardens building. TWP Consulting understand it is not OMIGPI’S business to supply standby electrical power to tenants.*
2. *After inspecting the existing main distribution board, it was found that it is in need of refurbishment prior to issue a certificate of compliance in terms of SANS 10142-1 requirements. Apart from the above, the main distribution board would have to be replaced since the required modifications to this distribution board to accept the standby electrical supplies are not allowed in terms of SANS 10142-1 requirements. This is for the benefit of OMIGPI and this CAPEX must be amortised and repaired of not less than 30 years.”*

[53] As appears from the foregoing, at no stage did van Heerden suggest that the existing main distribution board was in a dangerous state or constituted a personal safety risk. All he stated was that it was in need of refurbishment and would have to be replaced to accommodate the requested new standby electrical generator.

[54] It is also significant that nowhere in any of the correspondence addressed on behalf of the first plaintiff to the first defendant, was the first defendant ever placed *in mora* on the basis that the electrical installation was unsafe. Clearly, the first defendant was never placed on terms to render the installation safe. To the contrary, on 10 December 2008 the plaintiffs’ attorney wrote to the second defendant stating that the purported sale of Nedbank Gardens would amount to a breach of the development agreement. In my

view this letter is hardly consistent with the intention to cancel by virtue of any alleged non-performance of the lease agreement.

[55] In the light of what I have stated, I come to the conclusion that the allegation that the electrical wiring at Nedbank Gardens constituted a personal safety risk is something contrived by the plaintiffs' *ex post facto*, in an attempt to justify the cancellation of the lease agreement and the addenda. Clearly, once the first applicant had inspected the existing main distribution board, and when it now had full knowledge of the state of the substation, the only problem which the first plaintiff raised, was that the substation would have to be upgraded or replaced if standby generators were to be installed. There was nothing said or any concern raised about any danger, potential or otherwise, posed by the electrical installation at the leased premises at the time.

NO CERTIFICATE OF SAFETY IN RESPECT OF THE LIFTS

[56] The plaintiffs aver that the first defendant is in breach of the provisions of the regulations promulgated under section 43 of the Occupational Health and Safety Act 25 of 1993, which oblige them to ensure that every lift was inspected and tested at intervals not exceeding 36 months, by a registered person who had to complete a comprehensive report relating to such inspection.

[57] It is also averred that on or about 11 November 2008, the first plaintiff requested to be furnished with a certificate of safety for the lifts at Nedbank Gardens, but that this was never forthcoming.

[58] The plaintiffs led evidence to the effect that the lifts at Nedbank Gardens would get stuck or fail to open between floors, which then posed a serious risk to safety.

[59] The only stipulated obligation that the first defendant had in respect of the lifts is found in clause 7.1 of the lease agreement, which obliges the landlord to maintain lifts or escalators at Nedbank Gardens. From the evidence led, it is clear that the first defendant complied with this obligation by contracting with Schindler Lifts, a reputable lifts installation and maintenance company, for the maintenance of the lifts. Furthermore, Schindler Lifts duly obtained annual certificates of compliance certifying its maintenance of the lifts. I have noted the plaintiffs' complaint that these certificates were only produced during the trial. This does not, however, detract from the fact that the lifts were maintained in compliance with the express provisions of the lease agreement.

[60] The lease agreement does not have any express term which requires there to be a "*certificate of safety*" in respect of the lifts. Similarly, there is no implied term in this regard. What I have stated in paragraphs [32] to [43] hereof apply equally to any alleged implied term relating to the so-called

certificate of safety in respect of the lifts. The law does not imply any such term in an agreement of lease.

[61] In any event, as I have already stated, the premises were let *voetstoots* and on the express basis that the landlord did not warrant that the premises were suitable for the purposes of the tenant and reliance on the absence of any statutory certification is accordingly excluded.

[62] Even if a certificate of safety in respect of the lifts had been required, as the plaintiffs claim, this would not, in my view, constitute a breach by the first defendant of its obligations under the lease agreement.

[63] The first defendant conceded that the lifts did from time to time get stuck but that whenever this happened, Schindler Lifts would be contacted who would immediately attend to the problem. There is no evidence that suggests that anyone's life was threatened whenever this happened. In my view, the plaintiffs' complaints in this regard are misconceived.

[64] It is also relevant that the building was more than 30 years old when the plaintiffs took occupation. They moved into a building which was due for demolition or at the very least gutting and redevelopment. It is clear to me that they knew what they were taking and being given.

ACCESS CONTROL

[65] The first defendant is alleged to have breached the lease agreement in that *“access control in Nedbank Gardens was of such a nature that the personal safety of personnel and their assets were at risk”*.

[66] This allegation relates to the alleged access through the basement of the premises to the lift entrances.

[67] At the outset, I need to point out that there is no express term of the lease which imposes any such obligation on the first defendant.

[68] The plaintiffs once again attempt to rely on an alleged implied term in this respect but for the same reasons addressed earlier, no such term is implied in an agreement of lease.

[69] A further reason why no such implied term exist, is that the issue of access/security is addressed by the express terms of the lease agreement and its addenda, which is found in clause 4.16, and which expressly provides that the tenant shall at its own costs provide security for the premises to the landlord's reasonable satisfaction.

[70] Moreover, clause 10.1 of the lease agreement provides as follows:

“Specifically and without limiting the foregoing, no omission or commission by the Landlord and in particular the provision of any security service to the building or property, shall be construed in any manner whatsoever as an acceptance by the Landlord of any responsibility or liability towards the Tenant or any other person.”

It accordingly follows that there is no basis for the existence of any implied term of the nature alleged.

[71] Apart from the foregoing, the defendants led evidence, which was not challenged, that access through the basement of the premises to the lift entrances, was controlled and governed by a vehicle boom which was manned 24 hours a day by security provided by Interpark. Access through the boom and through the subsequent electronically locked gate was only possible by means of access cards issued to the tenants. In addition, the first defendant employed Gremick Securities to provide further security in the basement on a 24 hour basis. There were, in addition, electronic gates which were monitored by a CCTV system which was monitored by security staff at the main reception area.

[72] In the premises, I am satisfied that access control in Nedbank Gardens was more than sufficient. Accordingly, I find that the plaintiffs' contention that it was of such a nature that the personal safety of personnel was at risk, has no basis.

[73] I therefore find that the allegation of a breach of the lease agreement on the basis of lack or inadequate access control, is without merit.

AIR-CONDITIONING

[74] The plaintiffs allege that the first defendant breached the lease agreement in that *"the air conditioning was not working, which rendered*

Nedbank Gardens unfit for office work". It is also alleged that the first defendant refused to have the air-conditioning repaired as the quotation for such repairs was too high, that it was in fact never repaired, and that the problem remained until the first plaintiff vacated the premises on 31 March 2009.

[75] As I have already pointed out, the plaintiffs took occupation of the premises in the condition in which they were and knowing fully that the building was over 30 years old and scheduled for demolition or gutting and redevelopment. The air-conditioning system in the building was also 30 years old and in the same condition it was when the first plaintiff took occupation. This is the same condition in which it was at the time of the conclusion of the lease agreement.

[76] In any event, the evidence led on behalf of the first defendant conclusively established that the air-conditioning system was repaired at considerable cost amounting to approximately R300 000,00 during December 2008 until January 2009. Such repairs are reflected in invoices annexed to the defendants' plea.

[77] The evidence also disclosed that the plaintiffs were advised on 19 December 2008 that the air-conditioning company, Chill Out Services CC, would attend to the repairs to the air-conditioning system. All of the repairs were duly carried out in December 2008 and completed by 7 January 2009,

save for a new shaft which was on order and which was installed around 16 January 2009.

[78] The defendants' witnesses, Messrs. Miller and Dlamini, testified that after the repairs were effected, the temperature in the building was reduced to an appropriate level and that the only complaints which were received after such repairs had been effected, was that the building was too cool in certain areas but that this was also rectified.

[79] Clearly, it was only after the repairs to the air-conditioning system had been carried out, that the plaintiffs purported to cancel the lease agreement with effect from 31 January 2009, by means of a letter dated 13 January 2009.

[80] In the premises, I find that the allegation that the first respondent breached the lease agreement by virtue of the fact that the air-conditioning was not working and was never repaired, is unfounded.

[81] The plaintiffs were not entitled to terminate the agreement of lease as they purported to do, as the first defendant attended to the effective repairs to the air- conditioning system.

CLAUSES 10.1 AND 10.2 OF THE LEASE AGREEMENT

[82] The first defendant also relied on the provisions of clauses 10.1 and 10.2 of the lease agreement, contending that in terms of these clauses the plaintiff was not entitled to cancel the lease agreement.

[83] The plaintiffs have suggested, in the supplementary heads of argument, that these clauses were not relied upon in the pleadings. This is not correct because in paragraph 16 of the plea there is a specific denial that the first plaintiff was entitled to cancel the agreement, and attention is drawn pertinently to clauses 10.1 and 10.2 of the lease agreement.

[84] The plaintiffs submit, on the other hand, that nothing in these clauses, in particular clause 10.2, prevented the plaintiffs from cancelling the lease under the current circumstances. It was further submitted that this clause merely removed the right to cancel a lease as a result of “*damage, losses or injury*” as set out in clause 10.1. It was then submitted that this clause only applied to instances of physical damage, losses or injury and that this was not the basis upon which the first plaintiff cancelled the lease.

[85] Clause 10.1 provides that:

“... a Landlord ... is not liable for any loss of any nature suffered by the Tenant ... as a result of ... the failure on the part of the Landlord to carry out any work or of any latent or patent defect in the premises or of any other cause whatsoever including the negligence of the Landlord ...”

[86] Clause 10.2 provides that:

“The Tenant shall not be entitled to cancel this lease ... as a result of such damage, losses or injury as set out in 10.1 above.”

[87] It is common cause that the plaintiffs' claims for damages are based on alleged latent or patent defects on the premises and a failure by the first defendant to carry out corrective work.

[88] In my view, all the plaintiffs' claims are expressly excluded by the provisions of clause 10.1 of the lease agreement. The parties clearly contracted on the basis that the first defendant would not be liable for damages under the circumstances upon which the plaintiffs' claims are predicated.

[89] As can be seen, clause 10.2 is specific in that it disentitles the tenant to cancel the agreement because it has suffered losses which are defined in clause 10.1. Clearly this cannot and is not confined to physical loss or damage as the plaintiffs aver.

[90] As the plaintiffs' alleged cancellation is based on matters which clearly fall within the prescripts of clause 10.1 of the lease agreement, the plaintiffs are thus rendered incompetent and are expressly excluded by clause 10.2 to cancel the lease agreement.

[91] In the final analysis, I find that the plaintiffs had no basis upon which to cancel the lease agreement and that the subsequent cancellation is unlawful.

B. THE DEVELOPMENT AGREEMENT

[92] The plaintiffs' pleaded case is that the defendants breached an oral agreement that was concluded on 8 May 2008 between the first plaintiff and the first defendant. It is also alleged that Glover represented the plaintiffs in the conclusion of the alleged oral agreement.

[93] During the entire trial, no evidence whatsoever was led to establish the conclusion of any oral development agreement on 8 May 2008. Glover, who was the plaintiffs' main witness, did not, in his evidence, allege any such oral agreement. To the contrary, when the allegations in the pleadings were put to him during cross-examination, he denied that. Most importantly, he conceded readily, during cross-examination, that the letter dated 14 May 2008, annexed to the defendants' plea, *as annexure "DA"*, recorded the terms upon which the possible development of the Nedbank Garden site was contemplated.

[94] During argument it was submitted on behalf of the plaintiffs, that the matter should be adjudicated on the basis that the written development agreement is contained in annexure "DA" to the first defendant's plea.

[95] On the other hand the defendants aver that annexure "DA" to the first defendant's plea was no more than an agreement to negotiate. I will return to this aspect in due course.

[96] Wiedemann, the person who it was alleged in the pleadings acted on behalf of the first defendant in concluding the alleged oral agreement, testified that no such oral agreement was concluded. He stated that he did not have the authority to conclude such an agreement and that his authority was confined to the proposals reflected in the letter dated 14 May 2008. Significantly, Wiedemann's testimony in this regard was not challenged in cross-examination and thus stands uncontroverted.

[97] Consequently, it follows, indeed it is common cause, that no oral development agreement was concluded on 8 May 2008 or at all. Furthermore, based on the evidence of the defendants' witnesses and of Glover, it is common cause that no such oral agreement could have been validly concluded because:

97.1 before any development agreement could be concluded, the parties would have to agree *inter alia* on:

- 97.1.1 what precisely was to be built;
- 97.1.2 what the specifications for the new building were to be;
- 97.1.3 a schedule of finishes (which would have an impact on the cost of the development and the rentals that first defendant would require);
- 97.1.4 the costs of the development;

- 97.1.5 the rental to be paid, in this regard first defendant would have required an acceptable return on its investment and the rentals had to be acceptable to the first plaintiff; and
- 97.1.6 numerous other unresolved matters.

97.2 It was further common cause, on the evidence, that any development agreement would have to be approved by the first defendant's board and would have to be in writing and signed by both parties. It is so that the first defendant's board never approved any development agreement.

[98] Sight must not be lost of the fact that the first defendant had asserted in its plea, that the letter dated 14 May 2008, which was signed by Glover in acceptance of its terms by the first plaintiff, recorded the agreement between the parties concerning the proposed development. The plaintiffs replicated that this letter was not an agreement at all but that if it was "*it was superseded by the oral development agreement referred to in the particulars of claim*".

[99] It is significant that Glover, during cross-examination, conceded readily:

- 99.1 that the letter dated 14 May 2008 does indeed reflect what was agreed between the parties; and

99.2 that it was absurd, both logically and as a matter of fact, to suggest that the letter dated 14 May 2008 was superseded by an oral agreement dated 8 May 2008.

[100] I now turn to consider in detail the letter dated 14 May 2008 which plaintiffs claim embodies the alleged development agreement.

[101] Under the heading “*NEW DEVELOPMENT FOR TWP HOLDINGS LTD ON ERF 189 ROSEBANK*”, the following clause concerning the proposed development agreement, is recorded:

“Any transaction we enter into is subject to change and will require our board approval, which if we proceed to get their approval requires a signed development agreement and lease agreement signed and agreed upon by both parties.”

[102] This clause is significant for a number of reasons:

102.1 firstly, it appears in the document which, on Glover’s own testimony, is the document embodying the only development agreement between the parties;

102.2 secondly, it makes it clear that any development agreement concluded by the parties had, necessarily, to be in writing and signed and agreed upon by both parties;

103.3 thirdly, it makes it clear that a pre-requisite to any development agreement was the conclusion of a written lease agreement for the new building; and

103.4 lastly, it disposes, effectively, of the plaintiffs' assertion that the first plaintiff and the first defendant had concluded an oral development agreement.

[103] Mr Van den Berg, who appeared for the plaintiffs, conceded in his heads of argument that, from the evidence of, amongst others, Wiedemann and Ms Caplin, it was clear that many terms and details of the intended development were still open for further negotiation and discussion.

[104] In my view this concession is well made. I found the evidence of Ms Caplin to be particularly significant in this regard. I may also add that her testimony was not challenged in cross-examination. She highlighted the fact that:

1. in every instance where the first defendant embarks upon a new commercial building project, it does so only after comprehensive negotiations;
2. in circumstances such as those pertaining to the proposed development for the first plaintiff, a project would have been embarked upon only after detailed and comprehensive written

agreements had been concluded. She said that these would have to include a signed lease agreement and a signed development agreement;

3. that with the changed economic circumstances subsequent to September 2008, as all business has been badly affected by the sub prime crisis, the first defendant has been extremely cautious about involving itself in new developments;
4. that to her knowledge, subsequent to September 2008, the first defendant has embarked upon only two major new developments; and
5. that first defendant is obliged to adopt a conservative investment strategy, more particular in that its funding comes from pension funds, retirement annuities and other investments in which members of the public are involved. In other words, public money is used to finance the first defendant's projects.

[105] Based on the aforesaid, I am satisfied that the letter dated 14 May 2008 was no more than an agreement to negotiate. Furthermore, the letter makes it perfectly clear that any agreement to develop the property would be subject to first defendant's Board's approval and on the conclusion of a firm and binding written development agreement, accompanied by a signed lease

agreement. The submission by the plaintiffs that the exact terms of the development agreement are not relevant, cannot hold.

[106] As I have found that the development agreement, oral or otherwise, does not exist, it follows that the alternative prayer sought by the plaintiffs for rectification of the lease agreement must accordingly fail.

[107] Plaintiffs also claimed estoppel on the basis that the first defendant, by its conduct, represented that the purported development had been approved by the first defendant's board. In this respect reliance was placed on the fact that the plaintiffs' architect, TPSP, was allowed to be substituted for the previous architect, and was allowed to make a presentation to the project committee of the first defendant.

[108] In my view this does not in any way give rise to estoppel. It must be recalled that Glover, who testified for the plaintiffs, confirmed that there were still other fundamental matters the parties had to agree upon and which still needed to be negotiated. What I have already stated above, regarding Ms Caplin's testimony where she sets out circumstances under which first defendant embarks upon a new commercial building project, is relevant in this regard.

[109] In conclusion, I find that no development agreement as alleged was ever concluded between the parties. It follows that the plaintiffs' cause of

action which is predicated upon the development agreement is without merit and accordingly must fail.

C. FIRST DEFENDANT'S COUNTERCLAIM

[110] The first defendant has counterclaimed for the monthly rentals, administration charges and for electricity for the period September 2008 until June 2009.

[111] During argument the first defendant abandoned the claim for the amounts in respect of administration charges and electricity consumption, but persisted with the claim for rental in respect of the period September 2008 to June 2009, which amounts to R1 837 779,50.

[112] It was submitted on behalf of the plaintiffs, that the first defendant failed to prove its damages and that it could not claim rentals for the period mentioned.

[113] Wiedemann's evidence that the arrear rental is correctly reflected in annexure "DE" to the first defendant's Claim in Reconvention, was not challenged during cross-examination.

[114] As I have already found that the plaintiffs were not entitled to cancel the agreement of lease and its addenda, it follows that they remain liable for the rental due in terms thereof.

[115] It is common cause that the first plaintiff failed to pay the rentals due for the months of September 2008 to June 2009.

[116] It is also common cause that the first defendant sold Nedbank Gardens to the third defendant during December 2008, but that the transfer of ownership to the third defendant took place at the end of June 2009. Furthermore, the first plaintiff remained in occupation of the premises and only vacated same at the end of March 2009

[117] I accordingly find that the first defendant is entitled to judgment for payment of the sum of R1 837 779,50 in respect of rental for the period September 2008 until June 2009. In addition, I find that the retention of two counsel by the first defendant, in respect of the counterclaim, was justified.

[118] In the circumstances the following order is made:

1. The plaintiffs' claim is dismissed with costs.
2. Such costs shall include the employment of two counsel.
3. The first defendant's counterclaim is upheld.
4. Judgment is entered against the plaintiffs, jointly and severally, the one paying the other to be absolved, for:

- 4.1 payment of the amount of R1 837 779,50.
- 4.2 interest on the aforesaid amount at the rate of 15,5% per annum *a tempore morae*.

- 5. The plaintiffs are, jointly and severally, ordered to pay the first defendants' costs. Such costs shall include the employment of two counsel.

**B H MBHA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG**

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COUNSEL FOR 1 ST & SECOND DEFENDANTS	:GI HOFFMAN SC RW TANTON
INSTRUCTED BY	:WALKERS INC.
DATES OF HEARING	:21-24/05/10 & 14/06/10
DATE OF JUDGMENT	:28 JULY 2010