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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case no: A63/2017

In the matter between:

AS

First Appellant

ANS

Second Appellant

v

JC

First Respondent

THE CITY OF CAPE TOWN

Second Respondent

**THE OCCUPIERS OF THE PREMISES KNOWN AS
[...], L ROAD, WOODSTOCK**

Third Respondent

Coram: Justice J I Cloete *et* Justice M K Parker

Heard: 17 May 2019

Delivered: 19 June 2019

JUDGMENT

CLOETE J:

Introduction

- [1] This is an appeal against the order of the acting magistrate at Cape Town handed down on 6 September 2018 dismissing the appellants' application to evict the first and third respondents from a residential unit situated at [...], L Road, Woodstock. In the appeal *Mr Gess* appeared *pro amico* for the appellants and *Mr Brown*, together with *Ms Khan*, *pro bono* for the first and third respondents. We are indebted to them for their considerable assistance, including their input both prior to and during the appeal, which resulted in the disputed issues becoming crystallised.
- [2] The second appellant is the registered owner of the unit which the first appellant was at all material times duly authorised to let to tenants on her behalf. During March 2013 the first appellant ("AS") concluded a written lease agreement ("the lease") with the first respondent ("JC") who had already taken occupation of the unit.
- [3] The date of commencement of the lease was 1 April 2013. Clause 5 provided that the lease would continue indefinitely '*...with both the lessor and the lessee being entitled to terminate the same on two clear calendar months*'

written notice to this effect'. The other occupants of the unit are Mr EC and Mr TL. Only Messrs JC and EC opposed the application and persist with their opposition in this appeal. Mr TL indicated that he would be able to find alternative accommodation and thus abided the decision of the court *a quo*.

[4] At the heart of this appeal is whether or not AS lawfully cancelled the lease on 3 October 2017. Regrettably in his judgment the acting magistrate failed to make any specific finding that JC (and thus EC) were unlawful occupiers for purposes of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 ("PIE"), which is a statutory prerequisite for determination of the second and third stages of an enquiry under PIE, namely whether it is just and equitable to evict and, if so, the fixing of a just and equitable date for this purpose.

[5] From what can be gleaned from the judgment it appears that, because the acting magistrate found that a particular clause in the lease (clause 16.4) offended against the Constitution, was contrary to public policy and therefore unenforceable, the lease was not validly cancelled. The acting magistrate then proceeded to find that, because JC had subsequent to the cancellation settled what the acting magistrate described as '*the arrear rental*', it would not be just and equitable to evict. This was not necessary given his implicit finding that JC and EC could not be unlawful occupiers, and no more need be said about it.

- [6] During the appeal counsel were *ad idem* that neither the Consumer Protection Act 68 of 2008 (in particular s 14(2)(b)(ii) thereof) nor the Rental Housing Act 50 of 1999 find application, given that the lease in question is not a fixed term lease, despite the acting magistrate having placed his own particular interpretation thereon in order to bolster his finding that AS was required to furnish JC with one month's notice to vacate in circumstances where the latter was alleged to have breached the lease.

Relevant Clauses of the Lease

- [7] Clause 4.3 provides that rental '*must be paid monthly in advance on or before the first day of each month*'. Clause 7.2 stipulates that:

'If the rental is paid after the 7th day of the month in which it is due, the Lessee must on demand pay to the Lessor an amount of R100.00... to cover collection fees and/or additional administration costs.'

- [8] Clause 7.1.3 provides that the lessee must on demand pay to the lessor '*all charges for electricity (including electricity service charges) consumed on the Premises*'.

- [9] Clause 16 is the breach clause and reads in relevant part as follows:

'BREACH

16.1 Despite any other clause in this agreement, should –

16.1.1 the Lessee fail to pay the Deposit or any Rental on the relevant due date; or

16.1.2 either one of the parties ("the defaulting party") breach any of the other terms of this agreement and fail to remedy such breach within 14 (fourteen) days after receipt of a written notice from the other party ("the aggrieved party") demanding that the breach be rectified;

then the aggrieved party (which includes the Lessor for the purposes of clause 16.1.1) may without affecting any other legal rights:

- *either claim specific performance; or*
- *cancel this agreement immediately, without further notice, and recover damages from the defaulting party,*

provided that if the Lessee commits a breach of the provisions of this agreement three times in any calendar year, then upon the third breach, the Lessor may immediately implement either of the remedies referred to above, without first having to give the Lessee written notice to rectify the breach...

16.4 Should this Agreement be cancelled by the Lessor for any reason whatsoever, the Lessee and/or any other person occupying the Premises on the Lessee's behalf, must immediately vacate the Premises and allow the Lessor to take occupation thereof.'

[10] Finally, clauses 19.4 and 19.10 read as follows:

'19.4 No amendment of this agreement or of any clause thereof and no agreement to cancel this agreement will have any effect unless reduced to in writing and signed by the parties or their authorised representatives.'

'19.10 No indulgence granted by a party (including, without limitation, acceptance by the Lessor of any payment after the due date, whether on one or more occasions) shall constitute a waiver of any of that party's rights under this agreement; accordingly, that party shall not be precluded, as a consequence of having granted such indulgence, from

exercising any rights against the other party, which may have arisen in the past or which may arise in the future.'

Background Facts

[11] The pertinent background facts, which are either common cause or not materially disputed, are as follows. AS is an attorney. JC is a refugee from Southern Cameroon who was initially granted refugee status in South Africa in 2000. He is employed as a seasonal worker in the film industry and accordingly does not receive a regular monthly income.

[12] JC commenced residing in the unit in 2010 under title of the lessee at the time. During 2013 the previous lessee vacated and the lease was then concluded between AS and JC. EC has resided under JC's title as lessee since 2014. He too has been granted asylum in South Africa. He is employed as a sailor as and when he is able to secure such employment and tries to supplement his earnings by tutoring mathematics. His income is thus also neither regular nor consistent.

[13] Kedjom is JC's first language but he understands basic English. When the lease was concluded there were some clauses which, not being in plain language, he did not fully understand and which were not explained to him.

[14] Subsequent to conclusion of the lease JC initially resided alone in the unit. However, due to the irregular nature of his income, it became increasingly difficult for him to meet his rental obligation timeously. He accordingly found

others to stay with him to help cover the rent. He believed that he was permitted to do so since JC had himself previously resided in the unit with the former lessee on the same basis. Furthermore AS was aware of JC's arrangement and did not object.

[15] JC did not always make timeous payment of the rental. AS regularly and without voicing any disagreement accepted his late payments. For the most part, JC managed to make payment of the full monthly rental during the course of each month. Despite late payment AS did not invoke his right to charge the additional fee in terms of clause 7.2 of the lease.

[16] He also did not always make timeous payment of the electricity charges. When the lease was concluded AS did not explain to him how the charges would be demanded or how, or to whom, JC should make payment thereof. He accordingly adopted the same modus operandi as the previous lessee by effecting payment of what he understood to be owing as soon as possible after receipt of invoices delivered via post by the City to the unit. However he did not receive regular monthly invoices from the City and it often occurred that the City invoice received would have large amounts of accumulated charges as a result, making it difficult for JC to settle these immediately.

[17] During May 2015 the City disconnected the electricity supply to the unit. JC alerted AS to this and also approached the City in an attempt to resolve the issue.

- [18] Through his engagements with the City it was determined that the electricity had been disconnected due to arrear charges and rates. AS had failed or neglected to change the property ownership details with the relevant City department and the account for the unit was still in the name of the previous owner, Mr Alexander Erwin. The issue could only be resolved by AS who was required to attend on the City accounts department in order to rectify this. The electricity was subsequently reconnected on 5 June 2015, approximately 22 days after it had been disconnected.
- [19] AS informed JC telephonically that he had settled the account with the City. It was agreed that JC would repay him the money owing in respect of the arrears. AS did not provide him with proof of the exact outstanding amount, but JC recalls that AS advised him that it was approximately R5 000. It was agreed that JC would pay this off as soon as he could (*‘the 2016 agreement’*).
- [20] On or about 2 February 2016, when JC was out of Cape Town, he was informed by EC that a notice had been delivered to the unit indicating that the electricity would be disconnected, again owing to arrear rates and electricity charges (it is common cause that JC was not responsible for the rates in terms of the lease, but that this was the lessor’s responsibility). At that stage JC had not received any invoice for approximately three months. He accordingly despatched EC to the City to pay R2 000 in order to prevent the immediate disconnection of the electricity supply; ascertain the amount of arrear electricity charges; and make arrangements to pay off the balance. JC attached proof of payment of the amount of R2 000.

- [21] Again JC contacted AS to advise him of this, and to ask for guidance as to how the issue could be resolved and whether a pre-paid electricity meter could be installed. He addressed an email to AS dated 12 February 2016 in this regard. JC does not recall AS responding to this email. Again in February 2016, alternatively at the beginning of March 2016, another invoice was delivered to the unit by the City indicating that an amount of R4 712.83 was owed.
- [22] At the time JC believed that the invoice was for the arrear electricity charges consumed at the unit. He was unable to pay the full amount at once, but made two payments to the City totalling R2 460 on 12 March 2016 and 16 March 2016. Again he annexed proof of these payments.
- [23] Towards the end of March, alternatively at the beginning of April 2016, a further invoice from the City was delivered to the unit reflecting a balance due of R2 460. JC made a payment of R760, and thereafter continued to pay the City invoices as he received them in the post.
- [24] On 29 September 2016 JC received a letter from AS wherein for the first time he provided him with a schedule of amounts allegedly owing in terms of the lease totalling R16 457.02. Disputing the amount, JC requested a meeting to discuss and resolve the issue. On or about 30 September 2016 AS responded in an irritable and hostile manner, informing JC that he had *'no intention of continuing this debate and for many more months to come. We will either in the next week come to an agreement as to what is owing by you, and how*

you intend to settle your arrears, alternatively I will be left with no option to leave it to the courts to determine what is actually owing by you'. AS subsequently refused to meet with JC until January 2017. According to JC, in the interim he continued to pay rental as well as the invoices from the City when same were received in the post.

[25] Both EC and JC were present at the January 2017 meeting. They were not legally represented and were not fully aware of their rights. It was at this meeting that JC first found out that the payments he had made amounting to R3 220 (i.e. R2 460 + R760) had in fact been appropriated to the account of the previous owner of the unit, Mr Erwin; and that they were not credited to the electricity charges for the unit. It was AS who established this but informed JC that this was not his (i.e. AS's) problem. AS advised JC that, going forward, he would email the City's invoices to him and that payment in respect of electricity charges for the unit must be made into AS's account.

[26] Although JC accepted that he still owed AS money in terms of the 2016 agreement, he did not understand the breakdown of amounts that AS showed him at the meeting. He did not know how to challenge these amounts or that he had the right to do so. AS stated that unless JC paid the arrears he would take him to court, the lease would be cancelled and he would need to vacate the property. Both JC and EC experienced AS's demeanour as intimidating and believed that as an attorney, he was in a position of power.

[27] Without a proper understanding of his rights, or the situation, and with fear of legal action being taken against him, including that the lease would be cancelled and that he would be evicted, JC agreed to acknowledge that the amount he owed AS was R10 000 and that he would pay it off over time. There was no agreement regarding the date by when he was required to settle this amount, nor how much he would need to pay every month. He explained to AS that he would pay as soon as he could. His version was confirmed by EC under oath.

[28] On 23 January 2017 AS wrote to JC as follows:

'I refer to our meeting on Friday last week and attach hereto an updated schedule of the arrears regarding the rental payments.

I confirm that we agreed on Friday last week that the arrears would be reduced to R10 000 and that you agree that that amount is owing by you for the period ending 31 January 2017. It was furthermore agreed on Friday last week that you would attempt to reduce the arrears by making additional payments every month as to ensure that the rental payments are up to date in the near future.

Kindly reply to this email to confirm your agreement with the content thereof.'

[29] There is no indication on the papers that JC confirmed his "agreement" with the content of that email. However, on its plain language, it supports JC's version to the extent that there was no agreement as to a specific date by which the so-called arrears would be settled; and indeed, the high water mark was that JC *'would attempt to reduce'* the arrears by making additional payments every month so as to ensure that the *'rental payments'* were up to

date *'in the near future'*. In the replying affidavit AS did not contend that the contents of his email were in any way incorrect. However he maintained that JC's allegation that he was *'put under duress to agree to something he would otherwise not have agreed to'* was *'bizarre'* given his offer during that meeting to reduce what he considered to be the arrears then owing from R12 311.37 to R10 000.

[30] After consulting with his legal representatives JC was advised that the January 2017 agreement was void due to lack of consensus as well as a conflation of his obligations under the lease and the 2016 agreement (in relation to the arrear electricity charges).

[31] Subsequent to the January 2017 meeting JC continued to make payment of rental but struggled to make payments over and above the rent and electricity charges, since he did not have any regular work for over a year and was surviving primarily on support from friends and stipends from ad hoc work for community organisations. He was expecting to receive income from some work he had done as well as a tax refund from SARS, and alerted AS to this.

[32] JC did not receive a schedule or statement from AS for the months of February and March 2017. Accordingly, he did not know what the electricity charges were for those months and was unable to make payment. AS started emailing him schedules reflecting the rent and electricity charges due, according to him, from April 2017. Sometimes he would attach the invoice from the City as proof of electricity charges owed, and at other times not.

- [33] On 23 May 2017 AS wrote to JC enclosing what he referred to as *'the latest rental schedule'* and advising him that:

'You will note that the overdue amount increases from month to month instead of decreasing. That state of affairs is no longer acceptable.

Unless we see a determined effort during the next two to three months to reduce the arrears significantly we will be left with no option but to give you notice of termination of the lease agreement.'

- [34] This was followed by a further email dated 31 July 2017 to similar effect but JC was also informed that:

'...Unless a significant payment is received by us during the course of next week to reduce the arrears we will commence with the necessary steps to replace you with a tenant who is actually able to pay the monthly rental and related charges.'

- [35] The schedule annexed to that email reflects that, save for the "agreed amount" of R10 000 at 31 January 2017, JC was in fact ahead with his rental payments, with the total amount allegedly owing in respect of electricity charges for the period February 2017 to July 2017 being R4 322.76.

- [36] What is important about these emails is that: (a) on AS's own version, they constituted an attempt to unilaterally vary the terms of the January 2017 agreement which he maintained was valid and binding; and (b) in respect of electricity charges, no demand was made as envisaged in clause 7.1.3 of the lease; instead AS regarded them simply as accrued arrears.

- [37] On 21 August 2017 AS arrived at the unit and handed JC a letter dated 16 August 2017 which read as follows:

'Attached hereto is a schedule of the arrear rental payable by you which amounts in total to R12 623.99. Not included in that amount is the electricity for the month of August 2017.

Your failure to pay the amount of R12 623.99 [of which an amount of R10 000 has been overdue since January 2017] constitutes a breach of the agreement of lease. In the premises you are hereby given notice that unless the amount of R12 623.99 is deposited into the lessor's bank account by no later than close of business on 26 August 2017, the lessor will proceed to cancel the agreement of lease and the lessor will then make application for your eviction from the premises.'

- [38] It will immediately be apparent that the aforesaid demand, particularly insofar as the "agreed" amount of R10 000 is concerned, constituted a further attempt by AS to unilaterally vary the terms of the January 2017 agreement upon which he relied. Moreover, AS classified the amount allegedly owed as arrear rental whereas in the lease itself a clear distinction is drawn between rental and electricity payments. At the risk of repetition, electricity charges were payable by JC on demand and the email of 16 August 2017 itself specifically stated that electricity charges for the month of August 2017 were not included. It is thus fair to accept that no demand for payment of electricity for the month of August 2017 was made. In any event, AS did not comply with clause 16.1.2 of the lease because he failed to put JC to terms to remedy the alleged breach within 14 days after receipt of the notice. He also placed no reliance on the "third breach in any one calendar year" in clause 16.1, either in his correspondence to JC or the founding affidavit.

[39] Despite his demand, AS took no further steps at that stage. According to him, on 20 September 2017 JC paid an amount of R4 000 and by 9 October 2017 a further amount of R6 300. In the interim, on 3 October 2017 AS addressed an email to JC, referring to the previous demand and informing him that:

- '1. Our client confirms receipt of your payment of R4 000 on 20 September 2017;*
- 2. You have failed to pay to our client the balance of R8 623.99 of the arrears of R12 623.99 referred to in our client's letter of demand dated 21 August 2017;*
- 3. You have furthermore failed to pay to our client the rental for the month of October 2017 in the amount of R6 285.46 which was due and payable on 1 October 2017.*

In the premises our client has elected to cancel the agreement of lease pursuant to which you are in occupation of the abovementioned premises. You are accordingly required to vacate our client's property within twenty-four hours of receipt of this notice, failing which our client will make application for your eviction from the premises.

[40] Accordingly on AS's version JC was indebted to him on 3 October 2017 in a total sum of R14 909.45. However in the founding affidavit he alleged that JC owed him R17 586.47 at that date of which the disputed amount of R10 000 in terms of the January 2017 "agreement" comprised the major portion.

[41] Not only is the validity of that agreement disputed by JC but, on AS's own version, its terms do not support any entitlement to cancel, given the clear wording of his email dated 23 January 2017 stating that what was agreed was that JC would attempt to reduce the arrears by making additional payments

every month so as to ensure his rental payments were up to date in the near future. The content of that email also contradicts what AS alleged in the founding affidavit that JC *'would pay an additional amount to me so as to ensure that the rental arrears in the amount of R10 000 would be paid off in a period of a few months from 1 February 2017'*.

- [42] I have set out the background facts in some detail, not only for the purpose of demonstrating that it is not possible to determine with any clarity what was in fact owed by JC at any given time and more particularly 3 October 2017, but also to set out the manner in which AS has gone about complying with his obligations as lessor, because the latter is relevant to the arguments advanced during the appeal.

Discussion

- [43] Mr Gess correctly submitted that clause 16.1 of the lease requires notice to be given to remedy a default only when the lessee is in arrears for amounts other than rental. He accordingly argued that, even if JC was notionally up to date with rental payments at 21 August 2017, he was certainly in arrears with rental for October 2017 by 3 October 2017, and in terms of the lease AS was thus entitled to cancel without giving notice.

- [44] Having applied payments by JC (provided by AS) to the common law principles pertaining to appropriation thereof, he submitted that JC was in any event in arrears with rental as at 21 August 2017, and that accordingly AS was entitled to cancel by reason of that additional breach. AS was not

required to give any notice before cancellation, but in fact afforded JC 5 days to remedy that breach.

[45] *Mr Gess* further argued that, pursuant to the demand delivered on 21 August 2017, AS was in addition entitled to cancel due to JC's failure to pay the electricity charges that were set out in the schedule attached to that demand.

[46] Insofar as clause 16.1.2 requires that 14 days notice be given for breaches other than a failure to pay rental timeously, *Mr Gess* accepted that the demand dated 16 August 2017 (delivered on 21 August 2017) afforded JC less than 14 days notice, but submitted that this did not assist JC. He relied on *Lurlev (Pty) Ltd v Unifreight General Services (Pty) Ltd & Others* 1978 (1) SA 74 (D) where the court dealt with the situation where a clause in the lease provided for written notice of 14 days to remedy a breach before the landlord was entitled to cancel, and where notice to the tenant had been given affording it less than 14 days to pay the unpaid rent. The court held that the period for compliance was fixed by the clause in the lease, and not by the notice. When the prescribed period had passed, the landlord was entitled to cancel, and cancellation after the expiry of 14 days was lawful.

[47] He thus argued that the short period contained in the demand delivered on 21 August 2017 did not preclude AS from cancelling the lease (as he did) once the stipulated 14 day period stipulated in the lease had expired without the electricity charges having been settled.

[48] *Mr Gess* also relied on *Paradyskloof Golf Estate v Stellenbosch Municipality* 2011 (2) SA 525 (SCA) where a deed of sale contained a “non-waiver” clause similar to clause 19.10 of the lease in the present matter. The Supreme Court of Appeal held that where such a clause exists, the reasonableness of a delay in enforcing rights under the contract is rendered irrelevant.

[49] He pointed out that JC did not assert that AS’s contractual right to cancel was waived or lost on the ground of a failure to exercise that right, which moreover, in terms of *Paradyskloof*, could not be lost. He argued that each successive breach by JC would have afforded AS an accrued right to cancel, which he might choose to exercise or not. In the case of a failure to pay rental, this right accrued whenever it was not paid timeously in full. In the case of another breach, such as a failure to pay electricity, the right accrued after notice of default was given, a period of 14 days had elapsed, and the default was not remedied.

[50] He submitted that it would be incorrect to suggest that JC was lulled into the belief (or for that matter a reasonable belief) that it was acceptable not to pay rental strictly in terms of the lease, or that AS would not exercise his right to enforce its terms strictly in the event of future breaches which established fresh accrued rights to cancel. He contended that the correspondence shows that JC was warned of the entitlement to cancel on a number of occasions.

[51] Finally *Mr Gess* submitted that in the present case there are no factual circumstances or public policy considerations established by JC that would

render the enforcement of clause 16.1 of the lease against him contrary to public policy or unconscionable.

[52] *Mr Brown* aptly summarised the two grounds asserted by the appellants for valid cancellation of the lease as follows: first, that notice to remedy a default in the payment of a “mixed debt” was properly given but not complied with; secondly, in any event, rental for October 2017 was due on the first day of the month and had not been paid by 3 October 2017, which entitled AS to cancel without notice.

[53] As far as the first ground is concerned he submitted, correctly in my view, that on AS’s version the “agreed” amount of R10 000 at January 2017 related not only to pure rental but also to electricity. Given that it was not comprised purely of rental, for non-payment to constitute a basis for cancellation AS was obliged to follow the procedure set out in clause 16.1.2 of the lease.

[54] In support of this submission *Mr Brown* relied on *Hano Trading CC v J R 209 Investments (Pty) Ltd and Another* 2013 (1) SA 161 (SCA) at paras [31] to [34]. In that judgment the Supreme Court of Appeal held that where a contract provides that, in the event of the one party committing a breach of any of the terms of the agreement and failing to remedy such breach within a stated number of days after receipt of a written notice to do so, the party seeking to rely on such failure in order to cancel the agreement has to show that it has complied strictly with the peremptory provisions of the clause.

[55] He pointed out that the notice, as in the case of a notice placing a party *in mora ex persona*, must indicate clearly what is expected from the defaulting party in order for the latter to avoid the consequences of continued default, including the date for compliance: see *Kragga Kamma Estates CC and Another v Flanagan* 1995 (2) SA 367 (A) at 374D-G where it was held that:

‘However, on the assumption that the first defendant had to be placed in mora (ex persona), the question for decision is whether this was done. If the demand for payment did not have this effect, an essential prerequisite to the plaintiff’s right thereafter to cancel would be missing. So we must examine the terms of the demand...whatever its form, the demand had to be unambiguous and indicate a fixed date, reasonable in the circumstances, for performance (Nel v Cloete 1972 (2) SA 150 (A) at 159H). And, of course, it had to indicate that the creditor wished to receive his money (Dougan v Estment 1910 TPD 998 at 1001); that the debtor was required to perform (Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1977 (4) SA 310 (T) at 351H); and he must have been placed on terms to do so (Johannesburg City Council v Norven Investments (Pty) Ltd 1993 (1) SA 627 (A) at 633E). Whether this has been done is a question of fact for the decision of the Court (Wessels’ Law of Contract 2nd ed vol II para 2893).’

[See also *Ally and Others NNO v Courtesy Wholesalers (Pty) Ltd and Others* 1996 (3) SA 134 (N) at 149F-J].

[56] Applying these authorities to the facts of the present matter, I cannot agree with *Mr Gess* that the correspondence upon which AS relies to support the first ground met these requirements. To the extent that *Mr Gess* placed reliance on the decision in *Lurlev*, we are of course bound by Supreme Court of Appeal authority which appears to be to the contrary.

[57] In any event, as submitted by *Mr Brown*, the effect of clause 16.1.2, viewed against the 5 day period afforded to JC to remedy his default, was that on the sixth day JC would have had no way of knowing whether or not the lease was cancelled. He would also not know whether payment in full on the sixth day after demand would remedy the breach or not. Moreover, it is unlikely that AS himself considered the agreement as cancelled, whether upon the expiry of the 5 day period or the 14 day period stipulated in clause 16.1.2, because he not only accepted JC's payment of R4 000 on 20 September 2017, but did so without demur until purporting to cancel on 3 October 2017.

[58] As far as the second ground is concerned *Mr Brown* advanced an argument along the following lines. The starting point is s 26(3) of the Constitution as read with s 8(3) thereof. The former subsection provides that no-one may be evicted from their home without an order of court made after considering all relevant circumstances, and no legislation may permit arbitrary evictions (hence the enactment of PIE on 5 June 1998). The latter subsection makes it incumbent on a court, when considering a provision in the Bill of Rights (such as s 26(3)) to apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right.

[59] In *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) the issue concerned the constitutionality of a time limitation clause in a short-term insurance policy. The appellant contended that it was contrary to public policy and therefore unenforceable. Counsel also submitted on his behalf that public policy considerations (the legal convictions of the community) have been codified in

the Bill of Rights and the time limitation clause constituted an unreasonable and unjustified limitation of the appellant's s 34 right, i.e. access to court. The Constitutional Court was required to determine the proper approach of constitutional challenges to contractual terms.

[60] The majority of the court rejected the combination of the two arguments made on behalf of the appellant, warning at para [26] of the dangers inherent in testing the constitutionality of a contractual term directly against a provision in the Bill of Rights, but continued to set out the proper approach as follows:

[27] What then is the proper approach of constitutional challenges to contractual terms where both parties are private parties? Different considerations may apply to certain contracts where the State is a party. This does not arise in this case.

[28] Ordinarily, constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of Rights, as the Constitution proclaims, "is a cornerstone" of that democracy; "it enshrines the rights of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom."

[29] What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that

underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.

[30] *In my view, the 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. This approach leaves space for the doctrine of pacta sunt servanda to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them....'*

[61] *Mr Brown* correctly did not take issue with the existence of the “non-waiver” clause in the lease or the *Paradyskloof* decision. He accepted that such a clause is a valid protection against an argument that the lessor has waived any rights by conduct. He confirmed that JC did not assert that AS had waived his contractual right to payment of rental in full on the first day of each month.

[62] However he submitted, correctly in my view, that it does not automatically follow that AS is entitled to rely on that right in the particular circumstances of this matter. This was the point made in *Mahabeer v Sharma NO and Another* 1985 (3) SA 729 (A) at 736G-I:

‘Depending on the circumstances, such a failure may, eg, justify an inference that the right was waived or, stated differently, that the party entitled to cancel has elected not to do so (cf Pienaar v Fortuin 1977 (4) SA 428 (T) at 433G; Becker v Sunnypine Park (Pty) Ltd 1982 (1) SA 958 (W) at 964-5; Smit v Hoffman en 'n Ander 1977 (4) SA 610 (O) at 616G-H), or it may open the door to some other defence. In such cases the lapse of an unreasonably long

time forms part of the material which is taken into account in order to decide whether the party entitled to cancel should or should not be permitted to assert his right. But per se it cannot bring about the loss of the right. (CF Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1977 (4) SA 310 (T) at 325F-G).'

[63] By way of illustration, in *Paradyskloof* a property developer and the local authority had been locked in a dispute over a deed of sale pertaining to 277 hectares of prime property on the outskirts of Stellenbosch. The proposed development was to include, amongst others, the construction of an international luxury hotel, 250 dwelling units and an international tournament golf course with ancillary facilities, which is a far cry from what we are dealing with in the present case.

[64] As pointed out by *Mr Brown*, on the undisputed facts JC had historically not been able to pay the full rental on the first day of each month, but invariably during the course of a month as and when his funds became available. This was historically accepted by AS without once advising JC that he was intending to demand that JC pay in full on the first day of each month under threat of cancelling the lease without notice as a result.

[65] He submitted that whilst neither *Garlick Ltd v Phillips* 1949 (1) SA 121 (AD) nor *Edward L Bateman Ltd v Combined Metal and Wire Works (Pty) Ltd* 1975 (3) SA 497 (W) involved a contract where a “non-waiver” clause had been included, this does not change the principle set out in those cases.

[66] In *Garlick* the following was stated at 132 – 133:

'It was contended that there could be no estoppel in such circumstances because there was no duty on appellant to warn respondent that it was not giving permission to make late payments, ...But I am inclined to think that, if breach of a duty be necessary, there was a duty resting on appellant which was not performed. So long as its attitude remained one of indifference towards late payments of rent, there was of course no necessity to speak, but when appellant's state of mind changed from one of indifference to one of a desire or intention to take advantage of late payments of rent in order to obtain ejectment, then I think a duty arose to make that changed attitude known to respondent. A reasonable man in appellant's position would have known that a long continued receipt by him of late payments of rent without protest such as occurred in this case, would lead respondent into the belief that he had no objection to late payments and did not treat them as breaches of contract and would not, without notice, do so in the future. A duty therefore rested on appellant if it intended to treat late payments of rent in the future as breaches of contract and to take advantage of them, to inform respondent of that change of mind.

It was also contended that appellant had in fact given notice to respondent that it would no longer accept late payments because in the three letters quoted above it had informed respondent that it intended to cancel the lease and resume possession of the leased property.

It is no doubt true that those letters did inform respondent that appellant intended to terminate the lease and resume possession of the property, but in those letters appellant did not rely, as a ground for terminating the lease, upon the late payment of rent, which was actually occurring during the period of time covered by the letters, but relied upon the notice which had been given to terminate the lease. This being the case the letters do not assist appellant; on the contrary they seem rather to strengthen respondent's contention that he was led into the belief that appellant, by its conduct, gave him permission to make late payments of rent.'

- [67] Similarly, in *Edward L Bateman* at 498 the principle is set out that the lessor cannot in effect ambush the unsuspecting lessee by relying on strict

compliance without notification of the change in attitude. *Mr Brown* argued that this principle should not, in the particular circumstances of this case, be undermined by the presence of a clause protecting the right against waiver.

- [68] *Mr Brown* also pointed out that the Constitutional Court, referring to *Garlick*, recognised the obligation of good faith in contractual performance and enforcement in *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC) at para [61] and fn 55:

‘[61] The applicant alleges that she continued to make payments on the bond over a period of approximately four years, and that the Bank accepted those payments without letting her know that they were inadequate or unacceptable, or that they had obtained default judgment against her... It was argued that this amounted to a compromise that novated the judgment debt, or, if not, something less, that at least precluded execution without giving her some form of a hearing before proceeding. Alleged abuse of the execution process after granting the order is of a different kind from that following upon a constitutionally invalid process. This is not an issue for us to decide, but it may become an issue in the rescission application and eviction proceedings...’

[fn 55] Compare Garlick Ltd v Phillips 1949 (1) SA 121 (A). The idea of good faith underlies the acceptance of many rules of our contract law...’

- [69] In similar vein in *Everfresh Market Virginia (Pty) Ltd Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) the Constitutional Court made the following pertinent remarks:

‘[71] Had the case been properly pleaded, a number of interlinking constitutional values would inform a development of the common law. Indeed,

it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact. On a number of occasions in the past this court has had regard to the meaning and content of the concept of ubuntu. It emphasises the communal nature of society and “carries in it the ideas of humaneness, social justice and fairness” and envelopes “the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity”.

[72] Were a court to entertain Everfresh’s argument, the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, and the value of ubuntu, which inspires much of our constitutional compact, may tilt the argument in its favour. Contracting parties certainly need to relate to each other in good faith.’

[70] Having regard to the foregoing, and the particular facts in this case, I am in agreement with *Mr Brown* that JC was lulled into believing that strict performance was not required by AS when it came to the payment of rental. Faced with his purported demand that was vulnerable to challenge, AS saw fit to rely – without any warning – on a strict enforcement of the rental clause, thereby effectively ambushing an unsuspecting JC. The presence of the “non-waiver” clause protects AS’s right from being extinguished by conduct: it does not follow however that AS is entitled to use the clause to catch JC unfairly unawares and gain an unfair advantage thereby. I would add that, not only am I persuaded that JC was subjectively lulled into such a belief, but that a reasonable person in JC’s position would also have been.

[71] It must be strongly emphasised however that the conclusion I have reached in relation to the second ground (the right to cancel based on non-payment of

rental strictly in accordance with the lease) is not intended to set some sort of precedent of general application. It is only in relation to the specific circumstances of this case and in particular where JC (and EC) face the real risk of being rendered homeless as a direct result of AS's failure to adhere to the principles set out inter alia in *Everfresh*.

[72] Unlike in *Paradyskloof* we are dealing with a PIE appeal and special considerations thus apply. We are duty bound to adopt an inquisitorial approach and to consider '*all relevant circumstances*' for purposes of the three stage enquiry, the first of which is whether or not the occupation is indeed unlawful. To my mind, one of the relevant circumstances is the manner in which AS has approached his contractual rights and obligations under the lease.

[73] To sum up, in the particular circumstances of this case, I am compelled to conclude that, in relation to the second ground, to allow AS to rely at this stage on clause 16.1 of the lease (to cancel on the basis of non-payment of rental a mere two days after the beginning of October 2017) would be contrary to public policy, inimical to the values enshrined in the Constitution and unconscionable. This does not mean that the clause itself is contrary to public policy – it is not necessary to go that far – or that AS is not entitled to rely upon it in future if he puts JC, a vulnerable lessee in every sense of the word, on guard. But for purposes of the present appeal I am persuaded that, for the reasons already given, the lease was not validly cancelled, and

accordingly JC (and thus EC) did not, upon the purported cancellation, become unlawful occupiers for purposes of PIE.

[74] The following order is made:

‘The appeal is dismissed with no order as to costs.’

J I CLOETE

PARKER J

I agree.

M K PARKER

For appellants: Adv David **Gess**

Instructed by:

For 1st respondent: Adv Andrew **Brown**, Adv N **Khan**,

Instructed by: Ndifunda Ukwazi Law Centre, Disha Govender

For 2nd and 3rd respondents: not opposing

Instructed by: