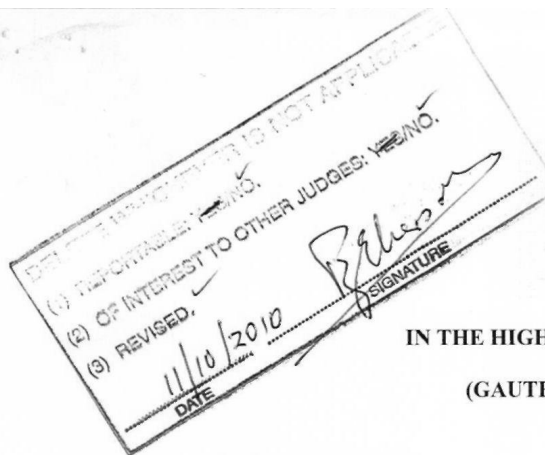




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG NORTH DIVISION)

Case No. 74000/09

12/10/2010

In the matter between

PHOMELLA PROPERTY INVESTMENTS (PTY) LTD.

Applicant

and

JP NITESPOT CC

Respondent

CORAM EBERSOHN AJ

DATE HEARD 11 AUGUST 2010

DATE JUDGMENT HANDED DOWN OCTOBER 2010

JUDGMENT

EBERSOHN AJ.

[1] The applicant is Phomella Property Investments (Pty) Ltd., a private company.

[2] The respondent is JP Nitespot CC, a close corporation.

[3] The prayers in the notice of motion read as follows:

- "1. That the respondent, and any person(s) occupying the undermentioned premises under title of the respondent, is forthwith evicted from the premises known as Suite LG2, Lower Ground Floor, South African Agricultural Union Building, situated at 255 Schoeman Street, Pretoria, Gauteng.**
- 2. That the respondent is ordered to pay the costs of this application.**

3. Further and/or alternative relief."

[4] It is common cause that a body known as Agri Suid-Afrika entered into a lease agreement as lessor with the respondent as lessee of the premises referred to in prayer 1 of the notice of motion. The lease commenced on the 1st August 2007 and would endure for a period of three years from the date of commencement thereof.

[5] The applicant purchased the fixed property on which the 28 storey office building in which the leased premises is located in the lower ground floor and took transfer of the fixed property.

[6] Paragraph 4.16 of the lease agreement reads as follows (record p. 39):

"4.16 Vir geval die verhuurde perseel of die gebou waarvan dit deel vorm, geheel of gedeeltelik vernietig of onbewoonbaar gemaak word deur enige oorsaak buite beheer van die verhuurder of huurder sal die verhuurder en huurder die reg hê om hierdie huurkontrak onmiddellik te kanselleer en in so 'n geval sal die verhuurder en huurder geen eis om skadevergoeding op gronde van kontrakbreuk of andersins teen die verhuurder of huurder hê nie.

Vir geval die verhuurder besluit om die verhuurde perseel of die gebou waarvan dit deel vorm geheel of gedeeltelik te verbou of te verander of te herstel, sal die verhuurder die reg hê om hierdie ooreenkoms, met 'n kennisgewing van twee (2) maande op te skort in welke geval die huurder die reg sal hê om die ooreenkoms te beëindig en sal die huurder geregtig wees om in geval van 'n gehele berowing van die verhuurde perseel, aanspraak te maak op kwytstelling van die huurgeld vir die uitstaande huurtermyn wat die huurder van die gebruik en besit van die verhuurde perseel beroof sal wees.

Gehele of gedeeltelike berowing van okkupasie soos hierbo beskryf sal die huurder nie die reg gee om hierdie ooreenkoms te kanselleer nie en die huurder sal onder sulke omstandighede geen eise teen die verhuurder hê nie, behalwe vir die kwytstelling of vermindering van huurgeld soos hierbo beskryf.

In die geval van die kwytstelling of vermindering van huurgeld sal die tydperk van nie okkupasie of gedeeltelike okkupasie nie in ag geneem word wanneer die tydperk van die huurkontrak bereken word nie."

In order to be able to interpret subparagraph 14.6 and to be able to establish the intent of the parties it is clear that the entire subparagraph must be read and be taken into consideration and that individual subparagraphs thereof should not be read and acted upon out of context and in the process ignoring the contents of the other

8. During the suspension period no rent will be due to Phomella.
9. Please take also note that you have the right, in terms of your lease agreement, to terminate the lease agreement due to the aforesaid suspension.
10. Should you wish to terminate your lease agreement, please fax your termination notice to 011 511 5626, attention Elsabe Griesel or contact Ms Griesel on 011 511 5335."

[8] On the 4th August 2009 the then attorneys of the respondent, Edelstein-Bosman Inc., addressed a letter (annexure VPN6 record p.44) to the applicant which letter reads as follows:

"Dear Sirs

**SOUTH AFRICAN AGRICULTURAL UNION BUILDING/ JP
NITESPOT CC**

Kindly take note that we act on behalf of JP Nitespot CC ("our client").

Kindly further take note that we have been placed in possession of your letter dated 20 July 2009 addressed to our client, wherein you advised our client that it is your intention to effect certain urgent and extensive renovations to the entire building.

In order to adequately reply to your letter dated 20 July 2009, we kindly request that you identify with certainty what alterations/renovations you intend to make, and more particularly what alterations/renovations you intend making to our client's leased premises. Upon receipt of the aforementioned information, we will be in a position to adequately reply to your letter dated 20 July 2009, where after we submit it will be in the respective parties best interests that a round table meeting be convened in order to discuss this matter further, and we therefore request that together with your detailed description of the alterations and renovations, that you also furnish ourselves with possible dates and times for said, round table meeting.

We trust you find the above in order and look forward to hearing from you at your earliest possible convenience.

Our client's rights remain reserved in toto."

[9] On the 6th August 2009, the City Planning, Development and Regional Services Department addressed a notice (annexure VPN7 record p. 46) to the applicant which notice reads as follows:

**"NOTICE OF A CONTRAVENTION OF SECTION 14(4) OF THE
NATIONAL BUILDING REGULATIONS AND BUILDING
STANDARDS ACT, 1977 (ACT 103 OF 1977)**

PROPERTY INFORMATION

ERF NUMBER: 2908

SUBURB:

Pretoria Cental

STREET NAME AND NUMBER: 255 Schoeman str

**REGISTERED OWNER OF PROPERTY NAME: VUYOKAZI PENELOPE
NJONGWE (ID NO. 7212100870080) in her capacity as the director of
PHOMELLA PROPERTY INVESTMENTS (PTY) LTD**

ADDRESS: 255 SCHOEMAN STREET

BUILDING INFORMATION

TYPE OF BUILDING: Shops and Offices (SALU Building)

You are herby notified that you have contravened Section 14(4) of the National Building Regulations and Building Standards Act, 1977 (Act 103 of 1977), in respect of such building.

You are hereby ordered in terms of Section 14(4) of the National Building Regulations and Building Standards Act, 1977 (Act 103 of 1977), forthwith to stop any use of such building or the permitting the occupation or use of such building.

Failing compliance with this notice, legal proceedings will in terms of Section 14(4) of National Building Regulations and Building Standards Act, 1977 (Act 103 of 1977), be instituted against you without any further notice.

MR Maimane

BUILDING CONTROL OFFICER."

[10] Section 14(4) of the National Building Regulations and Building Standards Act, 1977 (Act 103 of 1977) ("the Act") reads as follows:

"(4)(a) The owner of any building, or any person having an interest therein, erected or being erected with the approval of a local authority, who occupies or uses such building or permits the occupation or use of such building or permits the occupation or use of such building -

- (i) unless a certificate of occupancy has been issued in terms of subsection (1)(a) in respect of such building;**
- (ii) except in so far as it is essential for the erection of such building;**

- (iii) during any period not being the period in respect of which such local authority has granted permission in writing for the occupation or use of such building or in contravention of any condition on which such permission has been granted; or
- (iv) otherwise than in such circumstances and on such conditions as may be prescribed by national building regulation,

shall be guilty of an offence."

This subsection must, however, be read in conjunction with subsection (1A) of section 14 of the same act which subsection reads as follows:

"(1A) The local authority may, at the request of the owner of the building or any other person having an interest therein, grant permission in writing to use the building before the issue of the certificate of occupancy referred to in subsection (1), for such period and on such conditions as may be specified in such permission, which period and conditions may be extended or altered, as the case may be, by such local authority."

The reason why subsection (1A) was later introduced into the act was clearly to avoid a crippling disruption of the businesses of all the tenants in a whole building where it was not necessary.

[11] On the 13th August 2009 the applicant addressed a letter (annexure VPN8 record p. 47) to the Municipality which letter reads as follows:

"Dear Sir

RE: ERF 2908 PRETORIA – KNOWN AS SAAU BUILDING (herein after “the Building”) NOTICE IN TERMS OF SECTION 14(4) OF THE NATIONAL BUILDING REGULATIONS AND BUILDING STANDARDS ACT

We refer to the above notice delivered to the SAAU Building on 12 August 2009 as well as to the telephonic conversation between yourself and Chris Brunner of our offices.

During the aforementioned conversation with Chris, you advised that the following is required by yourselves in respect of the above building:

1. Fire Safety Certificate;
2. Engineers Certificate due to the fire damage that was done to the building a few years back;
3. As Built plans on areas that were affected by the fire;
4. A Glass Certificate; and

5. An Electrical Compliance Certificate.

As you are aware we recently became the owner of the building with transfer date being 1 July 2009. In line with our due diligence report, we plan to refurbish the building and the refurbishments include the upgrade and repair of the following:

1. the fire equipment and size;
2. the air conditioning system;
3. the fire detection system;
4. the escalators;
5. the elevators (lifts); and
6. the electrical repairs and upgrade.

The refurbishments have been scheduled to commence in September 2009 due to the fact that there are tenants in the building. Letters have been sent to the tenants advising them of same and requesting that they all vacate the building by 30 September 2009 at the latest (copies can be made available at your request). This was to provide the tenants with sufficient notice to enable them to find alternative premises.

We have already started setting the wheels in motion with regard to the compliance concerns that your department has advised us of, these included the following:

1. Requesting information and/or documentation from the previous owners in respect of this matter;
2. Fire safety – quotes have been requested and we are in the process of arranging a meeting between relevant parties on site for an inspection to be done;
3. Glass certificate – we are trying to source a glass company in order to establish what is required in order to obtain a glass compliance certificate;
4. As built drawings – same has been requested from the previous owners and we are awaiting their feedback herein;
5. Engineer's certificate – same has been requested from previous owners and depending on their feedback we will look into the possibility of employing the services of a independent engineer to compile and engineer's report; and
6. Electrical compliance – we have received a quote for the rectification and correction of the electrical installation and will be attending to same.

Our program indicates that the work will take some 3 – 4 months to

rectify. In light of the aforementioned, we hereby request the following;

1. An urgent meeting between all the parties (yourselves, previous owner and ourselves) in order to establish all that is required and how we proceed from this point; and
2. An extension of a period of 120 (one hundred and twenty) days in order to enable us to attend to the above.

We look forward to your favourable response herein."

[12] On the 17th August 2009 the applicant addressed a letter (annexure VPN9 record p. 49) to Edelstein - Bosman Inc. which letter reads as follows:

"Dear Sirs

RE: SAAU BUILDING – JP NITESPOT CC

We refer to the above matter and to your letters dated 4 August 2009 and 14 August respectively.

Please be advised that we have received a notice of contravention in terms of section 14(4) of the National Building Regulations and Building Standards Act from the City of Tshwane's Planning, Development and Regional Services Department.

In terms of the aforementioned notice we are required to immediately stop any use of the building or permitting the occupation or use of the building. Failure by us to comply with such notice will result in legal proceedings being instituted against us by the City of Tshwane (a copy of the letter and our response thereto is attached hereto).

Our letter of response to City of Tshwane sets out all the renovations/alterations that we intend to effect in respect of aforementioned building.

The effect of the above is that we are required to vacate the building on an urgent basis. We are in discussions with the relevant department at City of Tshwane with regard to possible extension being granted so that the tenants have at least until 30 September 2009 to vacate.

Unfortunately at this stage we have no choice but to comply with the notice given to us by City of Tshwane and hereby request that your client start making the necessary arrangements so that the leased premises is vacated by no later than 30 September 2009.

A meeting can be arranged between ourselves and your client in order to discuss this matter further, please advise on possible dates for the aforementioned meeting.

We trust that you find the above in order and will keep you abreast of

further developments in this matter."

[13] It must be pointed out that the letter of Edelstein - Bosman Inc. of the 14th August 2009, was not included as an annexure to the founding papers.

[14] On the 1st September 2009 Edelstein - Bosman Inc. addressed a letter (annexure VPN10 record p. 51) to the applicant which letter reads as follows:

"SOUTH AFRICAN AGRICULTURAL UNION BUILDING / JP NITE SPOT CC

Your letter for 17 August 2009 refers.

In terms of the Agreement of Lease you warrant that our client is entitled to occupy the building and the fact that you have not kept the building in good order and maintenance, or that you have been requested by the City Council to cease trading in the building is of no consequence to our client. We will more fully deal with this aspect in due course, should it become necessary.

Until such time as we have negotiated some form of clarity on this matter, our client will not be moving out on 30 September 2009.

We are available on the following dates for a meeting: Monday, 7 September 2009, at 10h00 or Tuesday, 8 September 2009, at 10h00.

Kindly advise us where the meeting will take place and which of the dates are acceptable to yourselves."

[15] The proposed meeting took place on the 18th September 2009 and on the 23rd September 2009 Edelstein-Bosman Inc. addressed a letter (annexure VPN11 record p. 52) to the applicant's attorneys Messrs. Ebersohn of Randburg which letter reads as follows:

"JP NITESPOT CC / PHOMELLA PROPERTY INVESTMENTS /SAAU BUILDING

We refer to the above matter and to the meeting which took place on 18 September 2009.

Further to the above, we enclose herewith;

- 1. Our client's liquor licence.**
- 2. The inventory**
- 3. A copy of the power of attorney signed by Mr WJ Jacobs which was given to the City Council in regard to the new gambling licence granted to our client.**

Should your client invoke the clause in terms whereof our client must vacate the premises, the premises in the interior will be left as is, ie. only the alcohol and other consumables will be removed. For the rest, the restaurant will be closed and locked and we shall be pleased if you will kindly advise us what is the anticipate day that the said restaurant can be re-opened.

We shall be pleased during the rebuilding period, as our client will not be trading there and that as there is the possibility that your workmen may cause damage, that you will ensure that there is insurance in respect of the replacement value of all the items in our client's premises, which we believe is approximately R1,750,000.00."

[16] The liquor licence for the year 2009 was issued by the Gauteng Provincial Government to the respondent on the 2nd December 2008 and was issued in terms of the (Gauteng) Liquor Act, 1989, and in terms of the provisions of the act the licence may only be issued if everything, premises included, is in order in and on the leased premises. I shall in more detail deal with the provisions of the (Gauteng) Liquor Act, 1989, *infra*.

[17] The inventory (record pp. 55-58) referred to in annexure VPN11 runs to four pages wherein items were specified under various headings and from the inventory it is clear that the night club/restaurant/gambling venture of the respondent constituted in fact a large and substantial enterprise. The inventory contains subheadings with items specified under each subheading. It commenced with the heading "Office" wherein the usual office items were specified in. The next subheading is "Restaurant" wherein there were about 41 tables and about 100 chairs, with sofas, linen cupboards etc.. The next subheading was "Reception" wherein the usual items to be found at a reception area were specified. Under the subheading "Bar Entrance" 10 Bar stools were specified with liquor fittings and racks, a sofa, a safe and many items like mirrors, a coffee machine, glasses, a TV set etc.. Under the subheading "Main Entrance" a table with a cash register backlights and slings were specified. Under the subheading "Club-Main Bar" two undercounter bar refrigerators, another loose standing refrigerator, a freezer, and many sundry items were specified. Under the subheading "Wash-up area" two tables, 3 drying trays and basins were specified. Under the subheading "Store Room" a wine refrigerator, a portable Bain Marie, a deep freezer and two liquor cabinets were specified. Under the subheading "Club Smaller Bar" one undercounter refrigerator, 1 cash register, a counter refrigerator, fittings, a counter, cupboards and racks were specified. Under the subheading "DJ Box and Dance Floor" no separate items were specified. Under the subheading "Club Main Area" two coin operated pool tables, 50 tables, about 160 chairs and bar stools, 4 bar chairs, airconditioners, a gambling area partition and

gambling machines plus a loudspeaker box were specified. Under the subheading "Passage Kitchen" a liquor cold room 3x3 metres, an ice machine, a box freezer and two basins were specified. Under the subheading "Kitchen" 3 stainless steel water cycle canopies, a ventilation fan, an extractor fan, 1x5 door undercounter refrigerator, a 5 division Bain Marie, a gas stove and oven, two chest freezers, one Ideas double hot plate, 1 nine griller burner, stove charcoal, 1 three flat grillers, one fryer, cling wrap roller, 3 small steel tables, 2 big steel tables, a toaster, a uniform cupboard, a microwave oven, a portable gas stove and crockery cupboards were specified. Under the subheading "Salad/Fountain Kitchen" one three door under counter bar fridge, 2 chest freezers, one filter coffee machine, 1 table, fittings and cupboards, a Pineware kettle, 3 single basins and one double basin were specified. Under the subheading "Preparation Kitchen" three stainless steel tables, a potato peeler, a chip cutter, a dishwasher, a meat cold room (3x4 metres), 2 scales, pots, pans, storage bins, cutlery, crockery and glasses, a double sink washer, a single sink washer, one single fryer, and one double fryer, were specified. Under the heading "General" ten 48 kg kitchen gas cylinders were specified. Under the heading "Fire equipment" neon signs, 9 fire extinguishers, 2 hoses and reels, a fire blanket and 5 emergency lights were specified. Under the subheading "Licences and Certificates" were specified:

Gas permit,
Eco Mist (Termite) certificate,
SABS Approved Fire Certificate,
Liquor Licence,
Kitchen Extractor Service Licence SAMRO,
Food Licence - Dept. of Health,
Business Licence - City Council, and
Gambling Licence."

The contents of the inventory was not challenged by the applicant.

[18] The items referred to in paragraph 17 show that various instances, including the Police acting in terms of the (Gauteng) Liquor Act, the Municipal Fire Brigade and the Municipal Health Department regularly inspected and approved the premises leased by the respondent which premises was in a good state of repair as was borne out by the photographs attached to the answering affidavit as annexures JPV2-JPV9 (record pages 105-109). The "Certificate of Acceptability for Food Premises" (annexure JPV1 record p.102) issued by the Department Health and Social Development, Division Health Services, Section Municipal Health Services of the Municipality on the 26th May 2009, *inter alia* reads as follows:

"C. CERTIFICATION AND RESTRICTION

It is hereby certified that the above mentioned food premises comply with the provisions of Regulations 5 and 6 in terms of Government Notice no. R 918 of 30 July 1999, in respect of the handling of food in the manner specified.

**RESTRICTIONS, CONDITIONS OR STIPULATION IN
TERMS OF REGULATION 3(1)(B)
(Blank space)**

**D. ENDORSEMENTS/EXEMPTIONS IN TERMS OF
REGULATION 15:**

Sanitary conveniences in accordance with the National Building Regulations."

[19] The liquor side of the applicant's business is regulated by the (Gauteng) Liquor Act, No. 27 of 1989. In terms of the provisions of the act nobody may deal in liquor unless it is done under and by virtue of a licence issued under the act. Chapter 3 of the act regulates the kinds of licences which may be issued. In terms of section 140 a designated police official shall in respect of every prescribed application for a licence made in terms of the act report to the Liquor Board, and after the licence was granted in respect of every yearly renewal thereof, on such matters as may be prescribed and in terms of section 141 file a report regarding the business to the Liquor Board and in terms of section 143 enter the premises at any time and search the premises and to report on any contraventions to the Liquor Board.

[20] It is clear that many official bodies had a keen interest in the reigning conditions in the leased premises with inspectors and police officers making regular visits to the leased premises and its contents to inspect it. The respondents denied that any defects existed in the leased premises and the applicant made no allegations regarding any defects in and to the leased premises.

[21] In any case, on the 2nd October 2009, a firm of attorneys Ebersohn Attorneys of Randburg, came on record on behalf of the applicant and addressed the following letter (annexure VPN12 record p.62) to Edelstein - Bosman Inc.:

**"PHOMELLA PROPERTY INVESTMENTS (PTY) LTD / JP
NITESPOT CC**

- 1. We confirm that we act on behalf of Phomella Property investments (Pty) Ltd, the owner of the SALU-Building**

(hereafter referred to as "our client").

2. We refer to your letter dated 23 September 2009, received on 25 September 2009, as well as the meeting held on 17 September 2009 at your offices as well as the telephone conversation on 30 September 2009 between writer and your Warran.
3. We confirm that our client has already invoked the provisions of clause 4.16 of Annexure "A" to the lease agreement, namely that it gave your client notice that the lease agreement will be suspended with effect of two months from receipt of the said notice.
4. It is our instructions that your client received the said notice on or about 27 July 2009.
5. As such your client must vacate the premises.
6. We confirm that your Warran telephonically indicated to writer on 30 September 2009 that your client will vacate the premises by 30 September 2009, but that your client will leave the items in the restaurant, as stated in your letter.
7. Please take note that as the terms of the lease agreement are suspended in terms of clause 4.16 of Annexure "A" to the lease agreement, your client must vacate the entire leased premises by removing all items from the said leased premises.
8. It is therefore our instructions to demand, as we hereby do, that your client removes all items from the leased premises and unlocks/opens the leased premises BY NO LATER THAN CLOSE OF BUSINESS ON WEDNESDAY, 7 OCTOBER 2009.
9. Should your client fail, refuse and/or neglect to comply with the aforesaid demand, our client will have no option but to apply for an eviction order in order to carry out the extensive renovations contemplated in our client's letter dated 20 July 2009 and as discussed at the aforesaid meeting.
- 10 In view of the fact that the SALU building requires extensive renovations especially in order to comply with the National Building Regulations and Standards Act, our client envisages that it will need approximately 6 months to renovate the building. Failure by tenants to vacate the building, will result in eviction applications being launched, which will delay the commencement and the finalization of the said renovations. Our client cannot therefore, at this stage, provide your client with an anticipated day as requested."

[22] It must be noted that the said letter was extremely vague in that it did not

specifically specify whether the "all items" in paragraph 8 thereof meant only "movables" like chairs tables, bottles of liquor and whether it also included "all fixed items" like built-in fridges, counter fridges etc.. This aspect eventually becomes very crucial in view of the threat contained in paragraph 8 of the said letter.

[23] Paragraph 9 of the letter indicated that in the event of the respondent not complying with the demand in paragraph 8, that an eviction order would be sought. The contents of paragraph 10 of the letter makes very interesting reading, not for what is stated therein but for what was omitted therefrom namely for instance what was to be done and/or renovated in the leased premises, why was it required that "all items" be removed from the leased premises, if, for instance, nothing was to be done to and/or no renovations were to be effected in and to the leased premises. Up to that stage and even to the stage the matter was argued in court, the applicant and its counsel, did not indicate to the respondent and/or to the court, what renovations etc. were to be effected to and/or in the leased premises. When one adds to that the demand that the premises be unlocked and kept unlocked the legality of the demand then becomes a legal issue which will be dealt with later herein.

[24] The applicant also did not up to that stage and even thereafter, disclosed what it discussed with the Municipality and whether or not any representations were made to have the respondent permitted by the Municipality to keep on occupying the leased premises as apparently there was nothing to be renovated in the leased premises and there were no structural issues in the whole building at stake.

[25] Edelstein - Bosman Inc. on the 5th October 2009 addressed a letter (annexure VPN13 record p.66) to Ebersohn Attorneys which letter reads as follows:

**"JP NITESPOT CC/PHOMELLA PROPERTY INVESTMENTS /
SAAU BUILDING.**

Your telefax of 2 October 2009 refers.

Our client has stopped trading and removed most of that which it can. Obviously, our client cannot remove its fixtures and fittings.

The lease does not provide that these must be removed and, by the very nature of our client's business, this would be impossible. In any event, our client does not believe that you need access to our client's premises in terms whereof everything needs to be removed. You have, in any event, never indicated what it is your clients wish to do and for which they require access to our client's premises which requires everything to be removed. Should you bring an application our client will, obviously,

oppose same.

We place on record that our client has ascertained that there has been no occupation certificate issued to that building for over 20 years. Our client is considering its position and, in all probability, may institute an action for damages shortly."

[26] Ebersohn Attorneys on the 13th October 2009 addressed a letter (annexure VPN14 record p. 67) to Edelstein - Bosman which letter reads as follows:

"LETTER OF CANCELLATION

PHOMELLA PROPERTY INVESTMENTS (PTY) LTD // JP NITESPOT CC

- 1. We refer to your letter dated 5 October 2009, received on 6 October 2009.**
- 2. In view of the fact that your client refuses to unlock/open the leased premises and refuses to remove its items from the leased premises, your client clearly repudiates the terms of the contract, alternatively is in breach of the terms of the lease agreement.**
- 3. As such our client hereby accepts such repudiation and cancels the lease agreement.**
- 4. It is therefore our instructions to demand, as we hereby do, that your client unlocks/opens the premises and removes all its items from the said premises BY NO LATER THAN CLOSE OF BUSINESS ON FRIDAY, 16 OCTOBER 2009."**

[27] A new attorney, namely Mr. Andre de Klerk, came on record on behalf of the respondent and wrote on the 15th October 2009 a letter to Ebersohn Attorneys (annexure VPN15 record p.70) which reads as follows:

"JP NITESPOT CC // AGRI S.A. / PHOMELLA PROPERTY INVESTMENTS (PTY) LTD

We write to you on behalf of our client, J P Nitespot CC who is the tenant of Suite LG2, lower ground floor of the S.A. Agricultural Union Building situated at 255 Schoeman street, Pretoria.

We record the following:

- 1. From the correspondence placed to our disposal your client purchased said building from Agri S.A. and became the registered owner thereof on 1 July 2009.**

2. In terms of paragraph 2 of clause 4.16, of annexure "A" to the lease agreement between Agri S.A. and our client, you have given our client two months notice that our client's lease will be suspended in order to carry out certain substantial renovations to the building and that our client should vacate the leased premises by not later than 30 September 2009.
3. We do understand that our predecessor Mr Alan Edelstein of Edelstein - Bosman Inc have held a round table meeting with you to attempt to reach some solution for our client's predicament with the suspension of the lease agreement.
4. You should be fully aware that our client's term of lease only expires on 31 July 2010 with the option to lease the premises for a further two years as from 1 August 2010.
5. Our client was never informed about the sale of the building prior to your client's letter dated the 20th of July 2009.
6. Our client conducted a very lucrative Restaurant and Pub from the premises and it has spent many thousands of rand in the improvement of the premises. The last being the installation of two slot gambling machines which had a tremendous potential for generating additional income.
7. From the notice received from the Department of Building Control of the City of Tshwane dated 6 August 2009 addressed to your client, it is obvious that Agri S.A. as well as your client should have been aware of the contravention of Section 14(4) of the National Building Regulations and Building Standards Act.
8. Your client should surely also have investigated the suitability of the building prior to it being purchased and transferred into your client's name.
9. Mr Alan Edelstein has according to our instructions indicated to you at a round table meeting that our client's business has been fatally affected.
10. The provisions of paragraph 4.16 and 5.2 are with respect not applicable to our client in view of the fact that:
 - 10.1 Your client and its predecessor, Agri S.A. were at all relevant times before the receipt of the notice from Building Control of the City of Tshwane dated 6 August 2009 aware of the defect of the building and in particular that no occupancy certificate has been issued for at least the last 20 years.
 - 10.2 Neither was the situation described in the first paragraph of 4.16 outside the control of Agri S.A. and subsequently

also your client;

10.3 It is explicitly disputed that our client has no claim against Agri S.A. as stipulated in paragraph 4.16 as well as in paragraph 5.2;

11. Our client's view is that Agri S.A. and your client are jointly and severally responsible for the fact that our client is unable to continue its business activities;
12. Our client has a claim against your client and/or Agri S.A. for any wilful and/or negligent action and/or misrepresentation concerning the habitability of the building as well as the non-existence of an occupation certificate;
13. Our client has suffered damages as the result of your client's and Agri S.A.'s unlawful actions amounting to at least R2.5 million as indicated to you by mr Alan Edelstein at the round table meeting.
14. Our client is still in occupation of Suite LG2, lower ground floor of the building and will not vacate it without it being fully compensated for the damages set out above.

Any action you might institute against our client for a threatened eviction will be opposed."

[28] A letter was apparently addressed by Ebersohn Attorneys to Edelstein - Bosman Inc. on the 13th October 2009 but it was not attached by the applicant to the founding papers. On the 16th October 2009 Mr. Andre de Klerk addressed a letter to Ebersohn Attorneys (annexure VPN16 record p.73) which letter reads as follows:

"JP NITESPOT CC / AGRI S.A. / PHOMELLA PROPERTY INVESTMENTS (PTY) LTD

We acknowledge receipt of your letter dated 13 October 2009 which was facsimiled to Edelstein Bosman Inc today.

We confirm our telephonic conversation between your Dr Gerrie Ebersohn and Mrs Snyman today when you informed her that you have in fact received our letter dated 15 October 2009.

Our client disputes that it has repudiated any contract and that your client is entitled to cancel the lease agreement. Your client is not even a party to the lease agreement.

Our client refuses to unlock, open the premises and remove all its items unless it is properly compensated for its loss of occupancy as set out in our letter to you dated 15 October 2009.

Should you decide to bring an urgent application you may serve such process on us. We have authority to accept the service on our client's behalf."

[29] On the 20th October 2009 Ebersohn Attorneys addressed a letter to Mr. Andre de Klerk (annexure VPN17 record p. 74) which letter reads as follows:

"PHOMELLA PROPERTY INVESTMENTS (PTY) LTD //JP NITESPOT CC

- 1. We hereby acknowledge receipt of –**
 - 1.1 your letter dated 15 October 2009, received on 16 October 2009; and**
 - 1.2 your letter dated 16 October 2009, received on 16 October 2009.**
- 2. We do not intend to deal with each and every allegation contained in your letters and our failure to do so should not be construed as an admission thereof. Our client's rights to respond in full, at a later stage, are hereby reserved.**
- 3. We confirm that our letter dated 13 October 2009, by means of which our client cancelled the lease agreement between it and your client, was faxed to Edelstein Bosman Attorneys on 13 October 2009 and not 16 October 2009 as indicated in your letter dated 16 October 2009.**
- 4. As such the lease agreement has already been cancelled.**
- 5. In the event that the High Court finds that our client's cancellation of the lease agreement was defective for whatever reason, which we contend will not happen, our client hereby again cancels the lease agreement on the basis that your client disputes and/or denies that a lease agreement existed/exists between our client and your client, which constitutes repudiation of the said lease agreement and which repudiation our client hereby accepts.**
- 6. The eviction application is being drafted and will shortly be served on your client.**
- 7. Please take note that we do not intend to litigate by means of correspondence and hence we do intend to debate the above."**

[30] The founding affidavit was deposed to on the 10th November 2009 and the notice of motion was signed on the 16th November 2009, was issued by the registrar on the 3rd December 2009 and served on the 3rd December 2009 by affixing it to

the front door of the leased premises and served on the 4th December 2009 on Mr. Andre de Klerk, the respondent's attorney. The notice of intention to oppose was served on the 10th December 2009. On the 6th January 2010 a notice of set down on the opposed roll for the 10th August 2010, was served by Ebersohn Attorneys.

[31] The answering affidavit was served on the 3rd February 2010 and a replying affidavit was served on the 17th February 2010.

[32] The applicants in the founding papers relied on two alleged "cancellations" of the lease agreement the first being an alleged repudiation contained in the letter of Edelstein - Bosman Inc. dated the 5th October 2009 (annexure VPN13 quoted in [25] *supra*) which repudiation was allegedly accepted by the applicants and the "acceptance" was conveyed in the letter by Ebersohn Attorneys (annexure VPN14 quoted in [26]) and the second alleged "cancellation" was based on the sentence which reads as follows in annexure VPN16 which was quoted in extenso in [28] *supra*:

"Your client is not even a party to the lease agreement."

[33] The respondent addressed its inability to comply with the applicant's demand that all items be removed from the leased premises in paragraph 21 of the answering affidavit which reads as follows:

"21. AD PARAGRAPH 25:

21.1 The receipt of Annexure "VPN12" is acknowledged.

21.2 As stated already above, the respondent was unable to remove all items from the leased premises especially the fixed built-in fixtures. The only movable items left behind are the tables and chairs that were moved to one side out of the way and two large cold drink fridges. These items can be moved within the premises to allow for the renovations.

21.3 The applicant was grossly unreasonable to demand the removal of the fixed fixtures for the reasons as previously stated."

[34] The applicant in the replying affidavit did not respond to paragraph 21.1 of the answering affidavit and with regard to paragraphs 21.2 and 21.3 stated the following:

"AD PARAGRAPH 21.2 OF THE OPPOSING AFFIDAVIT

- 72. I deny the allegations that the respondent was unable to remove all items from the premises.
- 73. I admit that tables and chairs were left in the premises by the respondent and that these items are still in the premises.
- 74. Legal argument will be addressed to the Honourable Court in due course that the lease agreement clearly contemplated that the respondent had to remove all its movable property and had to unlock the premises in order to comply with its contractual obligations, namely to give vacant possession.

AD PARAGRAPH 213 OF THE OPPOSING AFFIDAVIT

- 75. The applicant's letter of demand dated 2 October 2009 clearly contemplated that the respondent had to remove all items that could be removed from the premises.
- 76. The content of this paragraph is therefore denied and legal argument will be addressed to the Honourable Court in due course."

[35] The respondent also addressed the problems it had in paragraph 34 of the answering affidavit as follows:

"34. AD PARAGRAPH 39:

- 34.1 It is denied that the provisions of the National Building Regulations and Building Standards Act entitles or obliges the applicant to seek eviction from the premises, to the extent that even built-in fixtures had to be removed.
- 34.2 It is submitted that all that was required, was that the respondent ceased to occupy the premises by no longer conducting the business of a restaurant/night club from the premises. This has been complied with, since the respondent stopped trading before the 30th of September 2009.
- 34.3 It is evident that the applicant wanted to remove the respondent from the building at all cost in order to eventually achieve a cancellation of the lease. When the respondent chose not to cancel the lease as a result of the extreme inconvenience caused by the applicant's decision to effect "extensive renovations and refurbishment", the

applicant hastened to cancel the lease itself, without a valid reason."

[36] The applicant in the replying affidavit did not respond to paragraph 34.1 of the answering affidavit and with regard to paragraphs 34.2 and 34.3 stated the following:

"AD PARAGRAPH 34.2 OF THE OPPOSING AFFIDAVIT

- 88. with regard to the allegations that the respondent ceased trading from the premises before 30 September 2009, I refer the Honourable Court to what is stated above.**
- 89. The remainder of this paragraph is denied, and legal argument will be addressed to the Honourable Court in due course."**

[37] The applicant also attached to the replying affidavit, as annexure F (record pp.166-169) with 18 pages of photographs (record pp. 170-186) an alleged "Due Diligence SALU building Pretoria" which was allegedly compiled by one Brunner, an employee of the applicant already in 2008 and before the applicant purchased the property from Agri SA on the 4th December 2008 (deed of sale Annexure C record pp. 144-159). Brunner's verifying affidavit was attached as annexure "G" (record pp.187- 188). It was noted that Brunner's qualifications to draft such an expert document were not stated.

[38] Through neglect and/or by design no particulars as to what happened to the tenants in the SALU building on the other 27 floors were provided by the applicant. The applicant also through neglect and/or by design neglected to take this Court into its confidence and informed this Court of the following:

- a) what exactly was to be done to the leased premises by way of renovations and/or whatever which was not already in order as the many inspections by officials of many Departments proved in the past and recent past when the 2009 licences were taken out by the respondent and permits were issued to the respondent;
- b) how, the not stated and kept secret renovations and/or whatever, necessitated that the respondent remove "all items" from the leased premises; and
- c) what extensions and for which period the applicant applied for

from the Municipality in terms of the provisions of section 14(1A) of the National Building Regulations and Building Standards Act, No. 103 of 1997, and for which period with regard to

- i) the leased premises;
- ii) the other premises in the SALU building.

[39] Upon a reading of clause 4.16 of the lease agreement (record p. 39) it is abundantly clear that the applicant could only adopt the stance it took regarding the respondent having to give vacant possession in the event of the building or part thereof being destroyed or became uninhabitable ("onbewoonbaar") "deur enige oorsaak buite beheer van die Verhuurder of Huurder". From the afore-going, especially the Due Diligence report by Brunner even before the applicant purchased the property, the applicant and Agri SA knew that on certain floors of the building repairs were to be made but the building definitely was neither destroyed nor became uninhabitable to "enige oorsaak buite beheer van die Verhuurder of Huurder." It is clear that as the relief in terms of section 14(1A) of Act 103 of 1997 was to be had and which in all probability would have been granted with respect to the leased premises on the application of either the applicant or the respondent, who could also approach the Municipality in terms of the section, in view of the excellent condition the leased premises were. In this regard it must also be pointed out that Mr. Brunner's report (annexure F) did not identify any defects and/or unsatisfactory aspects relating to the leased premises and none of the photographs on the 18 pages depicted anything amiss in the leased premises. It is clear that on the basis the applicant brought the applicant namely the alleged cancellation of the lease the applicant has made out no case against the respondent. It is clear that with regard to the alleged first "cancellation" the applicant was not entitled to cancel the lease as it misread the contents of clause 14.1 of the lease agreement and with regard to the second alleged "cancellation" the applicant wilfully misread the sentence relied upon. It is clear that the contents of the sentence was factually correct namely the applicant was not a signatory to the lease agreement but never did the respondent disputed that the applicant *ex lege* stepped into the shoes of the original lessor when the applicant purchased the premises. The application was pertinently based on the alleged cancellation of the lease and the eviction was asked for on that ground. It must therefore fail and costs must follow the event. The parties will have to address the issue of the occupation certificate and relief with regard to the leased premises in terms of section 14(1A) of Act 103 of 1997 with the Municipality. In terms of the wording of the particular section the respondent can on its own approach the Municipality

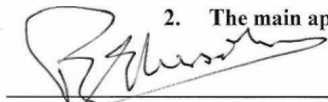
[40] The respondent maintained that the applicant acted most unreasonably merely to attempt to obtain a cancellation of the lease agreement regarding a lucrative business which could then be had for free. That may be so but that is not for this court to decide and another court will have to decide that issue.

[41] For peculiar reasons late filings of documents and non-compliance with court rules were opposed which just escalated the costs and did not contribute to the finalisation thereof and in so far as may be necessary the late filing of documents and non-compliance with the court rules by either of the parties is condoned and each party will have to bear its own costs in connection therewith..

[42] I accordingly make the following order:

"1. The late filing of documents and non-compliance with the court rules by either party is condoned and each party is to pay its own costs with regard thereto.

2. The main application itself is dismissed with costs."



P.Z. EBERSOHN

ACTING JUDGE OF THE HIGH COURT

Applicant's counsel
Applicant's attorneys

Att. G. Ebersohn
Kritzinger Attorneys
Ref. Dr. Ebersohn/GE356
Tel. 011 - 791 1104

Respondent's counsel
Respondent's attorneys

Adv. R. Venter
Andre de Klerk
Ref. A. de Klerk
Tel. 012 - 365 2512