

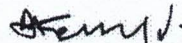


IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 27209/2021

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

3 July 2023
DATE


SIGNATURE

In the matter between:

PARKHURST INVESTMENTS CC

Applicant

and

PAUL'S HOMEMADE (PTY) LTD

Respondent

JUDGMENT

CRUTCHFIELD J:

[1] The applicant, Parkhurst Investments CC, sought the eviction of its tenant, Paul's Homemade (Pty) Ltd, the respondent, from premises owned by the applicant situated in Parkhurst, Johannesburg.

[2] The eviction entailed an order that a written lease agreement, being an initial lease agreement together with a second lease agreement, an extension and an addendum (collectively referred to as 'the lease'), had been cancelled validly by the applicant as a result of the respondent repudiating and/or breaching the lease in a material fashion.

[3] The respondent opposed the application and sought an order in terms of its counter-application for a statement and debatement of the electrical charges levied by the applicant ('the electricity charges issue'), payment of such amount found to be owing by the applicant, that the applicant attend to certain maintenance required in the common areas of the premises, install a generator and afford the respondent beneficial occupation of the premises by installing a security shutter, alternatively, employing a security guard in order to secure the exterior of the premises.

[4] The respondent issued an application for oral evidence ('the oral evidence application'), that the respondent argued had become moot as a result of the applicant not relying on the electricity charges issue as a ground of its claim for repudiation. The respondent argued that if the applicant had made its election not to rely on the electricity charges issue timeously, the oral evidence application would not have been necessary. Thus, the respondent sought that the applicant pay the costs of the oral evidence application, which the applicant opposed.

[5] The respondent operated a shop at the leased premises situated at Shop No 1, corner Fourth Avenue and Tenth Street, Parkhurst, Johannesburg ('the premises'). The

lease and the terms thereof were common cause between the parties. The material facts upon which this application rested were also largely common cause.

[6] The sole issue for determination was whether the respondent repudiated the lease. The outcome of the issue turned on certain correspondence addressed by the respondent's representative Mr Amoils, to the applicant's representative Mr Joffe, dated 11 May 2021 ('the 11 May 2021 correspondence'). The applicant alleged that it evidenced a repudiation by the respondent, being a deliberate and unequivocal intention to no longer be bound by the lease.

[7] The relevant provisions of the 11 May 2021 correspondence stated *inter alia* the following:

"... The rest of our team has been trying for months to engage with you in good faith on a range of issues including but not limited to the dire physical state of the store and the impact this has on our brand, the numerous and consistent electricity issues which has caused us significant financial and reputational damage and the security situation and break-ins that we have experienced. ...

Your latest attempt to restrict our sale of coffee, which is core to our operation and which we have been selling for over 4 years through the store, is malicious and sinister and is indicative of either corruption and coercion between yourself and Espresso and/or an attempt by you to thwart our business.

We have now exhausted all forms of reasonable engagement with you over the past few months to try and address our issues and concerns in a constructive way. We have consulted legally and ascertained that while you, as the landlord, have certain rights including the right to make reasonable demands, we also have reciprocal rights, as the tenant, including the right to make our own reasonable demands. There seems to be little or no case law pertaining to the rights that we need to enforce other than what is enshrined constitutionally, and so after due consideration in this regard, we now intend to enforce our rights.

We therefore demand that you revert with the time, date and location to have an urgent meeting with us to resolve the range of issues that we have. This meeting should take place within 7 days of receipt of this email unless you have justifiable circumstances that prevent you from meeting with us. We will clear our diaries to fit in with you. We also place on record that we believe that all outstanding issues can be resolved reasonably, fairly and expeditiously through constructive engagement in a meeting between the parties.

Should you refuse to meet and engage with us, then we hereby place our position and intended actions on record as follows.

- 1) From the attached and below email exchanges it is apparent that the only lingering issues with the refurbishment ...

- 2) Our electricity costs have been a contentious issue ever since we took occupancy of the premises and as the landlord you have refused to engage any third party professional to conduct an analysis and audit of the electricity charges despite our numerous requestes. We maintain that we are being unfairly charged for electricity and dispute all electricity charges to date. We therefore require that a third party independent be agreed upon and jointly appointed to conduct a thorough analysis and audit of the electricity charges. Until such a time as this analysis and audit is done and concluded we will be paying our electricity charges into our lawyer's trust account on the basis that these charges are incorrect and disputed. If you continue to refuse to appoint the necessary third party to conduct an analysis and audit we will view this as clear indication from you that electricity charges are inaccurate and we should not be required to pay inaccurate electricity charges. We reserve the right to claim any incorrect charges from you retrospectively, from commencement of the lease, should the analysis and audit indicate any incorrect charges.
- 3) We have recently experienced a break in to the store and have also had our customers and staff continuously harassed by criminal elements outside our store. You refuse to address this issue. We therefore require that a security guard be agreed upon and jointly (appointed) by the two parties with the costs to be shared between the parties. Until such a time as we have an agreement with regard to the security guard and costs thereof, we will be appointing an interim security guard and will offset your portion of the costs from our rental and pay this into our lawyers trust account pending resolution of the matter.
- 4) In furtherance to point 3) above, we require that an additional security shutter be installed at the store entrance to mitigate any future break-ins. You refuse to address this issue. We therefore require that the necessary security shutter be installed straight away and will commence with obtaining quotes in this regard. These quotes will be presented to you for your acceptance on the basis that the parties will again split the costs. Should you refuse to engage and ensure that the appropriate quote is accepted and that the appropriate security shutter installed expeditiously, we will proceed to install the security shutter that we deem appropriate and offset your portion of the costs from our rental and pay this into our lawyers trust account pending resolution of the matter.
- 5) The lease agreement does not restrict the sale of coffee ...
- 6) Lastly, we have suffered significant damages due to loss of sales and stock meltages as a result of the constant electricity outages at our store. You refuse to address this issue. We will therefore be quantifying the damages and arranging for a generator to be installed on the premises. We will commence with the obtaining quotes in this regard. These quotes will be presented to you for your acceptance on the basis that the parties will again split the costs. Should you refuse to engage and ensure that the appropriate quote is accepted and the appropriate generator installed expeditiously, we will proceed with the installation of the generator that we deem appropriate and in addition to our other damages will offset your portion of the costs and damages from our rental and pay this into our lawyer's trust account pending resolution of the matter.

We have arranged payment of our rental to bring our account up to date which is exclusive of the contested electricity charges and we will ensure that all non-disputed rental is paid timeously going forward. The proof of this latest payment will be sent separately.

We hope that you will take the ethical approach and engage constructively with us to resolve all the above issues amicably, failing which please refer all correspondence to our attorneys, Taitz and Skikne Attorneys address ..."

[8] The applicant's response, dated 20 May 2021, addressed *inter alia* to the respondent's representative, Mr J Amoils, and hand delivered to the respondent's

chosen *domicilium citandi et executandi* ('domicilium address'), for service and delivery in terms of the lease¹ ('the 20 May 2021 correspondence'), stated that the respondent's correspondence failed to take account of the detailed provisions of the lease agreement, particularly the obligation to pay the rental and other charges without deduction and/or set-off, monthly in advance on the first day of every month.² Furthermore, that the respondent's correspondence evidenced an intention not to be bound by and perform as required under the lease and constituted a repudiation of the lease.

[9] The applicant afforded the respondent five days to retract its threats to withhold or deduct part of the rental payable under the lease and to confirm in writing that the respondent would abide by its obligations under the lease.

[10] The respondent failed to respond to the applicant's correspondence and to retract its statements. The applicant thereupon informed the respondent, by way of correspondence dated 31 May 2021, of the applicant's election to accept the respondent's repudiation and to terminate the lease with immediate effect. The applicant required the respondent to vacate the premises accordingly.

[11] The respondent relied upon correspondence from its attorneys dated 1 June 2021, sent subsequent to the applicant's alleged termination of the lease. The respondent denied that the 11 May 2021 correspondence constituted a repudiation of the lease and contended that it constituted the respondent's attempt to resolve long-standing issues at the premises. Furthermore, the respondent undertook to pay the electricity charges as per the lease, being the equivalent of approximately R6 000.00

¹ Caselines 002-25.

² Clause 6.2 of the lease agreement.

per month, the balance to be paid into its attorney's trust account pending resolution of the electricity charges issue.

[12] The respondent alleged that the undertaking evidenced the respondent's intention to pay for its electricity usage as required under the lease and its good faith.

[13] As regards the respondent's contention at the hearing that the respondent's attorney's correspondence of 1 June 2021 destroyed any suggestion of a repudiation, that correspondence was irrelevant to the issue as it was sent after the applicant accepted the alleged repudiation and acted thereupon.

[14] The applicant premised its claim for the respondent's eviction on the applicant's interpretation of the 11 May 2021 correspondence. The principles of interpretation of documents are well-articulated in the extensive case law³ relevant to the issue. These principles apply equally to the 11 May 2021 correspondence as well as the subsequent correspondence.

[15] The interpretation of documents is a legal issue, a matter for the court and the test is objective. The subjective intention of the respondent's representative in authoring the 11 May 2021 correspondence is irrelevant to the process of interpreting it.

³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ('Endumeni'); *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* 2019 (5) SA 29 (CC) ('Waymark'); *Airports Company South Africa v Big Five Duty Free (Pty) Ltd & Others* 2019 (5) SA 1 (CC) ('Big Five'); *University of Johannesburg v Auckland Park Theological Seminary & Another* [2021] JDR 1151 (CC) ('University of Johannesburg'); *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) ('Blair Atholl') at para 76 and 77; *Capitec Bank Holdings Ltd & Another v Coral Lagoon Investments 194 (Pty) Ltd & Others* 2022 (1) SCA 100 (SCA) ('Capitec') at para [51].

[16] Similarly, the obvious mutual and heightened acrimony between the applicant and the respondent's representatives, other than providing a degree of context to correspondence, is irrelevant to the interpretation of the 11 May 2021 correspondence.

[17] The interpretive process requires a simultaneous consideration of the relevant text, its context and purpose. The respondent's representative expressed himself through the words used in the 11 May 2021 correspondence. Thus, the text of the latter correspondence, its structure and syntax operate as the starting point for its interpretation.⁴

[18] Words must be given their ordinary grammatical meaning in the light of the ordinary rules of grammar and syntax, unless doing so would result in an absurdity, simultaneously with a consideration of the context in which the words appear and the apparent purpose to which they are directed. The SCA in *Capitec*⁵ reiterated the obligation on courts to deal with the text as it stands in the relevant document.

[19] The respondent's counsel contended that the 11 May 2021 correspondence had to be considered in its entirety⁶ and within the context of the acrimony between the parties' representatives. Furthermore, that it mattered not that the respondent's demands made in the 11 May 2021 correspondence did not accord with the strict terms of the lease.⁷

[20] However, the question of whether the 11 May 2021 correspondence fairly interpreted evidenced the respondent's firm intention to not be bound by the lease stands to be assessed against the relevant terms of the lease.

⁴ *Capitec* note 3 above at para 51.

⁵ *Capitec* note 3 above at para 50.

⁶ *Inter Maritime Management SA v Companhia Portuguesa De Transportes Maritimos ESP* 1990 (4) SA 850 (A) ('*Inter Maritime*') at 861G-H.

⁷ *B Braun Medical (Pty) Ltd v Ambasaam CC* 2015 (3) SA 22 (SCA) ('*Braun*') at 25E-F.

[21] The applicant contended correctly the lease did not provide for the obligations claimed by the respondent in the 11 May 2021 correspondence, including the employment and shared payment of a security guard and the installation and shared payment of the costs of a security shutter and a generator.

[22] Given that the respondent's payment of the electricity used by it was due in arrears and not in advance, the applicant did not rely on payment of the electricity as a basis for the alleged repudiation.

[23] The applicant relied on two bases for the respondent's alleged repudiation. Firstly, the term of the lease that the respondent pay the rental and additional charges in full and in advance and thereafter institute action for specific performance, even if the action was based on an admitted obligation.

[24] Secondly, that the respondent pay the rental and additional charges in full to the lessor. Securing any portion of the rental and additional payment obligations under the lease in lieu of payment to the lessor did not comply with the lease. Accordingly, the respondent could not withhold payment of the rental or other amounts due under the lease or any part thereof, or set them off against any alleged obligation of the applicant.

[25] The lease provided that in the event of a dispute, the respondent was obliged to pay the disputed amounts in full and thereafter bring a claim for such damages as it contended it suffered. The terms of the lease were unequivocal and the respondent did not allege vagueness in respect of the lease.

[26] Nothing in the lease permitted the respondent to withhold or threaten to withhold payment as stated by the respondent in the 11 May 2021 correspondence.

[27] Furthermore, non-set-off clauses in lease agreements are upheld by our courts⁸ and the respondent did not advance any reason why I should not do so in this matter. Thus, set-off of the amounts disputed by the respondent was not a remedy available to the respondent under the lease.

[28] The applicant argued that the alleged repudiation arose from the respondent's threats in the 11 May 2021 correspondence to withhold payment of a portion of the rental instead of paying the full rental to the applicant.

[29] The respondent contended that the 11 May 2021 correspondence, objectively construed, constituted an attempt to persuade the applicant's representative to engage on the issues raised therein, being long-standing disputes between the parties.

[30] The respondent submitted that the 11 May 2021 correspondence should be considered in accordance with *B Braun Medical (Pty) Ltd v Ambasaam CC*,⁹ in which the appellant's demand was found to be one for performance by the respondent of its obligations and not a repudiation of the contract by the appellant, Braun. The latter's demand did not amount to an intimation by Braun that it was unwilling to perform its own contractual obligations.¹⁰

[31] Importantly in the context of the matter before me, the SCA found that even if Braun's demands (for performance) were unjustified, they could not have led to the objective conclusion that Braun did not intend to perform its obligations.

⁸ *Altech Data (Pty) Ltd v M B Technologies (Pty) Ltd* 1998 (3) SA 748 (W); *Win Twice Properties v Binos* 2004 (4) SA 436 (W) at 439.

⁹ *Braun* note 7 above.

¹⁰ *Braun* note 7 above at para 11.

[32] Moreover, the SCA also found that there was no threat by the appellant to withhold performance of its own obligations under the contract.

[33] The difference between the circumstances in Braun to those before me is that the respondent before me threatened to withhold payment of a portion of the rental payable under the lease. Given that critical variance between the two matters, the case before me does not fall to be determined in accordance with the outcome of Braun.

[34] The respondent referred to *Inter Maritime Management SA v Companhia Portuguesa De Transportes Maritimos ESP*,¹¹ in which the test for repudiation was cast as whether, objectively, the words or the conduct relied upon reasonably conveyed to the party in the position of the innocent party, (the applicant before me), an intention to terminate the contract.¹² The repudiating party must be shown to have “made quite plain his own intention not to perform the contract.”¹³

[35] The language relied upon for the alleged repudiation must convey and amount to a declaration of intent not to perform under the contract. The language must be considered in the light of the contract and the circumstances of the matter in order to determine if there is a repudiation of the contract.¹⁴ The importance of considering the entirety of the prevailing circumstances is referred to in *Inter Maritime*.¹⁵

¹¹ *Inter Maritime* note 6 above.

¹² *Id* at 862A.

¹³ *Id* at 862C.

¹⁴ *Id* at 862A (footnotes omitted).

¹⁵ *Id* at 861G-H.

[36] Both parties referred to *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*,¹⁶ to the effect that repudiation is not a matter of intention but of perception, the perception of a reasonable person placed in the position of the innocent party.

[37] The principle is that whilst a repudiating party may harbour a *bona fide* belief that his interpretation of the contract is the correct interpretation and might subjectively intend to be bound by the contract, the test is not the subjective intention of the repudiating party. The test is whether the repudiating party acted in such a manner as to permit a reasonable person in the position of the innocent party, to conclude that the repudiating party did not intend to fulfil their obligations under the contract.

[38] Furthermore, the conduct from which the inference of impending non or mal-performance is drawn must be clear and unequivocal, and not be equally consistent with any other feasible hypothesis.¹⁷

[39] The respondent, relying on *Data Colour*,¹⁸ pointed to various aspects of the 11 May 2021 correspondence that the respondent argued did not manifest an intention to not be bound by the lease but instead demonstrated a commitment to the lease.

[40] It is the test in *Datacolor* in conjunction with the various principles referred to afore, that I proceed to apply.

[41] The 11 May 2021 correspondence arose in the context of multiple fruitless attempts by the respondent's representative to engage with the applicant's representative on various issues in respect of the premises. As a result, the respondent,

¹⁶ *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) ('*Datacolor*') at para 16.

¹⁷ *Datacolor* id.

¹⁸ *Datacolor* id.

in the sixth paragraph¹⁹ of the 11 May 2021 correspondence, conveyed its intention to enforce its 'rights.' The alleged 'rights' could only be the respondent's rights under the lease.

[42] In the seventh paragraph of the 11 May 2021 correspondence, the respondent demanded a meeting with the applicant's representative. In the event that the latter refused 'to meet and engage' with the respondent, then the respondent, in the eighth paragraph, placed its 'position and intended actions on record as follows. ...'

[43] Multiple numbered subparagraphs followed thereafter in which the respondent allegedly stated its 'position and intended actions' in the event of a refusal by the applicant's representative to 'meet and engage' with the respondent's representative.

[44] I accept that the terms of the lease did not oblige the applicant's representative to meet with the respondent and that the respondent's language used in the 11 May 2021 correspondence was strident and demanding, even combative or aggressive in certain instances. Given, however, that the respondent's demand to meet essentially amounted to a demand to establish a line of communication with the applicant, the lessor, the respondent's demand for a meeting was not unreasonable.

[45] The last sentence of the seventh paragraph of the 11 May 2021 correspondence was important in the context of the overall assessment of whether the respondent 'made quite plain his own intention not to perform the contract.'²⁰ The sentence states; 'We also place on record that we believe that all outstanding issues can be resolved reasonably, fairly and expeditiously through constructive engagement in a meeting between the parties.'

¹⁹ The paragraphs are identified according to their chronological order in the 11 May 2021 correspondence.

²⁰ *Inter Maritime* note 6 above at 861E.

[46] Accordingly, the respondent's stance was that a personal meeting between the parties' respective representatives would serve to resolve the issues between the parties, thus permitting them to proceed constructively with the lease. The sentence, objectively, is indicative of a commitment by the respondent to continue with the lease and to resolve the issues between the parties, not to abandon the lease.

[47] Similarly, the respondent in the penultimate paragraph of the 11 May 2021 correspondence, demonstrated its commitment to continuing with the lease. The respondent stated therein that it had paid all outstanding rentals other than the disputed electricity charges (which are irrelevant for the reasons aforementioned), and that the respondent would ensure that all 'non-disputed rental' was paid timeously in the future. Accordingly, the respondent's rental was paid to date and other than 'disputed rental,' the rental would be paid timeously in the future.

[48] The question of what constitutes 'disputed rental,' other than the disputed electricity charges, must be answered with reference to the relevant subparagraphs preceding the penultimate paragraph.

[49] Turning to those numbered subparagraphs, they set out the respondent's intended actions in the event that the applicant's representative refused to meet and engage with the respondent. A perusal of certain subparagraphs reflected the sting in the respondent's statements, being the respondent's threat to withhold payment of portions of the rental, relied upon by the applicant as the basis of the alleged repudiation. I intend to consider each of the relevant subparagraphs.

[50] Whilst requesting the meeting, the respondent in subparagraph 3 demanded that the applicant agree to the joint appointment and employment of a security guard for the premises, the costs of which would be shared between the parties.

[51] The sting arose from the respondent's statement that until the parties reached agreement on the security guard and the costs thereof, the respondent intended to appoint an interim security guard and to 'offset your portion of the costs of from our rental and pay this into our lawyers trust account pending resolution of this matter.'

[52] The respondent's statement that it intended to set-off and secure the applicant's alleged portion of the security guard costs from the rental, was not conditional on the parties meeting with each other or on them reaching agreement. Objectively construed and fairly interpreted, the respondent's statement amounted to one of intent to withhold, set-off and secure a portion of the rental in the interim, pending any meeting between the parties and any resolution of the security guard issue.

[53] The lease did not permit the respondent to withhold, set-off or secure any portion of the rental or to threaten to do so. The lease required the respondent to pay the entire rental without deduction or set-off despite any dispute between the parties.

[54] In effect, the respondent articulated its intention to act in manner prohibited by the lease, by withholding and securing a portion of the rental. That statement demonstrated the respondent's intention to act outside of the terms of the lease and not in accordance with the terms of the lease. The fact that the lease did not oblige the applicant to pay any portion of the costs of a security guard was irrelevant to this aspect of the enquiry.

[55] The respondent in subparagraph 4 demanded that the applicant agree to the installation of an additional security shutter at the premises, the costs of which would be shared between the parties. The respondent's language in this subparagraph dealing with the security shutter differed from that in subparagraph 3 in respect of the security guard.

[56] The respondent stated in subparagraph 4 that 'should the applicant refuse to engage and ensure ... that the appropriate shutter (be) installed expeditiously, we will proceed to install the security shutter that we deem appropriate and offset your portion of the costs from our rental and pay this into our lawyers trust account pending resolution of the matter.'

[57] Accordingly, the respondent stated that it intended to act in a manner at variance with the terms of the lease, by setting-off and securing the portion of the rental equivalent to the applicant's alleged share of the costs of the security shutter, if the applicant refused to engage and ensure acceptance of the appropriate quotation and installation of the security shutter. The respondent's threat to withhold and secure the relevant portion of the rental would take effect if the applicant refused to engage with the respondent and agree on the installation of the appropriate security shutter and payment of the costs thereof.

[58] The respondent's language in subparagraph 6 regarding the installation of a generator and payment of the costs thereof mirrored that of subparagraph 4. The respondent threatened to set-off and secure the portion of the rental equivalent to the applicant's alleged share of the generator costs. The threatened conduct would take effect if the applicant refused to meet and engage with the respondent and ensure the expeditious installation of a generator.

[59] Once again, the respondent's stated intention to withhold and secure a portion of the rental in respect of the applicant's alleged share of the costs of the security shutter and the generator respectively, was not permitted by the lease. The respondent's statements demonstrated the latter's intention not to abide by the terms of the lease in the event that the applicant refused to engage and agree to the respective installations at the parties' shared costs.

[60] The respondent's statements that it would so act only in the event of the applicant not engaging and agreeing to the installations on the respondent's payment terms were irrelevant. This because there was no obligation on the applicant to pay any portion of the costs of either the security shutter or the generator, or to agree to the installation thereof.

[61] It was the respondent's threat to set-off and secure a portion of the rental that reflected, objectively, the respondent's refusal to comply with the lease. Securing a portion of the rental in lieu of paying it to the applicant did not comply with the lease. Threatening to do so, as the respondent did, similarly conveyed an intention not to be bound by the terms of the lease. The applicant was justified in interpreting the respondent's threats as evidencing the respondent's intention not to comply with the lease, notwithstanding the respondent's statements aforementioned evidencing the latter's wish to continue with the lease.

[62] Additionally in subparagraph 6, the respondent threatened to set-off the applicant's alleged share of the respondent's damages incurred as a result of multiple electricity outages at the premises. The lease was unequivocal. In the event of a dispute between the parties, the lease obliged the respondent to continue to pay the rental and other payment obligations in full and without deduction or set-off, pending determination of the dispute. The lease did not permit the respondent to withhold payment of part of the rental in lieu of any alleged payment by the applicant towards the respondent's damages. Nor did the lease allow the respondent to threaten to do so.

[63] In any event, the lease provided that the applicant was not responsible for the electricity outages experienced by the respondent and excluded liability of the applicant

for electricity outages.²¹ The respondent's remedy lay in a claim for such damages as it alleged it had suffered using the appropriate legal process.

[64] The respondent's counsel argued that the respondent did not intend to withhold any part of the rental but stated as much in an attempt to procure a meeting between the parties' respective representatives. That might well be so and accorded with the various statements by the respondent articulating its commitment to the lease, including the reference to the refurbishment of the premises. However, the motive and the subjective intention of the repudiating party are wholly irrelevant²² to the objective perception of the aggrieved party, as to whether or not the respondent's impugned statements evidenced an unequivocal and deliberate intention to not be bound by the lease.

[65] The respondent's language used in the 11 May 2021 correspondence was neither equivocal nor conciliatory. The text of the contentious aspects of the 11 May 2021 correspondence was not capable of ambiguity. The respondent's unequivocal statements objectively construed in the context of the circumstances between the parties at the time, reflected that the respondent was unable or unwilling to continue with the business as originally contemplated in terms of the lease. No alternative to the security shutter, the generator or to the employment of the security guard was requested or suggested by the respondent of the applicant. The respondent simply informed the applicant what it intended to do in that regard, demonstrating that it did not intend to comply with the lease. The applicant was justified in interpreting those statements as a repudiation of the lease.

²¹ Clauses 19.1 and 20.2 of the lease.

²² *Highveld 7 Properties (Pty) Ltd v Bailes* 1999 (4) SA 1307 (A) (*'Highveld 7'*).

[66] Accordingly, the 11 May 2021 correspondence did not reflect a proposal as argued by the respondent and found in *Inter Maritime*.²³ The respondent's stated intention to withhold, set-off and secure part of the rental for the reasons aforementioned, constituted a threat to contravene the respondent's most important obligation under the lease, to make full payment of the rental without deduction or set-off in advance and in the event of a dispute, to pay and argue thereafter.

[67] As to the respondent's argument that the address to which the applicant's correspondence was sent was not proper as it was not sent to the respondent's attorneys as required in the 11 May 2021 correspondence, the address utilised by the applicant was the respondent's chosen *domicilium* address in terms of the lease. Accordingly, the applicant was entitled to utilise the latter address.

[68] The applicant's reliance on the respondent's sale of coffee as part of its business, was referred to by the applicant at the hearing as irrelevant. In my view it was irrelevant and the applicant might have had difficulty in demonstrating that the business of 'confectionary' does not include the sale of coffee.

[69] In so far as the respondent's counsel argued that the respondent's contentions in respect of the security guard, security shutter and generator formed part of the applicant's common law obligation to afford the respondent beneficial occupation of the premises. Beneficial occupation was defined by the lease, which did not include terms in respect of the shared payment of a security guard, security shutter or generator. Moreover, in the light of my findings in respect of the repudiation, it is not necessary for me to deal further with the issue of beneficial occupation.

²³ *Inter Maritime* note 6 above.

[70] In the circumstances, I am of the view that a fair interpretation of the respondent's statements highlighted above, justified the applicant's perception that the respondent intended not to be bound by the terms of the lease. Thus, the applicant was justified in cancelling the lease and the appropriate order must follow.

[71] The applicant submitted that this being a commercial eviction, I should order the immediate eviction of the respondent from the premises. The respondent operates a business at the premises at which it employs various members of staff. Accordingly, an order for the immediate eviction of the respondent is not appropriate. Nor however is a date six months hence as submitted by the respondent, appropriate in the existing circumstances. A period of three months, being on or before 30 September 2023, will be adequate for the respondent to vacate the premises, locate new premises if it chooses to do so and to make the necessary arrangements for its staff members. The applicant will not suffer any prejudice from an order that the respondent vacate the premises on or before 30 September 2023.

[72] As to the costs, there is no reason why the order on the costs should not follow the order on the merits. The applicant sought an order for punitive costs on the scale as between attorney and client in terms of the provision in the lease that provided accordingly.

[73] There was nothing in the litigation itself that justified a punitive order for costs and I intend to grant an order for costs on the scale as between party and party.

[74] As regards the costs of the oral evidence application, they were costs incurred in the process of the litigation. Accordingly, I intend to order that they be costs in the cause of the application.

[75] In respect of the respondent's counterapplication, prayers 2 and 3 thereof for specific performance must fall away with costs in the light of the outcome of the applicant's application.

[76] As regards prayer 1 of the respondent's counterapplication for a statement and debatement of the electricity charges levied by the applicant and payment of such amount found to be owing by the applicant. The applicant opposed the claim and argued that it was ill-conceived as the parties were not in a relationship of a fiduciary nature with each other.

[77] A right to a statement and debatement of account arises in three situations; where there is a fiduciary relationship between the parties, a contractual right to the procedure or a statutory right thereto. The parties were not in a fiduciary relationship and the lease did not subject the applicant to a duty to account in terms of a statement and debatement procedure.

[78] The respondent claimed a statutory right in terms of the NERSA Reseller Guidelines ('the Guidelines'), and that the applicant was obliged pursuant thereto to provide the respondent with the necessary information required to ascertain if its electricity accounts were correct.

[79] The applicant argued that the lessor was not a reseller as envisaged in the Guidelines, that they did not have the effect of law and did not provide the respondent with a statutory right to a statement and debatement of its account and that the respondent had no case in law for a statement and debatement of the account pursuant to the Guidelines.

[80] An entity by the name of EMS Envirotel ('EMS') was contracted by the respondent previously to audit the electricity charges and determined that the applicant had read the meters correctly and that the respondent's electricity consumption was accurately calculated. Furthermore, the respondent had elected not to install a pre-paid meter in respect of the premises.

[81] The applicant contended that an account of the electricity charges was available to the respondent from Oxers Meter Reading Specialist ('Oxers'), which reads the relevant meter. Oxers provide a tenant advice printout, being a statement recording the meter, the previous reading, the current reading, the electricity units used and the corresponding amount due. The applicant attached an example of such a tenant advice printout from Oxers that was available to the respondent. The respondent complained that the Oxers' statements did not furnish the required information, particularly the tariff at which the respondent was being charged electricity. As a result, the respondent was unable to ascertain if it was being charged correctly.

[82] The Guidelines provide a regulatory framework. The reseller may only recover the difference between the tariff that it pays and the tariff that it charges the consumer. The consumer is entitled to know the basis on which the account is calculated and the tariff/s utilised to do so.

[83] Accordingly, there was no basis in law for an obligation on the applicant to engage in a statement and debatement of account in terms of the lease or under the Guidelines. However, the respondent was entitled to be provided with the tariffs utilised to calculate its electricity accounts, in order to ascertain if they were correctly calculated, as articulated by the respondent in its supplementary affidavit. There was no reason for the respondent not to be furnished with the tariffs by the lessor and I

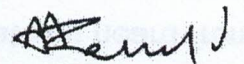
intend to grant such an order for a period of three years prior hereto and in respect of the respondent's future electricity accounts.

[84] The respondent did not demonstrate a right to a statement and debatement of account. In those circumstances there was no basis to refer the claim to a hearing for oral evidence.

[85] In the circumstances, the following order is granted:

1. The lease agreement, annexure "A" to the applicant's founding affidavit, read together with the second lease, annexure "G" and the extension, annexure "H" to the founding affidavit, further read with the addendum to lease, annexure "L" to the founding affidavit, to have been lawfully cancelled by the applicant pursuant to the respondent's repudiation of the lease agreement.
2. The respondent and any person or entity claiming title through or under the respondent is ordered to vacate the premises being Shop No 1, corner Fourth Avenue and Tenth Street, Parkhurst, Johannesburg by not later than 30 September 2023.
3. In the event of the respondent and any person or entity claiming title through or under the respondent, failing to comply with the order in paragraph 2 above, the Sheriff or his lawful deputy is authorised to take such steps as are required to give effect to the order for the eviction of the respondent and any person claiming title through or under the respondent.

4. The respondent is ordered to pay the wasted costs of the respondent's application for oral evidence brought by the respondent.
5. The applicant is ordered to provide the respondent with the tariff/s used to calculate the respondent's electricity accounts levied for the three (3) year period prior hereto, and, in respect of the respondent's electricity accounts levied in the future.
6. The respondent's counterapplication is dismissed with costs.
7. The respondent is ordered to pay the costs of the applicant's application.
8. The orders for costs in prayers 1 to 7 above include the costs of Senior Counsel where utilised.



A A CRUTCHFIELD
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 3 July 2023.

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INSTRUCTED BY:

Taitz & Skikne Attorneys.

DATE OF THE HEARING:

1 August 2022.

DATE OF JUDGMENT:

3 July 2023.