

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

Case number: 4648/2019

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

CORNEL VAN BASTEN

Plaintiff

and

ADRIAAN HENDRIK ODENDAAL

Defendant

CORAM: VANZYL, J

HEARD ON: 28 OCTOBER 2022

DELIVERED ON: 28 APRIL 2023

[1] At the commencement of the trial, both parties' counsel addressed me on what the respective parties' cases would entail. Mr Potgieter, appeared on behalf of the plaintiff and Mr Snellenburg on behalf of the defendant. The first witness on behalf of the plaintiff, who is an expert witness, Mr R Lamprecht, was then called to present his evidence. Between the end of the second day of the trial when Mr Lamprecht was still under cross- examination and the commencement of the third day of the trial, the parties reached an agreement in terms whereof they requested that I make an order in terms of Rule 33(4) that the dispute between the parties with

regard to the validity of the alleged demand that preceded the alleged cancellation of the agreement by the plaintiff, be determined separately before further evidence was to be presented. I conceded to the said request.

Background:

[2] The plaintiff and the defendant are sister and brother.

[3] The plaintiff is the owner of the farms commonly known as "Die Kranse" and "De Rotsen" in the district of Vrede, Free State Province ("the farms").

[4] The farms were inherited by the plaintiff from her late father, Hendrik Johannes Odendaal ("the testator"), in terms of his Will. In terms of the said Will all four children of the testator inherited different farms from him.

[5] During or about 2016 the testator and the defendant entered into a written lease agreement in terms whereof the defendant leased the farms for a term of five years from 1 February 2016 to 30 January 2021, with the option to extend the term of lease for a further 4 years and 11 months ("the lease agreement").

[6] According to the plaintiff the defendant failed to comply with certain provisions the lease agreement, which failure constituted a material breach of the lease agreement.

[7] In terms of clause 7.1 of the lease agreement the lessor is entitled to cancel the agreement if seven days' notice is given to the lessee to comply with the provisions of the lease agreement.

[8] Should the lessee not rectify the breach as stated in clause 7.1 of the lease agreement, the lessor would be entitled to cancel the lease agreement.

[9] According to the plaintiff, despite demand having been made to the defendant to comply with the relevant provisions of the lease agreement, which the plaintiff alleges he was in breach of, the defendant failed to do so.

[10] It is the plaintiff's case that she was consequently entitled to cancel the lease agreement which, according to the plaintiff, was done on 30 July 2019.

[11] It is the plaintiff's case that the defendant's right to occupy the farms.terminated on 30 August 2019, but despite demand the defendant has failed to vacate the farms.

[12] The plaintiff is consequently seeking an order confirming the cancellation of the lease agreement between the parties, an order for ejectment of the defendant from the farms, as well as his property and livestock, and costs of suit.

[13] In his amended plea the defendant denied various averments made in the particulars of claim, the details of which denials are not all relevant for present purposes. I will hereunder deal with those ones which are relevant for purposes of this judgment.

[14] As a result of what the defendant pleaded in his amended plea to the particulars of claim, he is requesting that the plaintiff's claims be dismissed with costs.

Separate adjudication of the dispute re proper demand:

[15] On 28 August 2022, which was the third day of the trial, I made the following order by agreement between the parties:

"In terms of Rule 33(4), the determination of the issue whether proper demand was made in terms of the lease agreement is separated from the other issues in the trial and is to be determined before further evidence is presented."

I will henceforth refer to the aforesaid dispute as "the separated issue".

[16] The parties agreed that certain particular documents, which form part of the discovered documents, and the contents thereof, be admitted by the parties and be

placed before me in a separate bundle ("the separate bundle") for purposes of the adjudication of the separated issue.

The particulars of claim:

[17] The averments pleaded in the particulars of claim which are relevant to the separate issue, are the following:

"7.

7.1 In terms of clause 7.1 of Annexure 'B' the plaintiff is entitled to cancel the agreement if seven (7) days' notice is given to the lessee by the lessor to comply with the provisions of the lease agreement marked Annexure "B".

7.2 The lessor will be entitled to terminate the lease agreement and to take occupation of the farms without prejudice to any claim the lessor may have against the lessee for *inter alia* the recovery of any damages suffered etc. if the defendant did not rectify the breach as stated in clause 7.1 of the lease agreement, ...

8.

The defendant failed to comply with clause 9.1.2.1 to 9.1.2.3 of Annexure "B,,.

9.

9.1 On or about the 30th of November 2017 the plaintiff made demand to the Executor for the defendant to comply with clause 9.1.2.1 to 9.1.2.3 of the lease agreement, marked Annexure 'B' (*sic*) attached hereto.

9.2 Despite the demand made to the Executor to ensure that the defendant comply with the provisions of the lease agreement with specific reference to paragraph 9.1.2.1 to 9.1.2.3, the defendant took no steps to keep the property free of invader plants ... [and] to prevent further erosion by taking reasonable steps to the

satisfaction of the lessor as per the provisions of clause 9.1.2.3 of the lease agreement ...

10.

The defendant further contravened ..., which is a violation of clause 10.8 of the lease agreement. ..

11.

The violation of clause 9.1.2.1, 9.1.2.2 and 9.1.2.3 of the lease agreement ... is a material breach of the terms of the lease agreement as per clause 7.2 of the lease agreement

12.

12.1 On the 30th of July 2019 the plaintiff was entitled to cancel the aforesaid agreement due to the defendant's failure and/or refusal to adhere to the terms of the agreement as referred to supra.

12.2 The plaintiff terminated the lease agreement attached hereto [by means of] the letter for cancellation of the lease agreement dated the 30th of July 2019, marked Annexure "D", which was served on the defendant at his *domicilium citandi et executandi* by the sheriff on the 15th of August 2019. A copy of the sheriff's return is attached hereto marked Annexure "E".

13.

....

The defendant's right to occupy the property therefore terminated on the 30th of August 2019, but despite demand the defendant has failed to vacate the property."

The amended plea:

[18] The defendant pleaded as follows to the particulars of claim in his amended plea:

"8.

AD PARAGRAPH 7.1 - 7.2:

8.1 The content of these paragraphs is admitted in as far as it corresponds with the express, alternatively tacit, alternatively tacit (*sic*) terms of the lease agreement.

8.2 Defendant specifically pleads that no notice to comply with the lease agreement was issued in terms of the lease agreement.

8.3 The defendant specifically pleads that no notice of alleged breach was issued in terms of the lease agreement.

9.

AD PARAGRAPH 8:

9.1 The defendant bears no knowledge of the allegations contained in this paragraph, accordingly denies same and puts plaintiff to the proof thereof.

9.2 The defendant specifically pleads that

9.3 ...

10.

AD PARAGRAPH 9.1:

10.1 The defendant bears no knowledge of the allegations contained herein, accordingly denies same and puts plaintiff to the proof thereof. The defendant specifically pleads that no written demand was made to the defendant.

10.2 The defendant specifically pleads that the Executor was at all material times satisfied that the provisions of the lease agreement has been complied with.

11.

AD PARAGRAPH 9.2:

11.1 The content of this paragraph is denied.

11.2 The defendant specifically pleads that:

11.2.1 The plaintiff made no demand to the defendant.

11.2.2 In the circumstances, defendant bears no knowledge of the alleged breach.

11.2.3

11.2.4

11.2.5 The defendant complied with the provisions of clause 9.1.2.1 to 9.1.2.3 of the lease agreement.

11.2.6 The defendant complied with the express, alternatively implied, alternatively tacit terms of the lease agreement.

12.

AD PARAGRAPH 10:

..,

The content of this paragraph is denied and the plaintiff is put to the proof thereof.

13.

14.

AD PARAGRAPH 12.1 AND 12.2:

14.1 The content of these paragraphs is denied for the reasons already pleaded.

14.2 The alleged termination of the lease agreement was not lawful, was without any basis and has no force and effect.

15.

AD PARAGRAPH 13:

15.1 The content of this paragraph is denied for the reasons already pleaded.

15.2 The defendant specifically pleads that it lawfully occupies the leased premises and, as such, that the defendant is under no obligation to vacate the leased premises."

The lease agreement:

[19] The following clauses of the lease agreement are relevant to the adjudication of the separated issue:

"6. **DOMICILIUM EN KENNISGEWINGS:**

6.1 Die verhuurder kies as domicilium citandi et executandi vir alle doeleindes hierkragtens te die plaas Brakleegte, distrik Vrede, Provinsie Vrystaat.

6.2 Die huurder kies as domicilium citandi et executandi R[...] [...], Vrede, 9[...].

6.3 Enige kennisgewing wat ingevolge hierdie ooreenkoms gegee moet word, moet deur enigeen van die partye aan die domicilium citandi et executandi van die ander party gerig word of aan sodanige ander adres as wat enigeen van die partye deur skriftelike kennisgewing vir sodanige doeleindes aan die ander mag gee.

6.4 Alie kennisgewings moet deur die een party aan die ander party per hand gestuur word.

6.5 Enigeen van die partye is daarop geregtig_ om deur skriftelike kennisgewing aan die ander, van tyd tot tyd, sy domicilium citandi et executandi en/of sy adres vir kennisgewing te verander met dienverstande dat dit slegs 'n fisiese adres mag wees.

6.6

7. **REPUDIERING:**

7.1 Indien die huurder versuim om die huurgeld of 'n gedeelte daarvan op die opeisbaarheidsdatum daarvan te betaal of 'n ander voorwaarde van hierdie huurooreenkoms breek en hy sewe dae lank in gebreke bly nadat hy 'n kennisgewing van die verhuurder ontvang het wat betaling van die huurgeld of herstel van die breuk na gelang die geval, vereis ..., het die verhuurder die reg om hierdie ooreenkoms onverwyld te kanselleer en om die verhuurde eiendom weer te betree en daarvan besit te neem sender benadeling van enige eis wat die verhuurder teen die huurder vir huurgeld reeds verskuldig, vir skadevergoeding, vir kontrakbreuk of andersins mag he

ALGEMEEN:

16.1 ...

16.2 Hierdie ooreenkoms kanselleer en vervang alle kontrakte aangegaan tussen die partye voor datum hiervan en geen wysigings of aanvullings hiervan sal van enige krag hqegenaamd wees, tensy dit op skrif gestel en deur die partye onderteken is.

AFSTERWE:

17. Dit word hiermee ooreengekom dat, indien die verhuurder te sterwe mag kom gedurende die duur van hierdie huurkontrak of enige hernuwing daarvan, hierdie huurkontrak desnieteenstaande sal voortgaan en bindend sal wees op die erfgename van die verhuurder.

Correspondence as contained in the separate bundle and submissions on behalf of the respective parties:

[20] It is common cause between the parties that one of the other daughters of the testator, Ms Carin van Aswegen, was the appointed executrix in the estate of the testator. It is also common cause between the parties that for purposes of the present matter, the executrix "*stood in the shoes of the lessor*" until such time as the farms were registered in the name of the plaintiff during or about May 2019.

[21] The plaintiff is relying on two letters/e-mails which, according to the plaintiff, read together, constituted the letter of demand. The first is a letter, dated 20 November 2017, addressed by the plaintiffs attorneys (of first instance) to the executrix. The said letter *inter alia* stated the following:

"BOEDEL WYLE: HENDRIK JOHANNES ODENDAAL

ONS KLIENT: CORNEL VAN BASTEN

Ons plaas egter op rekord dat ons klient steeds nie die geldigheid van die ooreenkoms erken nie, maar in terme van die kontrak, plaas ons die volgende op rekord en versoek dat u onmiddelik in terme van die bepaling van die huurkontrak, sal optree.

Dit blyk uit die deskundige se verslag hiertoe aangeheg dat daar sekere gedeeltes van die plaas is wat deur Mnr Odendaal gehuur word, welke as gevolg van sy optrede totaal en al oorbeweï is. Hierdie is 'n bepaling in die kontrak wat deur Mnr Odendaal verbreek word en verwys ons spesifiek na die klousules van die kontrak hierbo vermeld.

U sal ook merk dat ten opsigte van die aanbevelings van die deskundige, daar onmiddelik voortgegaan moet word om sekere prosesse in plek te kry, soos die oprigting van nuwe heinings, alternatiewelik die verbetering van die heinings wat onderskeie plase in kleiner weikampe verdeel, om oorbeweïding te voorkom.

U sal ook merk dat daar in die verslag vermeld word dat daar verskeie indringer plante op die plase voorkom, welke onmiddelik verwyder en/of behandel moet word, soos per die verslag van die deskundige hiertoe aangeheg.

Daar moet ook dringend sogenaamde 'barriers', soos per die verslag van die deskundige hiertoe aangeheg, opgerig word om die gronderosie wat reeds op die plaas duidelik sigbaar is, te voorkom en te beperk.

Ons plaas op rekord dat y Mnr Odendaal onmiddelik in terme van die bepalinge van die kontrak, aangesien y op hierdie stadium in die plek van die verhuurder staan, sal aanmaan om met die nodige herstelwerk, voorkomingswerk en verwydering van enige ongewenste plante hierin moet voortgaan, binne die sewe dae tydperk soos in die kontrak na verwys, spesifiek in terme van klousule 7.1 daarvan.

Ons plaas verder op rekord dat u 'n afskrif van hierdie skrywe sowel as die verslag aan Mnr Odendaal sal oorhandig en versoek dat u aan ons die nodige bewys sal voorsien dat die inhoud van hierdie skrywe, sowel as die verslag, ten opsigte van die werk wat op die eiendom gedoen moet word, persoonlik aan horn oorhandig is.

Ons plaas verder op rekord dat dit ons instruksies is dat indien Mnr Odendaal nie binne die sewe dae na datum van ontvangs van voormelde skrywe en kennisgewing begin .om die nodige werk te doen ten opsigte van die bepalinge van die kontrak wat deur Mnr Odendaal hierin nagekom moet word nie, ons instruksies hou om aan u opdrag te gee om onmiddelik voort te gaan om die huurkontrak Met Mnr Odendaal hierin te kanselleer en ook stappe te neem, indien hy-sou weier om die eiendom hierin te verlaat, 'n aansoek te bring om Mnr Odendaal en sy vee vanaf die plaas af te sit." (My emphasis)

[22] The second letter/e-mail which the plaintiff is relying on, is a subsequent e-mail sent from the executrix to the defendant, which reads as follows:

"Hi Broer!

Ek het jou probeer skakel maar kon jou nie op een van jou nommers in die hande kry nie.

Sien asseblief dringend aangehegte skrywe van NiemannGrobbelaar, wat Cornel verteenwoordig en sien asseblief hulle aangehegte skrywes en verslag.

Jou dringende terugvoer sal waardeer word.

Dankie en groete daar!

Carin"

[23] Mr Potgieter submitted that the executrix was requested to demand compliance with the provisions of the lease agreement from the defendant, which the executrix did by means of the e-mail addressed to the defendant, dated 20 November 2017, read together with the annexure thereto.

[24] Mr Potgieter contended that it is evident that the defendant had knowledge of the letter of demand and that he further knew in which respects he had been demanded to comply with the provisions of the lease agreement. In support of his contention Mr Potgieter relied on the following:

1. The contents of an e-mail which was sent from the defendant to the executrix on 21 November 2017, which reads as follows:

"Hi Carin

Ek het darem 7 dae maar skenk dringende aandag natuurlik hieraan.

Ek het reeds die Westelike kant wat die vlei insluit toegespan teen 'n koste van nagenoeg R35 000.00, so het m.a.w. reeds begin.

Ek gaan self objektiewe regsadvies inwin ten aansien van die bewering dat ek die grand oorbeweis aangesien ek juis reeds die grand geweldig verbeter het deur rotasie tussen Middenin se kampe en De Rotse.

Die advies wat ek wil kry voordat ek enige vorm van onderneming maak is die volgende:

(a) Die verslag bepaal glad nie watter skades aangerig is vir die sowat 12 jaar voorafgaande my huurooreenkoms nie, welke skade direk aan Camel toegeskryf kan word as begunstigde van die plaas vir daardie tydperk.

(b) Die vraag of al hierdie versoeke t.a.v. maak van kontoere, omheinings ens. op verbeterings en of onderhoud en voorkoming neerkom.

(c)

Wat ek wel kan bevestig is dat ek definitief ook die plaas wil opbou en keer dat erosie ens. plaasvind. Om die plaas in terme van die verslag in kampe op te verdeel sal egter nie gebeur nie, aangesien ek nie die kapasiteit daarvoor het nie.

Ek sal dus meet self uitvind tot waar my verantwoordelikheid strek tot op hede en daarvolgens handel ... "

2. An e-mail from the executrix sent to the plaintiff's attorney, dated 27 November 2017, and which e-mail was also copied to the plaintiff, paragraph 1 of which e-mail states that "[D]ie bewys dat u skrywe van 20 November 2017, met die bygaande verslag, aan Mnr Odendaal oorhandig is, is aangeheg". A document was attached to the e-mail, which document reflects the signature of the defendant, with the handwritten date "27/11/2017", which signature was appended beneath the words "[B]ewestiging dat bogenoemde dokumente ontvang is".

3. An e-mail from the defendant sent to the executrix, dated 22 March 2018, in which the defendant, inter alia, stated the following:

"Die aanvanklike aanmaning van Niemann Grobbelaar ontken aan die een kant die bestaan van die huurooreenkoms en dwing aan die ander kant die inhoud daarvan c1f " (My emphasis)

[25] Mr Potgieter referred to the purpose of a letter of demand as recorded in **Journal for Juridical Science**, Vol. 30 No. 1, 2005, M. Paleker, **Letters of Demand (*Interpellatio extrajudicialis*)**:

Substance and Form:

"The primary purpose of a demand is to inform the defendant that the plaintiff has a cause of action against him or her, and to persuade him or her to settle the claim, or to remove the cause of complaint within a stated time so as to avert formal proceedings from being instituted."

[26] During his argument Mr Potgieter agreed, correctly so, with the principle that a party suing on a contract cannot cancel the contract for non-performance of its obligations in terms of the contract, unless the guilty party is in mora. In this regard he referred to the judgment in **O-Line (Pty) Ltd v Datacentrix (Pty) Ltd** (56269/2016) [2021] ZAGPPHC 16 (22 January 2021), where the following was stated at para (90):

"[90] In the Full Bench decision in GPC Development CC [GPC Development CC & other v Uys [2017] 4 All SA 14 (WCC) para 27 - 29], the court laid down the following legal principle regarding cancellation of an agreement:

'[27] Counsel were in agreement regarding the applicable legal principles. In his judgment Nuku J relied on a passage in the 6th edition of Christie. The following passage in the 7th edition is to the same effect:

'If the contract lays down a procedure for cancellation, that procedure must be followed or a purported cancellation will be ineffective.'

In the later edition the author refers to Bekker, Hand and Hano Trading in support of the approach.

[28] In Bekker Yekiso J, relying on the decision in Godbold, held as follows:

'[17] The purpose of a_ notice requiring a purchaser to remedy a default is to inform the recipient of that notice of what is required of him or her in order to avoid the consequences of default. It should be couched in such terms as to leave him or her in no doubt as to what is required, or otherwise the notice will not be such as is contemplated in the contract.'

[29] In Godbold the learned judge cautioned as follows:

'The question for decision is always whether the conditions on which the right to cancel was dependent have been fulfilled (Rautenbach v Venner 1928 TPD 26 at 31). The purpose of such a notice is to inform the recipient of what is required to do in order to avoid the consequences of default, and if it is in such terms as to leave him in doubt as to the details of what he is required to do, then it may be that it will be held that the notice is not one such as is contemplated by the contract (Rautenbach's case, supra at p 31)''

[27] Mr Potgieter also relied on the judgment in **Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd** 2001 (2) SA 284 (SCA). The said judgment dealt with repudiation, but Mr Potgieter submitted that the underlying principles are analogue to the present matter and that fruitful guidance can consequently be taken from it. He pointed out that in the flynote of the matter, the following is noted:

"Actual communication of decision to cancel, once made and manifested, may be conveyed to guilty party by a third party."

Mr Potgieter further relied on extracts from the said judgment which dealt with the test for repudiation and the fact that it is an objective test and not a subjective test. I will, however, later return to this judgment.

[28] Mr Potgieter submitted that the courts nowadays lean more in favour of what is fair and reasonable between parties, as opposed to a strict formalistic approach..

Therefore, so he submitted, with regard to a letter of demand the real question is not how the letter of demand was sent, but whether it had come to the knowledge of the party who is to be placed in mora. In this regard Mr Potgieter relied on the judgment in **Beadica 231 CC and Others v Trustees, Oregon Trust and Others** 2020 (5) SA 247 (CC) at para [35], where the court stated as follows with reference to the majority judgment in **Barkhuizen v Naipier** 2007 (5) SA 323 (CC):

"[35] The majority judgment further explained that public policy, as informed by the Constitution, imports 'notions of fairness, justice and reasonableness', takes account of the need to do 'simple justice between individuals' and is informed by the concept of ubuntu. The majority recognised that public policy, in general, requires parties to honour contractual obligations that have been freely and voluntarily undertaken. This is because the principle of *pacta sunt servanda* is a 'profoundly moral principle, on which the coherence of any society relies'."

[29] Mr Potgieter submitted that one should be mindful of the fact that the executrix is not trained in the law, but a layperson in this regard. He submitted that the executrix intended to and in fact did send a letter of demand to the defendant. She did everything to ensure that it comes to his attention, by having sent it to him via e-mail and thereafter handing it to him personally.

[30] He submitted that from the totality of the facts it is evident that the defendant was fully aware that he had been demanded to comply with the relevant provisions of the lease agreement.

[31] Mr Potgieter consequently submitted that the provisions of clause 7.1 of the lease agreement had properly been complied with and therefore the e-mail of 20 November 2017, read with the annexure thereto, constituted a proper and valid demand in terms of the lease agreement.

[32] Mr Snellenburg, in his argument on behalf of the defendant, referred to the wording of paragraph 7.1 of the lease agreement which reads "*nadat hy 'n kennisgewing van die verhuurder ontvang het*" and pointed out that in paragraph 7.1 of the particulars of claim, the plaintiff specifically places reliance on this clause.

[33] Mr Snellenburg also referred to paragraph 6.2 of the lease agreement, which I have already quoted above, in terms of which the defendant's *chosen domicilium citandi et executandi* is recorded to be R[...] [...], Vrede, paragraph 6.3 in terms of which "*enige kennisgewing wat ingevolge hierdie ooreenkoms gegee moet word, moet deur enigeen van die partye aan die domicilium citandi et executandi van die ander party gerig word*" and paragraph 6.4 in terms whereof "*alle kennisgewings moet deur die een party aan die ander party per hand gestuur word*".

[34] Mr Snellenburg also pointed out that clause 16.2 of the lease agreement contains a non-variation clause in terms whereof "*geen wysigings of aanvullings hiervan sal van enige krag hoegenaamd wees, tensy dit op skrif gestel en deur die partye onderteken is*".

[35] Mr Snellenburg also dealt with the contents of some of the letters in the separate bundle, specifically also the letter and e-mail which the plaintiff is relying on for purposes of the demand.

[36] In his argument Mr Snellenburg also submitted that the Constitutional Court judgment of **Beadica 231 CC** is not applicable to the present matter. He also dealt with the **Datacolor**-judgment and submitted that it is distinguishable from the matter in *casu*, firstly because the said judgment dealt with repudiation, which is governed by different principles than those applicable to a letter of demand, and secondly, there was no specific provision in that contract which had to be complied with for purposes of repudiation, like there is for purposes of proper demand in the present matter.

[37] In his conclusion Mr Snellenburg contended that no proper demand in terms of the lease agreement had been made.

Consideration of the arguments:

[38] The plaintiff is seeking confirmation of the cancellation of the lease agreement.

[39] Paragraph 7.1 of the lease agreement constitutes a *lex commissoria*. **In North Vaal Mineral Co. Ltd v Lovasz** 1961 (3) SA 604 (T) at 606 C - D the Court stated as follows with regard to a *lex commissoria*:

"Clause 9 is a *lex commissoria* (in the .wide sense of a stipulation conferring a right to cancel upon a breach of the contract to which it is appended, whether it is a contract of sale or any other contract). It confers a right (viz. to cancel) upon the fulfilment of a condition. The investigation whether the right to cancel came into existence is purely an investigation whether the condition, as emerging from the language of the contract (a question of interpretation), has in fact been fulfilled (*Rautenbach v Venner*, 1928 T.P.D. 26)."

[41] Also in the **O'Line**-judgment, to which Mr Potgieter referred, the following principle was reiterated and confirmed at para [90] of the judgment:

"In Hano Trading CC [*Hano Trading CC v JR 209 Investments (Pty) Ltd & another* [2013] 1 All SA 142 (SCA) para 33], it was stated that the peremptory provisions of a cancellation clause must be strictly complied with."

[42] The terms of the lease agreement are not in dispute. The parties are also *ad idem* that at the date of the alleged letter of demand the farms had not yet been registered in the plaintiff's name and the executrix stood in the shoes of the lessor. The estate of the late Mr Odendaal, with inclusion of the farms, vested in the executrix in her capacity as such. The plaintiff, at the time, had no locus standi in relation 'to the farms.

[43] It is evident from the letter by the plaintiff's attorney addressed to the executrix, dated 20 November 2017, that the said attorney requested, on behalf of the plaintiff, that the executrix should, on behalf of the lessor, demand compliance with the relevant provisions of the lease agreement from the defendant in terms of the lease agreement:

"Ons plaas op rekord dat .u Mnr .Odendaal onmiddelik in terme van die bepalinge van die kontrak, .aange_sien u op hierdie stadium in die plek van die verhuurder staan, sal aanmaan ... spesifiek in terme van klousule 7.1 daarvan."

[44] Instead of complying with the request, the executrix merely forwarded the aforesaid letter by means of her e-mail, dated 20 November 2017, to the defendant. The executrix, herself, did not demand compliance with the provisions of the lease agreement from the defendant.

[45] One must also be mindful of the fact that a letter of demand has to be unambiguous. In the letter of 20 November 2017, the plaintiff's attorney stated that the plaintiff does not admit the validity of the lease agreement, but, at the same time, the executrix was requested "*dat u onmiddelik in terme van die bepalinge van die huurkontrak sal optree*".

[46] As correctly submitted by Mr Snellenburg, it is evident from subsequent correspondence that the executrix questioned certain allegations made on behalf of the plaintiff in her attorney's letter of 20 November 2017, being the very allegations upon which she instructed the executrix to demand compliance from the defendant. In an e-mail from the executrix sent to the plaintiff's attorney and which was copied to the plaintiff, dated 27 November 2017, the executrix, *inter alia*, stated as follows:

"Met verwysing na u skrywe van 20 November 2017. en u versoek dat ek onmiddelik in terme van die bepalinge van die betrokke huurkontrak meet optree, neem asseblief kennis van die volgende;

1.

2.

3.

4. As eksekuteur wat in die verhuurder se skoene staan, was ek nie in Februarie 2016, toe die huurkontrak begin het, op hoogte van die toestand van De

Rotze en De Kranse nie. Ek kan nie insien hoe daar tot die slotsom gekom kan word dat sekere gedeeltes van die plaas as gevolg van 'Mnr Odendaal se optrede' totaal en al oorbewe is nie. As u asseblief kan uitbrei oor wat hiermee bedoel word?

5. De Rotze en De Kranse is 'n moeilik begaanbare plaas wat direk aan Mnr Odendaal grens. Ek, as eksekuteur, sal baie moeilik toesig oor die plaas kan hou en is dit op hierdie stadium tot voordeel van u klient dat Mnr Odendaal wel na die plaas kyk.

6. Mnr Odendaal het aan my bevestig:

6.1 Dat hy definitief die plaas wil opbou; wil keer dat erosie ens. plaasvind en dat Mnr Rickus Lamprecht se verslag horn goeie leiding verskaf;

6.2 Dat geen beeste op di oomblik op die grond loop nie;

6.3 Dat hy reeds 'n kwotasie vir mandjies (*wire mesh stone barriers*) aangevra het om die gronderosie te beveg;

6.4 Dat hy die Westelike kant, wat die vlei insluit, toegespan het teen 'n koste van nagenoeg R35 000.00;

6.5 Dat hy onafhanklike advies inwin oor:

6.5.1 Die bewering van oorbeweiding;

6.5.2 Hoe indringer plante bestry kan word;

6.5.3 Tot watter mate hy aanspreeklik is aangesien hy slegs vanaf Februarie 2016 huur... Sy terugvoering in hierdie verband sal aan u gekommunikeer word.

Al bogenoemde punte inaggenome voel ek dat u klient se belang, tydens die bereddering van die boedel, nie nadelig beïnvloed word deur die huurkontrak nie.
Aangesien ek in my pa, die oorledene en verhuurder, se skoene staan, wil ek ook sy

wense eerbiedig tot en met die afhandeling van die boedel. Uit die oogpunt van my pa, het hy met inagneming van die aangehegte brief van Mnr Derick van Basten, u klient se versoek om 'n skikking te bewerkstellig en hul emmigrasie na Nieu-Seeland, nie voorsien dat die huurkontrak vir u klient 'n probleem sou wees nie." **(My emphasis)**

[47] The executrix, by means of the last mentioned e-mail, therefore indicated her stance: that in her view, there were no proper grounds upon which a letter of demand could be addressed to the defendant, that she was not willing to address such a letter of demand to the defendant and that she was not willing to cancel the lease agreement.

[48] In a subsequent e-mail which was sent from the executrix to the plaintiffs attorney, dated 10 April 2018, the executrix stated, *inter alia*, as follows in the last paragraph of the e-mail:

"Ek is in afwagting op 'n onafhanklike regsopinie aangaande die feit dat 'n party wat nog nie eienaarskap van 'n betrokke eiendom geneem het nie, die geldigheid van die huurooreenkoms op hierdie eiendom betwis maar betrokke wil wees by die afdwing van die inhoud van die huurooreenkoms, nie die gepaardgaande onsekertied wat dit vir die huurder inhou met die aangaan van kostes op die eiendom."

[49] It was only in a later letter, dated 6 August 2018, addressed by the plaintiffs attorney to the executrix that the validity of the lease agreement was eventually admitted. Importantly, it was also stated in the letter that there were no other provisions with regard to the lease of the farms except those explicitly set out in the lease agreement:

"Ons plaas op rekord dat ons nou instruksies vanaf ons klient ontvang het om die volgende op rekord te plaas:

1. Dat ons klient die geldigheid van die huurkontrak erken, soos aangeheg te ons skrywe aan u gedateer die 11de Augustus 2017, en welke u op terselfde datum

bevestig het dat dit die enigste en geldige huurkontrak is wat gesluit is tussen Mnr A.H. Odendaal en die oorledene;

2. Dat ons klient die inhoud, soos blyk uit die huurkontrak hierinbo na verwys, die enigste termes is waarop daar tussen Mnr A.H. Odendaal en die oorledene op ooreengekom is (*sic*); en

3. Dat daar geen bepalings ten opsigte van die huur van die eiendom is behalwe die, soks uitdruklik uiteengesit op die huurkontrak, soks aan u voorsien gedateer die 11de Augustus 2017 nie."

[50] In a later e-mail from the executrix addressed to the plaintiff's attorney and which e-mail was also copied to the plaintiff, dated 18 September 2018, it is evident that even then it was still the stance of the executrix that there was no reason why the defendant was to be placed on terms by means of a letter of demand:

"Die nakoming van die betrokke huurkontrak, word met verwysing na die inhoud van my skrywe van 27 November 2017, toegepas. Ek het die plaas op 6 Mei 2018 besoek en kan bevestig dat dit vir die somermaande gerus het. Sien aangehegte foto wat op die datum geneem is. Dit was vir die oorledene, ons pa, belangrik dat die plaas nie oorbeweis moes word nie en redelike sorg geneem moes word om die plaas te bewaar en dit is in dieselfde gesindheid wat ek die huurkontrak toepas en is nie bereid om dit op enige ander manier toe te pas nie. Indien u klient ontverde is met hierdie benadering, bevestig asseblief of u klient die kontrak direk wil afdwing met die nodige gesag, beheer en aanspreeklikheid en ek sal dit met die Meester opneem ..."

[51] With regard to the **Datacolor**-judgment, Mr Potgieter acknowledged that the matter deals with repudiation, but, as previously indicated, he submitted that the underlying principles are analogue to the present matter. The Court dealt at para [28] of the judgment with the manner in which an _innocent party to a breach of contract is to exercise his election to cancel the agreement:

"[28] The innocent party to a breach of contract justifying cancellation exercises his right to cancel if (a) by words or conduct manifesting a clear election to do so (b) which is communicated to the guilty party. Except where the contract itself otherwise provides, no formalities are prescribed for either requirement. **(My emphasis)**

[52] I agree with Mr Snellenburg's contention that the last mentioned matter is distinguishable from the present matter, since the lease agreement in *casu* specifically provides in paragraph 7.1 thereof as to when, how and by whom the letter of demand is to be given to the lessee. The matter in *casu*, consequently falls within the exception specifically stated by the court in the **Datacolor**- judgment where it is stated in the said para [28] "*except where the contract itself provides otherwise*".

[53] In his oral argument Mr Snellenburg, *inter alia*, relied on the judgment in **Bekker v Schmidt Bou Ontwikkelings CC and Others** 2007 (1) SA 600 (C), at paras [16] and [17], both for purposes of the requirements of a valid letter of demand and for the principle that in the absence of a valid letter of demand, no valid cancellation of an agreement can follow:

"[16] ... The seven days' notice required to remedy the breach was not complied with. At no stage was payment demanded from the applicant other than a demand to give guarantees. More so, none of the notices addressed to the applicant requiring her to perform were addressed to her *domicilium*, as provided for in the deed of sale. Accordingly, I cannot under these circumstances find that the agreement concluded between the applicant and the first respondent was validly cancelled.

[17] The purpose of a notice requiring a purchaser to remedy a default is to inform the recipient of that notice of what is required of him or her in order to avoid the consequences of default. It should be couched in such terms as to leave him or her in no doubt as to what is required, or otherwise the notice will not be such as is contemplated in the contract. (See *Godbold v Tomson* 1970 (1) SA 61 (D) at 65C "'D.) In my view the first respondent clearly failed strictly to comply with the provisions of the cancellation clause so that under no circumstances can it be said that the

deed of sale concluded between the applicant and the first respondent was validly cancelled, as the first respondent seeks to contend. (My emphasis)

[54] As indicated earlier, Mr Potgieter also placed reliance on the fact that the service of notices in terms of section 129 of the National Credit Act are in certain divisions accepted as proper notice even in circumstances where it had been digitally sent to a creditor. However, I agree with Mr Snellenburg's contention that the service of a section 129-notice is governed by the National Credit Act, read with applicable case law which have pronounced on the said issue, but which are not *mutatis mutandis* applicable to the law of contract where the parties freely and voluntarily agreed on the formalities to be applicable to a letter of demand in the particular circumstances.

[55] With regard to Mr Potgieter's reliance on the judgment of the Constitutional Court in **Beadica 231 CC**, I am in agreement with the submission by Mr Snellenburg that the said judgment is not applicable to the facts and circumstances of the present matter. In the said judgment the court dealt with the judgment in **Barkhuizen v Naipier**, supra, and stated as follows at paras [34] to [35]:

"[34] On appeal, Ngcobo J, writing for the majority, rejected the High Court's direct application of the Bill of Rights to contractual terms, opting instead for an indirect application through the: vehicle of public policy. The majority judgment explained that public policy is now deeply rooted in the Constitution and its underlying values. The majority held:

'(T)he proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights.'

[35] The majority judgment further explained that public policy, as informed by the Constitution, imports 'notions of fairness, justice and reasonableness', takes account of the need to do 'simple justice between individuals' and is informed by the concept of ubuntu. The majority recognised that public policy, in general, requires parties to honour contractual obligations that have been freely and voluntarily undertaken. This

is because the principle of *pacta sunt servanda* is a 'profoundly moral principle, on which the coherence of any society relies'. The majority further stated that this principle

'gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.' "

In fact, the court dealt with and re-confirmed the importance of parties to a contract to being held to the terms of the said contract and that it is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy, that the court may refuse to enforce it. In this regard the following *dicta* are stated at paras [80] to [81] of the judgment:

[80] ... However, a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh. These abstract values have not been accorded autonomous, self-standing status as contractual requirements. Their application is mediated through the rules of contract law including the rule that a court may not enforce contractual terms where the term or its enforcement would be contrary to public policy. It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it.

[81] The rule of law requires that the law be clear and ascertainable. As stated by this court in *Affordable Medicines*: 'The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.' The application of the common-law rules of contract · should result in reasonably predictable outcomes, enabling individuals to enter into contractual relationships with the belief that they will be able to approach a court to enforce their bargain. It is therefore vital that, in developing the common law, courts develop clear and ascertainable rules and doctrines that ensure that our law of contract is substantively fair, whilst at the same time providing predictable outcomes for contracting parties. This is what the rule of law, a foundational constitutional value, requires. The enforcement of contractual terms does not depend on an

individual judge's sense of what fairness, reasonableness and justice require. To hold otherwise would be to make the enforcement of contractual terms dependent on the 'idiosyncratic inferences of a few judicial minds'. This would introduce an IJ acceptable degree of uncertainty into our law of contract. The resultant. uncertainty would be inimical to the rule of law."

[56] Considerations of public policy are, in my view, not at all applicable to the present matter. The present matter deals with a lease agreement which was concluded freely and voluntarily by two parties who were on the same footing.

[57] The second leg of non-compliance with the provisions of the lease agreement in respect of the letter of demand which the defendant is relying upon, is the fact that the alleged letter of demand was not directed at the defendant's *domicilium citandi et executandi* as determined in clauses 6.2 and 6.3 of the lease agreement, nor was it handed over per hand at the chosen *domicilium*.

[58] In the **Schmidt Bou Ontwikkelings CC**-judgment, which I have already cited above, the court, at paras [13], [14], [15] and [16], required service upon the agreed *domicilium*:

[13] ... It was dispatched to the applicant per telefax transmission to the applicant's then attorneys, instead of applicant's *domicilium*, as provided for in clause 15 of the deed of sale.

[14] The second such purported notice of cancellation is by way of a telefax transmission dated 16 October 2003.... The letter is not addressed to the applicant's *domicilium* but, instead, is transmitted per telefax both to the applicant and her then attorneys.... Once again, the prepaid registered post and the seven days' requirement has not been complied with.

[15] ... Similarly, this letter was neither dispatched to the applicant per prepaid registered post nor was it addressed to the applicant's *domicilium* as required in terms of the deed of sale. It would appear that it is on the strength of this purported

cancellation that the first respondent saw fit to offer the property for sale to a third party.

[16] ... More so, none of the notices addressed to the .applicant requiring her to perform were addressed to her *domicilium*, as provided for in the deed of sale. Accordingly, I cannot under these circumstances find that the agreement concluded between the applicant and the first respondent was validly cancelled."

[59] It is consequently evident that also for this reason, the alleged letter of demand did not comply with the provisions of the lease agreement and therefore did not validly place the defendant in mora.

Conclusion:

[60] The alleged letter of demand on which the plaintiff relies, did not constitute a proper and valid letter of demand in terms of the lease agreement, in that:

1. The executrix, being the person who stood in the shoes of the lessor at the time, did not demand and never intended to demand compliance with the relevant provisions of the lease agreement from the defendant as determined in clause 7.1 of the lease agreement; and/or
2. The alleged letter of demand was not directed at the chosen *domicilium citandi et executandi* of the defendant and was not handed to him per hand at the said *domicilium*.

[61] The separated issue of "*whether proper demand was made in terms of the lease agreement*" is consequently determined to be that no proper such demand was made.

[62] In the absence of a proper .and valid letter of demand which properly complied with the provisions of the lease agreement, the plaintiff was not entitled to have cancelled the lease agreement.

[62] The parties were in agreement that should I determine the issue in terms of Rule 33(4) in favour of the defendant, like I have done, the plaintiff cannot be successful with her claim and it should then be dismissed.

Costs:

[63] Mr Snellenburg submitted that the costs of the action are to follow the outcome thereof. He, however, of own accord, conceded that it will be in my discretion to take into consideration that neither party raised the separate adjudication of the aforesaid issue regarding the validity of the letter of demand, at the commencement of the trial.

[64] Mr Potgieter stated in reply that the conduct of the defendant has a bearing on the wasted or unnecessary costs. In this regard he referred to the Rule 37 agenda filed by the plaintiff on 6 October 2022 in terms whereof, at paragraph 4, the plaintiff requested that the defendant admit all the correspondence and the content thereof, as set out in the plaintiff's Discovery Bundle, including letters and e-mails between the plaintiff's attorney, the executrix of Estate Late HJ Odendaal, Ms Carin van Aswegen, and the defendant. During the Rule 37 conference which was held on Thursday, 13 October 2022, the defendant declined to admit same. In a further undated document titled "Defendant's Reply to Outstanding Issues" the defendant was only willing to admit that *"the correspondence contained in the plaintiff's bundle at pages 26, 30, 32, 47 and 64 was sent and received. The content of the aforesaid correspondence is not admitted."* Mr Potgieter submitted that in the absence of the defendant's admission of the correspondence and the content thereof, the plaintiff could not have suggested the separate adjudication of the present point. It was only now when the defendant admitted the relevant correspondence contained in the separate bundle that it became possible to deal with the issue in this manner.

[65] Mr Potgieter further referred to the aforesaid Rule 37 agenda and the Rule 37 minute where the plaintiff, in paragraph 4.3 of the agenda, requested the defendant to agree that the plaintiff's evidence be tendered virtually, since she resides in Nieu-Zealand. However, the defendant was not willing to agree thereto. This necessitated the plaintiff to have travelled from Nieu-Zealand to South Africa at great expense.

[66] Mr Snellenburg, with my leave, responded to the aforesaid submissions in reply and. submitted that the defendant was entitled to have placed . the correspondence and the content thereof in dispute. He furthermore submitted that the defendant was under no obligation to have agreed to a virtual trial.

[67] I agree with Mr Snellenburg's contention that the defendant was under no obligation to have agreed to the aforementioned two aspects. I addition,. there was no indication or. suggestion at any stage prior to or at the commencement of the trial that the plaintiff was intending or would be requesting an order in terms of Rule 33(4) pertaining to the separated issue, but that the defendant was obstructing same due to his stance with regard to the correspondence. The first mention which was made of the possible adjudication of the separated issue as a means which, depending upon its outcome, could curtail. the proceedings immensely, was made by myself to Mr Snellenburg and Mr Potgieter at the end of the second day's trial. I made the said proposal as a result of their respective opening statements from which is became evident to me that the separated issue may determine the whole outcome of the trial.

[68] Mr Potgieter also submitted that the separated issue should have been raised by the defendant by means of an exception. In this regard he referred to the article of Paleker in the **Journal for Juridical Signs**, *supra*. I cannot agree with the last mentioned contention. The plaintiff's cancellation of the lease agreement and her entitlement to have done so constitute elements of the plaintiff's cause of action which, therefore, had to be proved by the plaintiff by means of evidence" In this instance it was done by means of the evidence as contained in the correspondence which was put before me by agreement between the parties. It is not something that could have been adjudicated merely on the pleadings, as required for purposes of an exception.

[69] Since neither of the two parties raised the separate adjudication of the issue regarding the. validity of the letter of demand, at the commencement of the trial or within the two court days which followed, I consider it fair that -each party is to be ordered to pay his/her own costs of those two days.

Order:

1. The plaintiff's action against the defendant is dismissed.
2. The plaintiff is to pay the costs of the action, excluding the costs of 25 and 26 October 2022.
3. With regard to the costs of 25 and 26 October 2022, each party is to pay his/her own costs.

C VAN ZYL, J

On behalf of the plaintiff: Adv NJ Potgieter
Instructed by: Honey Attorneys
BLOEMFONTEIN

On behalf of defendant: Adv N Snellenburg SC
Instructed by: Bezuidenhouts Inc.
BLOEMFONTEIN